



**The Law Reform Commission**  
**AN COIMISIÚN UM ATHCHÓIRIÚ AN DLI**

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**CONSULTATION PAPER**

**ON**

**THE LAW OF LIMITATION OF ACTIONS ARISING FROM  
NON-SEXUAL ABUSE OF CHILDREN**

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**(LRC-CP16-2000)**

**IRELAND**

**The Law Reform Commission**

**I.P.C. House, 35-39 Shelbourne Road, Ballsbridge, Dublin 4**

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## THE LAW REFORM COMMISSION

### Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20th October, 1975, pursuant to section 3 of the *Law Reform Commission Act, 1975*.

The Commission's Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in January, 1977. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published sixty Reports containing proposals for reform of the law; eleven Working Papers; fifteen Consultation Papers; a number of specialised Papers for limited circulation; and twenty one Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in an Annex to this Report.

### Membership

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners. The Commissioners at present are:

<i>President</i>	The Hon. Mr Justice Declan Budd, High Court,
<i>Full-time Commissioner</i>	Mr Arthur F Plunkett, B.L.,
<i>Part-time Commissioners</i>	Dr Hilary A Delany, B.L., Lecturer in Law, Trinity College, Dublin;
	Ms. Patricia T Rickard-Clarke, Solicitor, Partner McCann FitzGerald Solicitors;
	Professor Finbarr McAuley, Jean Monnet Professor of European Criminal Justice, University College Dublin.

The Secretary to the Commission is John Quirke.

**Research Staff**

*Director of Research:* Professor David Gwynn Morgan LL.M. (Lond.), Ph.D. (N.U.I.).

*Legal Researchers:* Ms. Bairbre O'Neill, B.C.L., LL.M.  
Ms. Dara Dowling, B.C.L., LL.M.(University of Paris II)  
Mr Patrick McEvoy, B.C.L., LL.M. (Cantab.), B.L.  
Mr Liam Herrick, B.C.L., LL.M.  
Ms. Nessa Cahill, LL.B., LL.M.(Bruges), B.L.

**Legal Information**

*Manager:* Ms. Helen Bradley, B.A., M.Phil., M.L.I.S

*Assistant Librarian:* Ms. Marina Greer, B.A.

**Clerical Staff**

Ms. Deborah McAdams, Private Secretary to the President  
Ms. Susan Fitzpatrick, Clerical Officer  
Mr Denis McKenna, Clerical Officer  
Mr Liam Dargan, Clerical Officer

**Legal Researchers on this Project**

Ms. Nessa Cahill, LL.B., LL.M. (Bruges), B.L.  
Ms. Laura Rattigan, B.C.L., LL.M., B.L.

**Contact Details**

Further information can be obtained from:

***The Secretary***

***The Law Reform Commission***

***IPC House***

***35-39 Shelbourne Road***

***Ballsbridge***

***Dublin 4***

***Telephone:*** (01) 637 7600

***Fax No:*** (01) 637 7601

***Email:*** [info@lawreform.ie](mailto:info@lawreform.ie)

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## APPENDIX B: LIST OF LAW REFORM COMMISSION'S PUBLICATIONS



## INTRODUCTION

### Part I: The Reference of the Attorney General

1. On 25 May 1999, the then Attorney General, Mr. David Byrne, S.C.,<sup>1</sup> acting pursuant to section 4(2)(c) of the *Law Reform Commission Act, 1975*, requested the Law Reform Commission to undertake an examination of, and research in relation to, the following:

“[T]he law on limitation of civil actions as it relates to actions arising out of the abuse (other than sexual abuse) of children, the principles governing the matter and the approaches to the matter in other jurisdictions. And in particular, I request you to undertake research into the following aspects:-  
whether different limitation regimes apply to sexual as against other forms of physical abuse;  
the extent to which different limitation regimes apply to an action taken against the perpetrator of such abuse as distinct from actions against other persons or bodies who may be held liable (whether vicariously or otherwise) for acts of negligence or breach of duty in failing to prevent such abuse;  
the medico-legal aspects of the matter.”

The then Attorney General requested the Law Reform Commission to submit to him any recommendations for reform of this area of the law as the Law Reform Commission considers appropriate.

### Part II: The Layout of this Consultation Paper

2. This Consultation Paper has been prepared in response to the Attorney General’s Reference. The remit of the Law Reform Commission is solely to consider the limitation of actions in respect of non-sexual child abuse. Any considerations or recommendations concerning the substantive law of tort are outside the scope of this Reference.

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<sup>1</sup> The current Attorney General is Mr. Michael McDowell, S.C.

**Chapter 1** This Chapter details the background to the current Reference. It places the Reference in context by outlining the problems of the existing law of limitations in the context of civil actions arising from non-sexual child abuse, as well as the purpose and justifications that lie behind limitation statutes.

**Chapter 2** This Chapter contains an analysis of the law pertaining to limitation periods in several common law jurisdictions and, in particular, the approach taken towards limitations of civil actions arising from child abuse, both sexual and non-sexual.

**Chapter 3** This Chapter discusses the possible options for reform with provisional recommendations in this regard.

**Chapter 4** This Chapter considers various miscellaneous issues which arise in the context of the possible options for reform.

**Chapter 5** This Chapter contains a summary of our provisional recommendations.

### **Part III: The Consultation Process**

3. We would like to stress that all the recommendations in this paper are tentative and provisional. Owing to the sensitive issue of this Reference and the inherent difficulties associated with the issue of child abuse, the Law Reform Commission seeks the views of interested persons or groups in relation to the options for reform which we consider and any other issues which are addressed in this Consultation Paper. Thus, the final recommendations of the Commission will be made only after careful consideration of all submissions received and upon extensive consultation with interested parties. Following this consultation process, the Commission will present its final Report to the Attorney General.

Those who wish to participate in the consultation process should submit their submissions in writing to the Commission by 30<sup>th</sup> November, 2000, at the following address:

The Law Reform Commission,  
IPC House,  
Shelbourne Road,  
Ballsbridge,  
Dublin 4.

## CHAPTER ONE: INTRODUCTION

### Part I: Background to the Attorney General's Reference

1.01 The history of the present Reference to the Commission is worth noting as it helps to clarify the scope of this Paper. Broadly speaking, the origin of the Reference lies in the huge public concern which arose following revelations by persons who had been abused as children, particularly those in State-administered institutions.

#### (a) *Child Abuse Scandals*

1.02 In the 1990s, incidents of child abuse and child sexual abuse, in particular, came to light in Ireland. Scandals revealed by the Kilkenny Incest inquiry, the Madonna House Inquiry and the case of Sophia McColgan to name but a few, served to highlight the existence of the problem. Recently, revelations of child abuse in RTE's documentary series "States of Fear" brought to the forefront of public consciousness, systematic abuse of both a physical and a sexual nature which had occurred from the 1930s to the present day in orphanages, industrial schools and other state-funded institutions established for the care of children.

1.03 In the 1980s the same problem was encountered in countries such as Canada, the United States and Australia. The extent of such abuse in these countries only became known as a result of the establishment of official enquiries.<sup>2</sup> For example, the Waterhouse Report, *Lost in Care*, dealing with sexual abuse in Welsh residential homes, was recently published in Britain.<sup>3</sup> In Ireland there are currently no comprehensive official figures as to the scale of the problem.

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<sup>2</sup> In Canada, for example, the first major work to document the extent of child abuse was the *Badgley Report* in 1984. This report found that approximately one in three males and more than one in two females had been abused during childhood. More recently, the Canadian government published a report on institutional child abuse. Governments in many Australian states established task forces to investigate the problem. Many jurisdictions faced the same legal issues with which we are dealing here. The stances and responses adopted by such jurisdictions are described in Chapter 2, below.

<sup>3</sup> See British press of 16 February 2000.

**(b) Political Reaction**

1.04 The political response to these revelations took a number of forms. On May 11 1999, the Taoiseach announced a package of measures to deal with the issue of child abuse. These included:

“...an apology on behalf of the State to victims of child abuse; the setting up of a commission to inquire into childhood abuse; expansion nationwide of the counselling services available to assist victims of child abuse; immediate amendment of the limitation laws as they relate to civil actions based on childhood sexual abuse; referral of the question of limitation in other forms of childhood abuse to the Law Reform Commission and priority advancement of legislation to include a register of sex offenders.”<sup>4</sup>

1.05 The first response of the Government was the establishment of the Commission to Inquire into Child Abuse on May 22, 1999.<sup>5</sup> The Commission is chaired by The Hon Miss Justice Mary Laffoy and its task is to operate as a listening / counselling forum on the one hand and, on the other hand, as an investigative forum. Part of the work of the Commission is to ascertain the cause, nature and extent of both sexual and non-sexual child abuse in institutions and other places and to produce an official set of figures in that respect. The Commission estimates that it could take approximately two to three years to complete its work. The second response of the Government was the Reference of the Attorney General to the Law Reform Commission under Section 4 of the 1975 Act, which is set out in full in the introductory chapter of this Consultation Paper.

1.06 The third response of the Government was the position adopted in relation to the *Statute of Limitations (Amendment) Act, 2000*.<sup>6</sup> When originally introduced in the Dáil, the Bill was intended to apply to both physical and sexual abuse. The Government welcomed the Bill in principle but queried whether it should apply to physical abuse as well as to sexual abuse. The view expressed by the Minister for Justice, Equality and Law Reform was that,

“With other forms of child abuse ... the issues are not always as clear-cut as in the case of sex abuse. Questions arise from the wide range of activities which, at one end of the scale, would have been classed until not too long ago as reasonable corporal punishment and, at the other end of the scale are by any

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<sup>4</sup> Dail Debates (27 May 1999) Vol 505, col 1021.

<sup>5</sup> The *Commission to Enquire into Child Abuse Act, 2000*, establishing the Commission, was enacted on 26 April, 2000.

<sup>6</sup> Note that a second Bill to amend the law of limitations was also considered in the Dáil. The *Statute of Limitations (Amendment) Bill, 1999* proposed to amend the *Statute of Limitations (Amendment) Act, 1991* by extending the time period within which to bring an action for damages for personal injuries in respect of physical or sexual abuse, to six years from the date on which the cause of action accrued or the date of knowledge (if later). This Bill has never passed into law.

standard unacceptable but may not affect the ability of a person to take legal proceedings in a given time. The Government's view is that it needs to obtain the advice of experts on whether and to what extent other forms of abuse are likely to have the inhibiting effect on the victim long into adult life that is known to occur in many instances of childhood sex abuse."<sup>7</sup>

1.07 The scope of the 2000 Act was clarified in October/November 1999, when the Bill was amended at the Committee Stage in the Dáil so as to exclude non-sexual abuse from its ambit.

1.08 The Act which was ultimately signed into law in June 2000, extends the definition of "disability", as contained in the *Statute of Limitations, 1957*,<sup>8</sup> to circumstances in which a person is suffering from a significant "psychological injury" as a result of being sexually abused during childhood so "that his or her will or his or her ability to make a reasoned decision," to institute civil proceedings in respect of such abuse is "substantially impaired".<sup>9</sup>

1.09 These amendments were of considerable importance in setting the proper legal context for the Law Reform Commission to deal with the Attorney General's Reference. It would have been futile to proceed with this Consultation Paper until the scope of the 2000 Act had been properly clarified.

## **Part II: Preliminary observations**

### **(a) *Scope of the Reference***

1.10 It is most important that two matters concerning the remit of the Law Reform Commission under the Attorney General's Reference should be clearly understood at the outset. The first of these is that, under the Reference, the Commission is called upon to examine the law of limitation of actions only insofar as it concerns the non-sexual abuse of children. This inevitably poses questions of definition and these questions are addressed later in this Consultation Paper. Secondly, the remit of the Law Reform Commission is confined to an examination of the law within the area just mentioned only insofar as it concerns the limitation of actions, that is to say the time limit within which victims of such abuse may bring civil proceedings against the perpetrators or other persons or bodies liable under the existing law (whether vicariously or otherwise) in respect of the abuse.

1.11 It follows that any question of changes in the law, other than the law of limitation of actions concerning such child abuse, lies beyond the remit given to the Commission by the Attorney General. Certain matters are entirely excluded from consideration, such as the possibility of amendment of the present law of tort or breach of duty to create new civil

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<sup>7</sup> Deputy O'Donoghue, Dáil Debates, 27 May 1999 (Vol 505, col 1026).

<sup>8</sup> S.48.

<sup>9</sup> *Statute of Limitations (Amendment) Act, 2000*, s.2.

wrongs and the extension of vicarious liability (the rules of liability whereby one person may be held responsible for the acts or omissions of another) so as to impose liability on persons who would not be liable under the present rules on vicarious liability.

1.12 Furthermore, the wider areas of social or legal policy which may arise in dealing with victims of child (non-sexual) abuse lie outside the remit of the Law Reform Commission. Such areas of policy have been assigned to the Commission to Inquire into Child Abuse which now stands established by the *Commission to Inquire into Child Abuse Act, 2000* under the chairmanship of the Hon Miss Justice Laffoy.

By way of contrast, under a corresponding Governmental initiative in Canada undertaken in 1998, the Canadian (federal) Law Reform Commission had a remit which covered areas corresponding both to that of the Law Reform Commission in Ireland and to that of the Laffoy Commission, albeit perhaps without the statutory powers of the latter.

1.13 We make this point not in any sense by way of a sense of grievance that our remit under the Attorney General's reference is not wider than it is; on the contrary, we fully agree with the Government that the task assigned to the Laffoy Commission can best be achieved on the basis of the special powers and functions conferred on that Commission by the Act which constituted it. The Law Reform Commission would not have had either the resources or the statutory powers to fulfil those functions under the 1975 Act.

Our purpose in making this point is simply to convey to the readers of this Consultation Paper the fact that the remit of the Law Reform Commission is just one part of a three-pronged governmental approach to the question of child abuse and as such is a single segment of a considerably larger overall picture.

1.14 In approaching the remit which has been conferred on it, the Commission adopts the stance which is normal in any consideration of the reform of the law concerning limitation of actions: the need to strike as fair a balance as one can between the legitimate claims of injured parties and the legitimate right of defendants not to be subjected unfairly to stale claims or to open-ended threats of liability. In the law of limitations, these interests are in conflict and neither side can have everything that it wants. These considerations are elaborated further on in this chapter.

1.15 We also wish to emphasise the following preliminary matters relevant to the scope of this Reference:

(i) The principal approach adopted by society in tackling the problem of child abuse has been to bring the perpetrators of such abuse to justice by means of the criminal law process and at the same time to protect children from abuse by means of child welfare legislation.<sup>10</sup> Thus, little attention has traditionally been paid to civil actions and compensation for victims. In recent years, however, victims of child abuse have turned to the civil courts and in so doing they encounter difficulties with the Statute of Limitations.

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<sup>10</sup> *Child Care Act, 1991; Children Act, 1997.*



(ii) This Paper is concerned exclusively with the law on the limitation of civil actions, not with the substantive law. Quite a bit could be said about the substantive law in this area, and it is worth observing that generous, expansive interpretations are likely to be given to problematic cases. In any case, it should be reiterated that such matters are outside the scope of this Paper. It must therefore be ascertained whether the alleged abuse is legally actionable under the present state of the law. In this regard, it seems reasonable to suppose that not to feed a child is a breach of fiduciary duty, assuming such a duty exists in the circumstances, as will usually be the case in the situations of trust and dependency addressed by this Paper. Locking a child in a room would presumably constitute the well-established tort of false imprisonment. This question will require further consideration.

(iii) The main object of this Paper is to determine whether there should be a special limitations regime and, if so, what it should be. But a further question is whether the particular act or tort should come within the category of actions which benefit from such a limitations regime. The relevance of this question will become apparent when it is seen, in the next section, that the application of the existing legislation on the law of limitations (the *Statute of Limitations, 1957* and the *Statute of Limitations (Amendment) Act, 1991*) is based partly on the particular form of the action. The Commission intends that the regime proposed in this Paper would apply to all civil actions arising from incidents of non-sexual abuse, whatever the particular cause of action. This issue will be expanded upon in Chapter 4.<sup>11</sup>

**(b) Medico-legal aspects**

1.16 Under the terms of the Attorney General's Reference, the Commission is requested to undertake research into the medico-legal aspects of the law on limitation of civil actions.<sup>12</sup> In furtherance of this objective, the Commission consulted medical literature, opinion and evidence, particularly that of a psychological and psychiatric nature, regarding the types and categories of child abuse and the effects of such abuse, among other matters. This body of opinion has been considered, analysed and applied at various stages throughout this Paper.

1.17 There are four areas in which the medical aspects of child abuse are particularly prominent in this Paper:

- (i) The Commission invokes medical analysis and opinion to ascertain the effects of abuse upon a child victim.<sup>13</sup> In considering this issue, questions are asked and distinctions drawn, with respect to how the effects of sexual abuse and

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<sup>11</sup> See below at paras.4.27–4.32.

<sup>12</sup> See Introduction above.

<sup>13</sup> See below at paras.1.34–1.43.

- non-sexual abuse differ.<sup>14</sup> The Commission attempts to ascertain the consensus, if any, within the medical profession, particularly among psychologists and psychiatrists, regarding the effects of non-sexual abuse upon a child's ability to pursue legal action against a perpetrator.
- (ii) A further dimension of this Paper which draws heavily upon medical analysis and opinion, is the question of the types of abuse and the categorisation of abusive conduct.<sup>15</sup> The Commission invokes expert medical analysis of the types of abuse which can occur and applies this categorisation throughout the Paper.<sup>16</sup>
  - (iii) In the course of considering the various options for reform in Chapter Three, the Commission weighs the advantages and disadvantages of reliance upon medical opinion and evidence as to the effects of non-sexual abuse upon a child victim.<sup>17</sup> It is particularly important that the Commission ascertained the status of medical thought in this area, and incorporated that understanding in attaining, what the Commission considers to be the most appropriate balance between the legal and the medical aspects of this Reference.
  - (iv) In Chapter Three, the Commission makes a provisional recommendation for the reform of the law in this area.<sup>18</sup> The discussion among psychiatrists and psychologists as to the age at which a victim of abuse should be capable of making decisions as to legal action, assisted the Commission in the task of deciding the form which this recommendation should take.<sup>19</sup>

### **Part III: The Law of Limitations in Ireland**

#### **(a) General justifications for imposing periods of limitation**

1.18 The purpose of limitation periods which has been discussed in two previous publications of this Law Reform Commission,<sup>20</sup> is twofold. First, a limitations regime aims to discourage plaintiffs from sitting on their rights and delaying unreasonably in

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<sup>14</sup> See below at paras.1.34, 3.05.

<sup>15</sup> See below at para.1.50.

<sup>16</sup> See below at para.4.15

<sup>17</sup> See in particular the arguments against invoking the test of "disability" as in the *Statute of Limitations (Amendment) Act, 2000*, below at para.3.13. See also paras.3.22, 3.23, 3.37.

<sup>18</sup> See below at paras.3.43, 3.50.

<sup>19</sup> See in particular para.3.42. It should be noted that the divergent medical opinions as to the stage at which a victim of abuse reaches sufficient maturity to take action, was taken into account by the Commission, and this is reflected in the two alternative periods of limitation recommended by the Commission in Chapter Three.

<sup>20</sup> Law Reform Commission, *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (LRC 21, Sep. 1987); Law Reform Commission, *Consultation Paper on the Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (Nov. 1998).

instituting proceedings. Secondly, it aims to protect defendants against the possible injustice of stale claims. In essence statutory limitation periods seek to balance issues of fairness to the plaintiff and fairness to the defendant.

1.19 The principal justifications in favour of limitation periods are:

1. The need to guarantee fairness to defendants (*ie* the diligence principle) in that the threat of being sued after unreasonable delay would prejudice unfairly the ability of defendants to contest plaintiffs' claims. This may be exacerbated by the deterioration of evidence with the passage of time.
2. The need to achieve certainty, in that defendants are entitled to have a claim resolved without undue delay and to be secure in the knowledge that they will not be subjected to open-ended threats of liability.
3. This second argument ties in with economic considerations, especially from the point of view of insurance. Without the certainty of limitation periods, the burden of insuring against and defending unlimited claims would result in higher costs of insurance premia, which would affect all members of society.
4. The final justification for limitation regimes concerns the public interest. The public has an interest in disputes being resolved as quickly as possible through the judicial system and this system should not be burdened with old claims and disputes which could reasonably have been sorted out earlier.

1.20 It is apparent that in devising limitation rules a balance must be struck between the competing rights of the plaintiff and the defendant and the interests of society. The Alberta Law Reform Institute noted this:

"In encouraging the timely resolution of disputes, a limitations system must strike a proper balance among the interests of potential claimants, potential defendants and society at large. Potential claimants have an interest in obtaining a remedy for injury from legally wrongful conduct; potential defendants have an interest in being protected from endless claims; and society at large has an interest in providing a range of remedies for injury from wrongful conduct and an orderly and fair process for determining when it is appropriate to award them."<sup>21</sup>

**(b) The law of limitations in Ireland**

1.21 The current Irish law on limitations is embodied in the *Statute of Limitations, 1957*, as amended by the *Statute of Limitations (Amendment) Act, 1991* and the *Statute of Limitations (Amendment) Act, 2000*. Clearly, child abuse comes within the ambit of tort law, in particular the tort of trespass to the person (assault and battery) and the tort of negligence and breach of duty giving rise to an action for personal injuries. Thus, the provisions regarding time limits for tort actions contained in these statutes are of direct concern.

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<sup>21</sup> Alberta Law Reform Institute, *Report No. 55: Limitations* (1989) at 16.

**(c)      *The Statute of Limitations, 1957***

1.22      Section 11(2) of the 1957 Act provides that an action founded on tort must be brought within six years from the date the cause of action accrued.<sup>22</sup> This general six year rule is subject to two exceptions: cases of slander and personal injury actions, in respect of which the limitation period is three years. The former exception is of no concern in the present context.

1.23      The 1957 Act also allows for the postponement of a limitation period during a person's minority (*ie* until they reach 18 years of age)<sup>23</sup> or while a person is of unsound mind.<sup>24</sup>

**(d)      *The Statute of Limitations (Amendment) Act, 1991***

1.24      This legislation was enacted on foot of recommendations made by the Law Reform Commission in 1987.<sup>25</sup> Prior to the enactment of the 1991 Act, the law made no allowance for persons whose cause of action could be extinguished before they even knew they had such a cause of action.<sup>26</sup> The central argument put forward by the Law Reform Commission in support of a change in this rule was that stated by Carroll J in *Morgan v. Park Developments*,<sup>27</sup>

“Whatever hardship there may be to a defendant in dealing with a claim years afterwards, it must be less than the hardship to a plaintiff whose action is barred before he knows he has one.”<sup>28</sup>

1.25      The general rule concerning personal injury actions, is now contained in section 3(1) of the 1991 Act:

“An action...claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty...shall not be brought after

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<sup>22</sup> See *Hegarty v. O' Loughran* [1990] 1 IR 148 where Griffin J at 158, defines the date when the cause of action accrued as the date “when a complete and available cause of action first comes into existence”.

<sup>23</sup> *Statute of Limitations, 1957*, s.48(1)(a).

<sup>24</sup> *Ibid.* s.48(1)(b). Provision is also made for postponement of time in s.48(1)(c) in respect of a convict subject to the operation of the *Forfeiture Act, 1870*, which is not relevant in the present context.

<sup>25</sup> Law Reform Commission, *Report on the Statute of Limitations: Claims in respect of Latent Personal Injuries* (LRC 21, Sep.1987).

<sup>26</sup> See *Hegarty v. O' Loughran* [1990] 1 IR 148; *Morgan v. Park Developments* [1983] ILRM 156.

<sup>27</sup> [1983] ILRM 156.

<sup>28</sup> *Ibid.* at 160.

the expiration of three years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured.”

1.26 Section 2 of the 1991 Act defines the “date of knowledge” as the date on which the person first had knowledge of certain facts namely:

- “(a) that the person alleged to have been injured had been injured,
- (b) that the injury in question was significant,
- (c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,
- (d) the identity of the defendant, and
- (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of the action against the defendant.”

1.27 As can be seen from the above, the 1991 Act introduces a “discoverability” or “date of knowledge” test in respect of personal injury actions. Time does not run until an injured person has knowledge of the fundamental facts relating to their cause of action.

***(e) The law of limitations in child abuse cases***

1.28 To date, there has been no judicial determination in this jurisdiction regarding the application of the Statute of Limitations to civil actions arising from child abuse. In particular, there has been no decision concerning the application of the discoverability rule in the 1991 Act to such actions. Two recent cases have come before the courts concerning this issue, but both were settled before a judicial decision was reached.<sup>29</sup>

1.29 The law at present provides that normal limitation rules are postponed during a person’s minority so that in effect time does not run until a person has attained their majority (*ie* reached 18 years of age).<sup>30</sup> Therefore, with regard to an action founded on the tort of trespass, a person has until the age of 24 to institute proceedings. If the conduct in question gives rise to an action for damages for personal injury arising out of negligence, nuisance or breach of duty, within the meaning of the 1991 Act, a person has three years from the age of majority to bring a claim or three years from the date

<sup>29</sup> The first was the case of *Sophia McColgan v. The North Western Health Board and Desmond Moran* which was heard in the High Court in 1998. The defendants argued that the plaintiff was statute barred. However, this issue was not resolved by the court as the case subsequently settled. The second case involved an action against Madonna House and the Eastern Health Board taken by a previous resident of Madonna House. This case was heard by the High Court, in March 1999 and ran for 22 days. The question as to whether the plaintiff’s claim was statute barred did not receive judicial determination as the judge in question resigned in April 1999 before giving judgment. This case was subsequently settled in November 1999. This was a crucial case as it was viewed to be a test case for many other actions.

<sup>30</sup> See *Age of Majority Act, 1985, s.2.*

they discovered they had suffered a significant injury.

#### **Part IV: Child Abuse Actions and the Irish Statute of Limitations**

1.30 When the Statute of Limitations is considered in the context of child abuse, in particular child sexual abuse, it is often argued that the traditional balance between the rights of the defendant and the plaintiff, and those of society, should be altered in favour of the plaintiff and more particularly that no limitation period should apply.

1.31 The principal problem in applying the law of limitations to civil actions for childhood abuse, and the reason that the imposition of periods of limitation is objected to in this context, is that victims of such abuse often find themselves statute-barred. This may seem surprising considering the rules of limitation in actions for trespass, negligence, nuisance or breach of duty, outlined above.<sup>31</sup> Under these rules, it would appear that a person should have adequate time from the age of majority within which to bring proceedings and no limitation problems should arise.

1.32 However, in many cases the damage caused as a result of childhood abuse is primarily psychological in nature. In these circumstances, victims may initially be unable to recall the abuse, they may be unaware of the connection between the abuse and the mental or emotional harm suffered in adulthood, they may fail to understand that the abuse was wrong or, alternatively, even when a victim does possess knowledge of the abuse and its consequences, this knowledge may be rendered useless if the victim is immobilised from acting. Some commentators point out that knowledge is a fundamental requirement to ground a cause of action and, as this knowledge is lacking in many victims of child abuse due to these psychological effects of abuse, periods of limitation should not be applied.

1.33 As against this, unreliable evidence presents significant problems from the point of view of defendants. The extent of the unreliability of the evidence is the subject of much debate and controversy among psychologists and other commentators. One of the main problems in this regard is the repressed memory syndrome. As will be seen below, it has been argued that this syndrome can produce false memories based on the power of suggestion during therapy. This makes it even more difficult for a defendant to counter such false evidence several years later and could pose a danger to innocent defendants. Finally, there may exist a danger that the abolition of limitation periods could constitute an abuse of process in itself and leave many potential defendants open to false allegations.

1.34 To understand in more detail why many victims find themselves statute-barred, regard must be had to the long term effects of such abuse on a person, effects which continue to manifest themselves right into adulthood. It is significant that, while there is

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<sup>31</sup> Above at para. 1.29.

a significant body of literature detailing the effects and psychological damage that emanate from childhood sexual abuse, comparatively few studies have been conducted into the long-term effects of non-sexual child abuse on persons in their adult years.<sup>32</sup> As a result of the lack of authoritative studies, it is difficult to know whether it can be said that the same psychological damage is caused to persons who have suffered child abuse, other than sexual abuse, so as to hinder their ability to bring legal proceedings within time. However, it is worth noting that several Canadian courts have taken the view that the same adverse psychological effects flow from both sexual and non-sexual abuse of children.<sup>33</sup>

1.35 Due to the difficulty of ascertaining the long term effects of non-sexual abuse, we include here a synopsis of the long-term effects of child sexual abuse. However, it should be noted that the consequences of childhood sexual abuse vary with the individual. Not all children who are sexually abused are prone to problems in adult life; some are more resilient than others. Moreover, the harmful consequences of the abuse may not be apparent in the immediate aftermath of the abuse and may not become fully apparent until adulthood.

1.36 The following account describes how an adult who was sexually abused as a child may react. It is hoped that this account will help to explain the reasons for the delay in commencing litigation in respect of child abuse and will also illustrate the problems raised by child abuse in general.<sup>34</sup>

**(a) “Avoidance behaviour” or “Post-traumatic Stress Disorder (PTSD)”**

1.37 Post-traumatic stress disorder is concerned with the development of certain characteristic symptoms following a psychologically distressing event outside the normal range of human experience. PTSD is normally associated with victims of war and concentration camp survivors. Essentially it denotes that a victim is aware of the abuse but disassociate themselves from any reminders of the traumatic event, including litigation. Some psychologists are of the view that the use of the terms “PTSD” or “avoidance behaviour” is unhelpful as they amount to various emotional effects which stem from child abuse.

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<sup>32</sup> Casey and Craven (eds), *Psychiatry and the Law* (Oak Tree Press, 1999) at 129: Two such studies were carried out in the U.S. in 1984 and 1994 in respect of physical abuse.

<sup>33</sup> *Lawrence v. Lawrence*, 26 July 1999 (British Columbia, Supreme Court), 1999 Acwsj Lexis 7939; *A.D.Y. v. M.Y.Y.* [1994] BCJ 375.

<sup>34</sup> J Mosher, “Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest” (1994) 44 UTLJ 169 at 178; R. Scorer, “Limitation Periods in Child Sexual Abuse Cases: Some Comment on the Law Commission’s Proposals” [1999] JPIL 3; Mullis ACL, “Compounding the Abuse? The House of Lords, Childhood Sexual Abuse and Limitation Periods” (1997) Med.L.Rev. 22; Nugent, “The Statute of Limitations in Sexual Abuse Cases” (1998) 3 Bar Rev. 5; Des Rosiers, “Limitation Periods and Civil Remedies for Childhood Sexual Abuse” (1993) 9 CFLQ 43.

**(b) “Repressed Memory Syndrome”**

1.38 “Repressed memory syndrome” is, in general, very rare and there is even controversy as to whether it is sufficiently well established and exact to be called a syndrome. However, what is widely accepted is that where a person is a victim of physical or sexual abuse, certain consequences will ensue. On such consequence is that the victim may be reluctant, in varying degrees, to acknowledge what has occurred. One view is that the repressed memory syndrome is simply an extreme form of this tendency. Another possible consequence of abuse is that a person affected by such a cataclysmic event at a formative period will usually be depressed and fearful of authority figures.

To define “repressed memory syndrome” in more technical terms, it is a situation where the victim may experience the symptoms of abuse but fail to recall the actual abuse itself. In such a situation it is alleged that the victim repressed all memory of the abuse until the memory returned. Pursuant to such a theory it is contended that repression is a defensive psychological response to a severe trauma whereby an event such as sexual abuse is too painful for the mind to process with the result that it is subsumed into the unconscious mind. Once there, it remains intact until some future event or stimulus such as psychotherapy triggers the retrieval of the memory. The theory of repressed memory syndrome has been subject to much criticism and scepticism among psychologists and psychiatrists.<sup>35</sup> This criticism relates to the fact that it is possible to implant a false memory of a traumatic event and it is then open to the power of suggestion to invoke such a false memory.

**(c) Psychological incapacity**

1.39 This is a situation where the victim has a knowledge of the abuse and can make the connection between it and their psychological symptoms or injuries but, due to a lack of emotional strength, is unable to confront the abuser or to take any action against the perpetrator such as litigation.

**(d) Inability to recognise the link between the abuse and psychological symptoms**

1.40 This is where victims have knowledge of the abuse but fail to make the connection between it and their psychological injuries or symptoms.

**(e) Conclusion**

1.41 In these four situations, it may be that the actual effect of the abuse will prevent a victim from being able to begin legal action within the limitation period. One

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<sup>35</sup> See Mullis ACL, *op. cit.* fn.33 at 31; Des Rosiers, *op. cit.* fn.33 at 43.



commentator has summed up the reasons for this as follows:

“...the effect of the abuse make it very difficult for the victim to complain. While she knows she has been abused, recognises that she has psychological problems and these stem at least in part, from the abuse, she is psychologically unable to bring herself to complain. At least three reasons might contribute to this. First, even when they reach majority, victims often continue to blame themselves for the abuse. Such self-blame is a strong inhibitor to disclosure. Secondly, complaining of abuse, particularly where the abuser is part of the family takes considerable courage and emotional strength. Yet, such strength is often lacking in victims of child sexual abuse....Thirdly, even where the abuse has ended that does not necessarily mean that the ‘relationship’ between the abuser and the abused has been terminated...”<sup>36</sup>

1.42 The Ontario Limitations Act Consultation Group (who proposed a separate limitation regime for victims of sexual and non-sexual abuse)<sup>37</sup> considered

“...it likely that in many cases the same psychological impediments to legal action would follow from...non-sexual assaults within proximate relationships (domestic assaults, child abuse). However, since the nature of the conduct constituting sexual assaults and other physical assaults is so diverse, it could not be conclusively presumed that every victim would be traumatized...”<sup>38</sup>

1.43 The relevance of these descriptions of the psychological effects, to a possible legal test for the limitation of actions, is that, even if a victim may be aware of the possibility of legal action, they may decide that to take such action would revive hideous memories and may even be destructive. The issue then is whether the law should view that victim as having chosen not to litigate, and therefore apply the Statute of Limitations to the cause of action. The alternative would be to distinguish this plaintiff from other litigants who fear the trauma of court proceedings, and devise a special regime for dealing with these cases. The decision as to which side of the line a particular case would fall upon, may be regarded as a question of legal policy as well as one of psychiatric expertise.

## **Part V: The Scope of “Non-Sexual Abuse”**

### **(a) “A general sketch of “child abuse”**

1.44 In order to put the terms of the Attorney General’s Reference into perspective,

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<sup>36</sup> Mullis ACL, *op. cit.* fn.33 at 26.

<sup>37</sup> See below at paras.2.030-2.044.

<sup>38</sup> Ontario Limitations Act Consultation Group, *Recommendations for a New Limitations Act* (1991) at 6.

some understanding of what is meant by “child abuse” is essential. Arriving at such an understanding is not an easy task, however, as is evidenced by the fact that there is no universally accepted definition of “child abuse”, nor is there a statutory or legal definition of the term in this jurisdiction. Psychologists, researchers, writers on the subject and the courts each use the term “child abuse” in a variety of contexts. The fact that there are so many definitions in the literature on the subject shows that none is adequate for all purposes.<sup>39</sup>

**(b) Meaning of “abuse”**

1.45 One problem with defining “child abuse” is that the term “abuse” does not refer to one specific type of act, but covers a wide range of behaviour. A further problem is that what constitutes “abuse” is a question of degree and it is largely dependent upon the opinions and values of society, which are ever changing. It has been said that “the definition of child abuse varies over time, across cultures and between social and cultural groups”.<sup>40</sup> One particular illustration of this is the fact that, while severe physical beatings and rape are clearly abusive, it may be difficult to differentiate between acceptable corporal punishment and assault.<sup>41</sup> The problem of changing standards regarding the level of punishment which is acceptable, was highlighted by the Minister for Justice, Equality and Law Reform in a speech delivered in the Dáil in May 1999.<sup>42</sup> This led to the formation of the view by the Government that expert advice was necessary in this area.<sup>43</sup>

1.46 It should be noted that a broad definition of “child abuse” will lead to an increase in the number of children who may be classified as having been abused.<sup>44</sup> This in turn makes it difficult to identify the effects of the more serious forms of abuse. On the other hand, if a narrow definition is adopted, the number of potential victims is limited. With such an approach, children may be left unprotected and at risk of further abuse.

1.47 The definition of “abuse” is not something which the Commission intends to elaborate upon to any significant degree, as it is envisaged that the question of whether

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<sup>39</sup> Gilmour, *Innocent Victims: Questions of Child Abuse* (1988) at 11.

<sup>40</sup> Lyon and deCruz, *Child Abuse* (2<sup>nd</sup> ed., Family Law, 1993) at 4.

<sup>41</sup> Corporal punishment was formerly regarded throughout the world as an acceptable and normal method of disciplining children. However, in the past twenty years, several countries have reversed their thinking on this subject. The Scandinavian countries in particular have banned corporal punishment both in the home and in schools. In Ireland, corporal punishment was not banned in schools until 1982 and we have now reached a stage where we query whether physical chastisement of children even by their parents should be permitted.

<sup>42</sup> Deputy O'Donoghue, Dáil Debates, 27 May 1999 (Vol 505, col 1026), above at para.1.06.

<sup>43</sup> *Ibid.*

<sup>44</sup> Cobley, *Child Abuse and the Law* (1995) at 3.

there is abuse will not be contentious in the majority of cases potentially affected by this Paper. Moreover, as was stated above, the Reference does not touch upon the substantive law, and it would therefore be inappropriate to embark upon a lengthy discussion of this topic. For the same reason, the Commission does not recommend that the term “abuse” be defined in legislation.<sup>45</sup>

**(c) Definitions of “sexual abuse”**

1.48 Sexual abuse is more easily defined than other types of child abuse. It can cover a variety of acts from molestation to rape. It is useful at this stage to quote the definition of sexual abuse which is contained in the *Statute of Limitations (Amendment) Act, 2000*. Section 48A (4) defines “an act of sexual abuse” as including the following:

- “(a) any act of causing, inducing or coercing a person to participate in any sexual activity,
  - (b) any act of causing, inducing or coercing the person to observe any other person engaging in any sexual activity, or
  - (c) any act committed against, or in the presence of, a person that any reasonable person would, in all the circumstances, regard as misconduct of a sexual nature;
- Provided that the doing or commission of the act concerned is recognised by law as giving rise to a cause of action.”

**(d) Definitions of “non-sexual abuse”**

1.49 For the purposes of this Paper, it must be ascertained what the expression “non-sexual” encompasses. It is useful to have regard to the definition of an “act of sexual abuse” contained in the 2000 Act, quoted above. This is particularly important as the regime proposed in this Paper for non-sexual abuse and that contained in the 2000 Act to deal with sexual abuse, should complement each other and provide a clear scheme for the limitation of every civil action arising from incidents of child abuse. This issue will be addressed in greater detail in Chapter 4.<sup>46</sup>

**(e) Categories of child abuse**

1.50 The Irish Department of Health and Children in its recent publication, *Children First: National Guidelines for the Protection and Welfare of Children* (September 1999), defines child abuse as falling into four categories, in similar terms to the English Department of Health.<sup>47</sup> These guidelines also recognise the fact that a child may be

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<sup>45</sup> See below at paras.4.14-4.17.

<sup>46</sup> See below at paras.4.03-4.13.

<sup>47</sup> See *Working Together under the Children Act 1989* (Department of Health, UK, 1991) at part 6.

subjected to more than one form of abuse at any given time. It should be stressed that these are not legal definitions. However we believe that it is necessary to quote extensively from the guidelines in order to provide an overview of the types of abuse at issue.

#### "Neglect

Neglect is normally defined in terms of an omission, where a child suffers significant harm or impairment of development by being deprived of food, clothing, warmth, hygiene, intellectual stimulation, supervision and safety, attachment to and affection from adults or medical care.

Harm can be defined as the ill treatment or the impairment of the health or development of a child. Whether it is significant is determined by his/her health and development as compared to that which could reasonably be expected of a similar child.

Neglect generally becomes apparent in different ways over a period of time rather than at one specific point. For instance, a child who suffers a series of minor injuries is not having his or her needs met for supervision and safety. A child whose ongoing failure to gain weight or whose height is significantly below average may be deprived of adequate nutrition. A child who consistently misses school may be being deprived of intellectual stimulation. The threshold of significant harm is reached when the child's needs are neglected to the extent that his or her well being and/or development are severely affected.

#### Emotional Abuse

Emotional abuse is normally to be found in the relationship between a caregiver and a child rather than in a specific event or pattern of events. It occurs when a child's needs for affection, approval, consistency and security are not met. It is rarely manifested in terms of physical symptoms. Examples of emotional abuse include:

- i. persistent criticism, sarcasm, hostility or blaming;
- ii. conditional parenting, in which the level of care shown to a child is made contingent on his or her behaviour or actions;
- iii. emotional unavailability by the child's parent/carer;
- iv. unresponsiveness, inconsistent or inappropriate expectations of a child;
- v. premature imposition of responsibility on a child;
- vi. unrealistic or inappropriate expectations of a child's capacity to understand something or to behave and control himself in a certain way;
- vii. under or over protection of a child;
- viii. failure to show interest in or provide age appropriate opportunities for a child's cognitive and emotional development;

- ix. use of unreasonable or over harsh disciplinary measures;
- x. exposure to domestic violence.

Children show signs of emotional abuse by their behaviour (for example, excessive clinginess to or avoidance of the parent/carer) their emotional state (low self-esteem, unhappiness) or their development (non-organic failure to thrive). The threshold of significant harm is reached when abusive interactions become typical of the relationship between the child and parent/carer.

#### Physical Abuse

Physical abuse is any form of non-accidental injury that causes significant harm to a child, including:

- i. shaking;
- ii. use of excessive force in handling;
- iii. deliberate poisoning;
- iv. suffocation;
- v. Munchausen's syndrome by proxy (where parents fabricate stories of illness about their child or cause physical signs of illness);
- vi. Allowing or creating a substantial risk of significant harm to a child.

#### Sexual Abuse

Sexual abuse occurs when a child is used by another person for his or her gratification or sexual arousal or for that of others. For example,

- i. exposure of the sexual organs or any sexual act intentionally performed in the presence of a child;
- ii. intentional touching or molesting of the body of a child whether by a person or object for the purpose of sexual arousal or gratification;
- iii. masturbation in the presence of a child or involvement of the child in the act of masturbation;
- iv. sexual intercourse with the child, whether oral, vaginal or anal;
- v. sexual exploitation of a child;
- vi. consensual sexual activity between an adult and a child under 17 years. In relation to child sexual abuse, it should be noted that for the purposes of the criminal law, the age of consent to sexual intercourse is 17 years."

## CHAPTER TWO      COMPARATIVE JURISDICTIONS

### Part I:              England and Wales

#### (a)            *The present law*

2.001    The present law on limitation in England and Wales is to be found in the *Limitation Act, 1980*. This Act does not contain specific and distinct time periods for actions based on child sexual or non-sexual abuse. Instead such actions are subject to the general limitation rules applicable to torts and claims arising from personal injuries.

2.002    The general rule in respect of torts is that such actions must be brought within six years from the date on which the cause of action accrued.<sup>48</sup>

2.003    In the context of personal injury actions, section 11(1) of the 1980 Act provides for a limitation period of three years from either the date on which the cause of action accrued or the date of knowledge (if later) of the person injured in the context of

“...any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision)”.

“Date of knowledge” is defined in section 14 as the date on which the person injured first had knowledge of the following facts:

- “(a)    that the injury in question was significant;
- (b)    that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
- (c)    the identity of the defendant;
- (d)    if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant; and knowledge that any acts or omissions did or did not as a matter of law involve negligence, nuisance or breach of duty is irrelevant.”

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<sup>48</sup>            *Limitation Act, 1980, s.2.*

2.004 This is almost identical to the date of knowledge test in the Irish *Statute of Limitations (Amendment) Act, 1991*. Knowledge under the 1980 Act (as is the case in Ireland) includes both actual and constructive knowledge.

2.005 Unlike Ireland, where there is no judicial discretion not to apply periods of limitation, if invoked, English courts have a discretion to extend time in personal injury actions, notwithstanding the fact that the limitation period has expired.<sup>49</sup> Such judicial discretion does not apply in respect of torts, other than negligence, nuisance or breach of duty, which are subject to a six year limitation period. In deciding whether it is equitable to let the matter proceed, the court must take into account the following factors:<sup>50</sup>

- (i) the length of and the reasons for the delay on the part of the plaintiff;
- (ii) the extent to which having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11;
- (iii) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he or she responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
- (iv) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
- (v) the extent to which the plaintiff acted promptly and reasonably once he or she knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
- (vi) the steps if any taken by the plaintiff to obtain medical, legal or other expert advice and the nature of such advice he may have received.

Under section 28 of the 1980 Act, limitation periods are suspended during disability<sup>51</sup> which includes minority (under 18 years) and unsoundness of mind.

**(b) Case law**

2.006 The 1980 Act does not contain any separate provisions in relation to limitation periods for child abuse actions. Therefore, the general law of limitations in respect of

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<sup>49</sup> *Ibid.*, s.33.

<sup>50</sup> *Limitation Act, 1980* (UK), s.33(c).

<sup>51</sup> "Disability" in s.28 is restricted to disability existing at the date of the accrual of the cause of action and does not encompass supervening disability. While not relevant to this Paper, it is interesting to note that s.28A of the 1980 Act, inserted by the *Latent Damage Act, 1986*, does provide for supervening disability.

general torts and personal injury actions contained in the 1980 Act govern such claims. The problems raised by the law of limitations in relation to child abuse actions was first encountered in the case of *Stubbings v. Webb*.<sup>52</sup>

2.007 In the *Stubbings* case the plaintiff alleged that she had been raped and sexually abused by her stepbrother and stepfather respectively, between the ages of two and fourteen. She issued proceedings in 1987 when she was 30 years of age. Her case was that she did not appreciate that she had suffered serious psychological injuries as a result of the abuse, until she received therapy in 1984. In other words, the plaintiff did not discover the causal connection between her injuries and the abuse until she underwent therapy.

2.008 The plaintiff based her cause of action in negligence, nuisance and breach of duty pursuant to section 11 of the 1980 Act, claiming damages for personal injuries, and contending that time did not run until she had acquired the requisite knowledge as provided for in section 14. If time had expired, the plaintiff sought to rely on the judicial discretion not to apply the limitation period. The defendants, on the other hand, argued that the plaintiff's claim was statute-barred. They further contended that section 11 was not applicable to her claim as her claim was based on an action in tort, namely, trespass to the person, which has a time limit of six years.

2.009 The House of Lords found for the defendants. Griffiths LJ, delivering judgment on behalf of the Court, held that section 11 did not apply to a cause of action based on sexual assault and rape, as these came within the category of intentional trespass to the person. The House of Lords refused to hold that the phrase "breach of duty" in section 11 could apply to all actions in which damages for personal injuries are claimed and particularly did not include an action for deliberate assault. Griffiths LJ stated that,

"...the phrase [breach of duty] lying in juxtaposition with 'negligence' and 'nuisance' carries with it the implication of a breach of duty of care not to cause personal injury, rather than an obligation not to infringe any legal right of another person."<sup>53</sup>

In so deciding, the House of Lords overturned 30 years of jurisprudence of the Court of Appeal to the effect that the phrase "breach of duty" covered a breach of any duty under the law of tort.<sup>54</sup> In accordance with the decision in *Stubbings*, the relevant limitation period was that contained in section 2, namely six years. Even though this period did not start to run until the plaintiff attained her majority, it had expired several years before the proceedings were issued and the plaintiff's claim was therefore statute barred.

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<sup>52</sup> [1993] AC 498.

<sup>53</sup> *Ibid.* at 329.

<sup>54</sup> *Letang v. Cooper* [1965] 1 QB 232 *per* Denning MR.



2.010 This decision of the House of Lords has been the subject of severe criticism in England and Wales.<sup>55</sup>

2.011 The plaintiff in *Stubbings* subsequently made an application to the European Court of Human Rights<sup>56</sup> claiming that there had been a breach the European Convention of Human Rights.<sup>57</sup> The Court held that there had been no violation of the Convention. It held that the limitation period of six years from the age of majority was not unduly short and that the limitation rules applied were proportionate to the aims of securing finality, legal certainty, and of protecting defendants from stale claims and unreliable evidence. The Court also noted:

“There has been a developing awareness in recent years of the range of problems caused by child abuse and its psychological effects on victims, and it is possible that the rules on limitation of actions applying in Member States of the Council of Europe may have to be amended to make special provision for this group of claimants in the near future.”<sup>58</sup>

2.012 The more recent case of *S v. W*<sup>59</sup> distinguished the *Stubbings* decision. In that case the plaintiff had been sexually abused during childhood. She sued her mother for negligence in failing to protect her from the abuse. The Court of Appeal held that this was not an action for trespass to the person but was clearly an action for damages for personal injuries, so that the three year limitation period from the date of knowledge, contained in section 11 of the 1980 Act, applied.

2.013 As a result of the decisions in *Stubbings v. Webb* and *S v. W* the law in England and Wales is in an anomalous and absurd state as regards sexual abuse claims: a plaintiff can sue a parent in negligence for allowing the abuser to abuse but cannot sue the abuser for negligence.

**(c) Proposals for law reform in England and Wales**

2.014 The Law Commission of England and Wales has recently undertaken an examination of its entire law of limitations and has published a consultation paper

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<sup>55</sup> Julian R.J. Allinson, “Limitation of Actions in Child Abuse Cases” (1996) JPIL 19; Davies, “Limitation of actions in personal injury cases: law of tort or law of torts?” (1993) SLR 74; Mullis “Compounding the Abuse? The House of Lords, Childhood Sexual Abuse and Limitation Periods” (1997) MedLRev 22; A McGee, “Trespass and Limitation” (1993) 109 LQR 356; WVH Rogers, “Limitation and Intentional Torts” (1993) 143 NLJ 258.

<sup>56</sup> *Stubbings v. United Kingdom* (1997) 23 EHRR 213.

<sup>57</sup> European Convention on Human Rights, Arts. 6, 8, 14.

<sup>58</sup> *Op. cit.* fn.8 at para.54.

<sup>59</sup> [1995] 1 FLR 862.

setting out its recommendations.<sup>60</sup> A report is due to be published in the near future.

2.015 The Commission's main proposal is that there would be a core limitation regime, which would apply uniformly to all causes of actions. This would eliminate the need to categorise different classes of action. The main elements of this core regime are:

- (i) The core regime would apply in all causes of actions and would consist of an initial limitation period of three years which would run from when the plaintiff knows or ought reasonably to know that he has a cause of action.<sup>61</sup> Clearly this incorporates a discoverability test.
- (ii) A long-stop limitation period of ten years or thirty years in personal injury cases (to take into account victims of childhood sexual abuse) that would run from the date of the act or omission which gives rise the claim. After the expiration of this period no action could be taken regardless of the state of knowledge of the plaintiff.
- (iii) The plaintiff's disability, including supervening disability, would extend the limitation period.
- (iv) The courts would have no discretion not to apply a period of limitation.

Under the core regime the date of discoverability or date of knowledge is the commencement point for the limitation period.

**(d) New proposals in relation to child abuse**

2.016 The Law Commission examined the problems posed by the law in this area. In so doing they had regard specifically to actions arising from sexual abuse rather than child abuse claims in general. The Commission first considered whether a limitation period should apply at all in cases of child sexual abuse. In considering this question they looked at the proposals of other law reform commissions, particularly Ontario and Western Australia. The Commission also took into account the policy considerations of limitation periods and concluded that there should be a limitation period. They then considered the introduction of a separate limitation regime for such cases but firmly rejected this possibility.

2.017 The Commission was of the view that these claims were capable of being dealt with under the proposed core regime. In support of this conclusion they claim that "applying this discoverability test to claims by sexual abuse victims will resolve many of the problems which the current accrual method can cause in this area."<sup>62</sup> They are

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<sup>60</sup> Law Commission of England and Wales, *Consultation Paper on the Limitation of Actions* (No. 151, 1998).

<sup>61</sup> Words such as "he" which import the masculine gender, should be construed throughout this Paper as also importing the feminine gender, and vice versa, unless the contrary intention appears. See s.11 of the *Interpretation Act, 1937* and s.33 of the *Interpretation (Amendment) Act, 1993*.

<sup>62</sup> Law Commission of England and Wales, *Consultation Paper on the Limitation of Actions* (No. 151, 1998) at para.13.31.

also of the view that the long-stop limitation period of 30 years would mean “that it is unlikely that many victims would find their claims barred by it.”<sup>63</sup> In addition they point out that the advantages of a long stop outweigh the disadvantages in that after a certain period of time it is not possible to give a fair trial to disputes.<sup>64</sup>

2.018 The Commission was also of the view that the definition of disability under the existing law in England and Wales is far too narrow to include victims of sexual abuse. They recognised that the “trauma of abuse is said to give rise to psychological impediments to bringing an action which should be recognised as a form of disability sufficient to delay the start of the limitation period.”<sup>65</sup>

2.019 The provisional recommendation proposed by the Law Commission in respect of “disability” is that the focus should shift to a lack of capacity. The definition proposed was the following:

“A person is without capacity, if at the material time:

- (a) he is unable by reason of mental disability to make a decision for himself on the matter in question or
- (b) he is unable to communicate his decision on that matter because he is unconscious or for any other reason”.<sup>66</sup>

The term “mental disability” as it appears in the proposal, is defined as “a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning.”<sup>67</sup>

2.020 It is of note that this definition of disability does not apply specifically to the case of sexual abuse victims. The Law Commission stated that they considered it to be “strongly arguable” that such victims would fall within the proposed definition of “disability”.<sup>68</sup> However the Commission also acknowledged that the definition may not take into account all forms of psychological incapacity which can stem from sexual abuse. While recognising this flaw, the Law Commission were of the view that it would be difficult to arrive at acceptable definitions of what exactly constitutes “psychological incapacity” in this context, due to considerable academic disagreement.<sup>69</sup> To that end, the question was left open for consultees to determine whether the definition of

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<sup>63</sup> *Ibid.* at para.13.34.

<sup>64</sup> *Ibid.* at para.13.35.

<sup>65</sup> Law Commission of England and Wales, *Consultation Paper on the Limitation of Actions* (No. 151, 1998) at para.12.118.

<sup>66</sup> *Ibid.* at para.12.123.

<sup>67</sup> *Ibid.* at para.12.123.

<sup>68</sup> *Ibid.* at para.12.124.

<sup>69</sup> *Ibid.* at para.12.124.

disability should make provision for the psychological incapacity suffered by victims of sexual abuse.<sup>70</sup>

2.021 The Law Commission's provisional view was that the core regime proposed in the Consultation Paper should apply to claims arising from child abuse, rather than adopting a separate regime for dealing with such claims.<sup>71</sup> Clearly the reasoning would be the same in respect of non-sexual abuse of children.

2.022 The Law Commission's proposals regarding child sexual abuse cases have already been subject to the criticism of placing too much emphasis on the discoverability principle and in not taking into account the lack of capacity phenomenon experienced by many victims of abuse.<sup>72</sup>

## Part II: Scotland

2.023 Scottish law uses both the concept of prescription, which is derived from Roman law and is found in civil law jurisdictions, such as France and Germany, and that of limitation, which is found in English law. Prescription is a legal presumption of abandonment or satisfaction of the claim, with the consequence that prescription periods can extinguish the plaintiff's rights. Limitation rules, by contrast, do not extinguish the right but merely bar the remedy.

2.024 The *Prescription and Limitation (Scotland) Act, 1973* governs the law on the limitation of time in respect of civil actions. Section 17 of the 1973 Act provides that, in civil actions for damages for personal injury, there is a three year limitation period from the event giving rise to the action. However, this section also sets out exceptions, which extend this period. For example, time does not run while a child is under a legal disability by reason of nonage (under 16) or where a person is of unsound mind.<sup>73</sup> In addition, section 17 contains a delayed discovery rule which extends the basic three year period until it would have been "reasonably practicable" in all the circumstances, for a person to become aware of the relevant facts, such as the fact that the injuries in question were sufficiently serious to justify bringing an action.<sup>74</sup> Finally, the courts in Scotland have a discretion to extend time and thus override the prescribed time limits where it "...seems equitable to do so".<sup>75</sup>

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<sup>70</sup> *Ibid* at para.12.125.

<sup>71</sup> *Ibid.* at para.12.125.

<sup>72</sup> Scorer, "Limitation Periods in Child Sexual Abuse Cases: Some Comments on the Law Commission's Proposals" [1999] JPIL 3.

<sup>73</sup> *Prescription and Limitation (Scotland) Act, 1973*, s.17(3).

<sup>74</sup> *Ibid.*, s.17(2).

<sup>75</sup> *Ibid.*, s.19A.

2.025 Under Scottish law there are no separate statutory provisions in respect of the limitation of time in child abuse actions. Instead these would be governed by the time periods laid down in section 17 of the 1973 Act combined with the disability provisions contained therein and the provision for judicial discretion. It is interesting to note that section 17 states:

“...this section applies to an action of damages where the damages claimed consist of or include damages in respect of personal injuries, being an action...brought by the person who sustained the injuries or any other person”.<sup>76</sup>

No reference is made to the particular category of tort action and so this overcomes the problems encountered in England and Wales.<sup>77</sup> Clearly, child abuse actions would be covered by section 17 of the 1973 Act.

### **Part III: Canada**

#### **(a) Overview**

2.026 Each of the Canadian provinces has its own statutory rules on limitation of actions. Generally speaking, the limitation period in an action in tort, runs from the date of discoverability of the cause of action. In those jurisdictions where this is not explicitly contained in legislation, the courts have applied such a discovery rule.

2.027 The difficulty posed by statutory limitation periods in the context of claims arising from child abuse has been well recognised in Canada for many years. In the past decade, many provinces have addressed this problem by enacting specific statutory limitation regimes to deal with cases arising from child sexual abuse. These legislatures have separated cases of child sexual abuse from all other torts for the purpose of the law of limitations. For instance, the provinces of British Columbia, Saskatchewan and Newfoundland have each abolished limitation periods in respect of sexual abuse claims. Other provinces have postponed the running of time in such cases until the connection between the psychological injuries and the abuse was capable of discovery by the victim. While there have generally been no separate limitations regimes introduced in respect of non-sexual child abuse, the example of Ontario is very interesting as it was proposed there to reform the law in respect of victims of both sexual and non-sexual child abuse. However, these proposals were never enacted into law. These legislative reforms and proposals are discussed more fully below.

2.028 The Canadian Supreme Court has also taken an active role in ameliorating the problems created by statutory limitation periods in claims arising from child abuse. The

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<sup>76</sup> *Ibid.*, s.17(1).

<sup>77</sup> See above at paras 2.007-2.013.

case of *M(K) v. M(H)*<sup>78</sup> was the first decision of the Canadian Supreme Court concerning a civil action arising out of child abuse. The plaintiff in this case was a victim of incest. She had been abused by her father during the period 1964 to 1974, between the ages of eight and sixteen. She later married and had three children. This marriage subsequently failed. In 1984 she attended a self-help group for incest victims and it was as a result of this that the plaintiff made the connection between the abuse and her psychological and emotional problems. In 1985, at the age of 28, she instituted a civil action against her father seeking damages for assault and battery and breach of fiduciary duty. Pursuant to the legislation of Ontario, there is a limitation period of four years in respect of an action for assault and battery, whereas no limitation period is imposed in respect of an equitable claim, such as a breach of fiduciary duty. The trial court and the Ontario Court of Appeal both held that the plaintiff's claim was statute barred. The Supreme Court of Canada reversed the decision, holding that incest was both a tortious assault and a breach of fiduciary duty and that time did not run until the plaintiff was reasonably capable of discovering the wrongful nature of the abusive acts and the nexus between those acts and her injuries. The Court decided to apply the reasonable discoverability test and held, by a majority, that there is a presumption that incest victims only discover the necessary connection between their injuries and the wrong done to them (thus discovering their cause of action) during some form of psychotherapy. Therefore, the limitation period did not run against the victim until she had received therapy.

**(b) Ontario**

2.029 Under the present state of the law of Ontario, a person has four years from the date the cause of action arose within which to bring a claim founded on assault, battery, wounding or imprisonment,<sup>79</sup> with the normal postponement of time during minority and other disability, based on unsoundness of mind or mental deficiency or incompetence.<sup>80</sup>

**(i) Attempted law reform**

2.030 Ontario has a history of failed attempted reforms of its limitations law.<sup>81</sup> The

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<sup>78</sup> (1992) 96 DLR (4<sup>th</sup>) 289.

<sup>79</sup> *Limitations Act, Revised Statutes of Ontario*, 1990 Ch. L.15, s.45(1)(j).

<sup>80</sup> *Ibid.*, s.47.

<sup>81</sup> In 1969, the Law Reform Commission of Ontario published a report, which reviewed the area of limitations law and proposed major reforms. In 1977 a draft bill was released by the Ministry of the Attorney General based on these recommendations. Discussions and work continued on this draft bill until finally a bill known as Bill 160 was introduced into the legislature in December 1983. The Bill received a first reading but did not receive second and third readings and died on the table. In 1989 there were further calls for reform of the law. This was heightened by the Ontario Court of Appeal decision in the case of *M(K) v. M(H)* which had decided that a claim for childhood abuse was out of time under the law as it stood. In the same year a private member's bill addressing the problems facing victims of sexual abuse as a result of the existing law, was received in principle by the

most recent attempt which is of relevance in the present context, was the establishment in 1989 of a Limitations Act Consultation Group by the Ministry of the Attorney General, with the object of conducting a comprehensive review of the law on limitation and making recommendations for reform of the law in this area.

2.031 This group was representative of several interest groups in order to reconcile as many competing interests as possible and to secure the passage of new legislation. A report was published by the group in March 1991,<sup>82</sup> which recommended far-reaching and innovative reforms. These were largely embodied in the *Ontario Limitations (General) Bill, 1992*. This Bill failed to be enacted into law.

2.032 The reforms proposed by the Consultation Group consisted of the introduction of a single limitation period of two years from the time of the act or omission giving rise to the claim. This two-year period incorporated a discovery test: time would not run until a person had acquired or ought to have acquired knowledge of the material facts. Four possibilities were put forward as bases for acquiring this knowledge.<sup>83</sup> In addition, all claims were to be subject to a 30 year ultimate limitation period or ten years in exceptional cases.<sup>84</sup>

(ii) *Proposals concerning child abuse*

2.033 Of particular interest and significance was the recommendation by the Group in its 1991 Report that there should be special statutory limitation provisions for victims of both sexual abuse and non-sexual abuse. This was quite a radical approach and though there have been many law reform reports advocating changes to the law of limitations, this was the first report to deal specifically with the problem of child abuse. These recommendations were also mirrored in the 1992 Bill which contained the following provisions:

2.034 First, no limitation period was to apply in proceedings arising from childhood sexual assault "...if at the time of the assault one of the parties to it had charge of the person assaulted, was in a position of trust or authority in relation to the person or was someone on whom he or she was dependent, whether or not financially."<sup>85</sup> The definition of the relationship which must exist between the victim and assailant is broad

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legislative assembly but it too died on the table.

<sup>82</sup> *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991).

<sup>83</sup> Knowledge of the following facts were considered: (i) that the injury, loss or damage had occurred; (ii) that the injury, loss or damage was caused or contributed to by the act or omission of the defendant; (iii) the identity of the defendant; (iv) the significance of the injury, loss or damage relative to the claim.

<sup>84</sup> *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991) at 4.

<sup>85</sup> *Ibid.*, clause 16(h).

enough to cover situations outside the family setting. It could apply to situations where one of the parties to the assault had charge of the child or was otherwise in a position of trust or authority. The special limitations regime could also apply to relationships where the child is dependent on the perpetrator.

2.035 Secondly, in respect of claims of sexual assault which occur other than in a relationship of trust and dependency (*ie* assaults by a stranger), the Bill created a rebuttable presumption that the plaintiff was “incapable of commencing the proceedings because of his or her physical, mental or psychological condition” until the proceedings were in fact commenced.<sup>86</sup>

2.036 Thirdly, the Bill contained a rebuttable presumption in the context of claims for non-sexual assault, that the “plaintiff was incapable of commencing the proceeding because of his or her physical, mental or psychological condition” until the proceedings were in fact commenced.<sup>87</sup> This presumption only applied where there was a relationship of intimacy between the parties or where one of the parties to the assault was someone on whom the person was dependent, whether or not financially. This provision was clearly aimed at persons who were in a relationship of trust or dependency with each other. While it is directed at non-sexual child abuse, it also covers domestic spouse abuse. The Bill provided that the running of time would be postponed for this category of persons while they were suffering from incapacity as a result of a physical, mental or psychological condition. No definition was given as to what constitutes a psychological condition for the purpose of this provision.

2.037 It is finally worth noting that the Bill provided that the legislation, when it came into force, would be fully retrospective in the case of sexual and non-sexual abuse claims.<sup>88</sup>

(iii) *Justifications for recommendations*

*Sexual abuse*

2.038 The reasons for recommending the abolition of limitation periods in sexual abuse claims, as advanced by the Consultation Group in its 1991 Report, were as follows:

- (a) The vulnerability of persons who have been sexually abused renders them incapable of considering legal proceedings until many years after the event and this particularly arises in a relationship of trust or dependency (such as incest).
- (b) Several factors combined to render the victim incapable of instituting legal proceedings: the perpetrator, the nature of the act, power of perpetrator over the

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<sup>86</sup> *Ibid.*, clause 9.

<sup>87</sup> *Ibid.*, clause 9.

<sup>88</sup> *Ontario Limitations (General) Bill, 1992*, clause 23(7).



victim and abuse of that position of power to silence the victim.<sup>89</sup>

- (c) "To impose a limitation period on actions for sexual assault in a relationship of trust or dependency is to reward assailants who have most effectively traumatized and silenced their victims. Clearly, the public interest does not require that immunity from liability be extended to those assailants."<sup>90</sup>
- (d) One of the purposes of limitation periods is to discourage parties from giving vent to old disputes. However, in these cases, it appears that public policy with respect to incest and other sexual assaults demands that 'old' disputes be allowed to proceed in order to provide relief for the victim and to deter abusers.
- (e) A defendant would be unlikely to be prejudiced by loss of evidence since it is their sexual conduct that is in issue.

#### *Non-sexual abuse*

2.039 In making the recommendation that there should be a rebuttable presumption that a victim of non-sexual assault which occurred in a close proximate relationship, is incapable of pursuing a claim and is entitled to a postponement of the limitation period, the Consultation Group were of the view that the factors which rendered a victim of sexual assault incapable of bringing proceedings, could possibly be the same for a victim of non-sexual assault. The Group remarked that child abuse "...can leave a victim incapable of pursuing legal action until years after the age of majority is attained".<sup>91</sup> In particular they stated that the focus should be on the validity of the claim and not on the condition of the plaintiff. Thus, instead of compelling every victim to prove inability to pursue the claim, the limitation period should be postponed unless the defendant can prove that the victim was capable of bringing the proceedings within the limitation period.

2.040 However, the Group was keenly aware that the recommendations should be confined to assaults arising in relationships of trust and dependency. In the Report, the Group remarked that,

"[t]he class of defendants who would have to prove the plaintiff's capability is drawn more narrowly than in the case of sexual assault...because the defendant will be dealing with claims in respect of any assault. The broad compass of assault includes not only the most vicious or persistent beating but also the non-consensual administration of medical treatment and a shove by a teacher or police officer. It would be unduly onerous for a doctor or police officer to prove 10 years after the event that the plaintiff was in a position to commence the proceedings two years earlier.

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<sup>89</sup> *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991).

<sup>90</sup> *Ibid.* at 20.

<sup>91</sup> *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991) at 31.

However, in the case of sexual assault, or non-sexual assault of a person in a personal and intimate relationship or a relationship of dependency, the defendant will have direct knowledge of the circumstances and will not have significant problems about the loss of evidence ”<sup>92</sup>

2.041 In addition, the Group was also aware that, due to the diverse nature of physical assaults, it could not be conclusively presumed that every victim would be traumatised by an assault <sup>93</sup>

2.042 The effect of the creation of this rebuttable presumption is that the onus is placed on the defendant to prove that the plaintiff had discovered the cause of action and was capable of pursuing it within the relevant limitation period

*Sexual assaults by a stranger*

2.043 The Group advanced the same justifications for the application of the regime to sexual assaults by a stranger as the justifications put forward in respect of non-sexual assaults in close relationships.

(iv) *Ontario Limitations (General) Bill, 1992*

2.044 The recommendations of the Ontario Limitations Act Consultation Group formed the basis of the Ontario *Limitations (General) Bill, 1992* (Bill 99), which was introduced into the legislative assembly on 25<sup>th</sup> November 1992 and given its first reading. In 1995 a general election was called which brought about a change of government and the Bill lapsed. The end result is that these radical proposals have never become law and so the law of limitations in Ontario remains as it was. Despite its failure, the model put forward in the Ontario Bill has been influential in other Canadian provinces and has provided food for thought in the context of child abuse.

(c) *Saskatchewan*

2.045 In Saskatchewan, there is no limitation period in respect of sexual abuse claims.<sup>94</sup> Moreover, there is no limitation period in respect of claims arising from non-sexual abuse, where such abuse occurs in the context of a relationship of intimacy or dependency. The Saskatchewan law,<sup>95</sup> as amended in 1993 to provide for these types of actions,<sup>96</sup> states:

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<sup>92</sup> *Ibid* at 31 and 32

<sup>93</sup> *Ibid* at 6

<sup>94</sup> Saskatchewan *Limitation of Actions Act* R.S.S. 1978, as amended by the *Limitation of Actions (Amendment) Act* 1993, s 3(3.1)

<sup>95</sup> Saskatchewan *Limitation of Actions Act* R.S.S. 1978, s 3(3.1)

<sup>96</sup> Saskatchewan *Limitation of Actions (Amendment) Act* 1993

" (3.1) A person is not governed by a limitation period and may at any time bring an action for trespass to the person, assault or battery where:

- (a) the cause of action is based on misconduct of a sexual nature;  
or
- (b) at the time of the injury:
  - (i) one of the parties who caused the injury was living with the person in an intimate and personal relationship; or
  - (ii) the person was in a relationship of financial, emotional, physical or other dependency with one of the parties who caused the injury.

(3.2) Subsection (3.1) applies whether or not the person's right to bring the action was at any time governed by a limitation period pursuant to this Act or any other Act."

2.046 This provision is very much along the same lines as the Ontario model. In particular the wording of the proximate relationship between the victim and the abuser is that adopted by the Ontario Limitations Act Consultation Group in their 1991 Report.<sup>97</sup> More significantly, the Saskatchewan legislation goes further than the *Ontario Limitations (General) Bill, 1992* as no limitation period is imposed in respect of non-sexual assaults in close relationships based on trust or dependency.

**(d) Prince Edward Island**

2.047 The *Statute of Limitations Act, 1988* governs the law relating to limitation periods on Prince Edward Island. This act stipulates that a person has two years within which to bring an action for trespass to the person, assault, battery, wounding or other injury whether arising from an unlawful act or from negligence.<sup>98</sup> The *Statute of Limitations Act, 1992* created the following exception in respect of claims arising from sexual abuse:

"In any action for injury to the person based on an allegation of sexual abuse, the limitation period...begins to run when the plaintiff understands the nature of the injuries and recognises the effects of the abuse."<sup>99</sup>

2.048 By virtue of this amendment, the limitation period is suspended until the plaintiff draws a connection between the abuse and the injuries sustained, but only in the context of claims arising from sexual abuse. Once a plaintiff discovers the

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<sup>97</sup> *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991) at 10.

<sup>98</sup> *Statute of Limitations, RSPEI 1988*, s.2(1)(d).

<sup>99</sup> *Statute of Limitations Act, 1992*, inserting s.2(3) to the *Limitation of Actions Act, RSPEI 1988*.

connection the limitation period of two years begins to run. Essentially this approximates to a discoverability test.

2.049 There is no separate provision for dealing with cases of non-sexual abuse. Such cases are governed by the general limitation period applicable to trespass to the person, which is two years with a postponement of time during disability. “Disability” is defined in the Act as “minority” or “unsoundness of mind”.<sup>100</sup>

**(e) British Columbia**

2.050 British Columbia was the first Canadian province to abolish limitation periods for actions based on sexual abuse, which it did in 1992.<sup>101</sup> Pursuant to statute, no limitation period applies where the cause of action is

“...based on misconduct of a sexual nature, including, without limitation, sexual assault,  
(i) where the misconduct occurred while the person was a minor, and  
(ii) whether or not the person’s right to bring the action was at any time governed by a limitation period.”<sup>102</sup>

2.051 However, this legislation does not make separate provision for non-sexual abuse cases. Such cases are therefore governed by the normal limitation rules, which impose a limitation period of two years from the date when the action arose,<sup>103</sup> subject to the usual suspension of time based on disability arising from minority or unsoundness of mind.<sup>104</sup>

**(f) Newfoundland**

2.052 Section 8(2) of the *Limitations Act, 1995* abolishes limitation periods in respect of a claim brought by a person based on sexual misconduct where that person was:

“(a) under the care or authority of;  
(b) financially, emotionally, physically or otherwise dependant upon; or  
(c) a beneficiary of a fiduciary relationship with,  
another person, organization or agency...”.

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<sup>100</sup> *Statute of Limitations, RSPEI 1988*, s.1(c).

<sup>101</sup> *Limitation Amendment Act, SBC 1992*, c.44, s.1(b).

<sup>102</sup> *Limitation Act, RSBC 1996*, c.266, s.3(4)(k), originally enacted in 1992 (*Limitation Amendment Act, SB 1992*, c.44, s.1(b)). The 1996 Act revised the *Limitation Act, RSBC 1979*.

<sup>103</sup> *Limitation Act, RSBC 1996*, s.3(2)(a).

<sup>104</sup> *Ibid.*, s.7.

2.053 As can be seen, the legislature enacted a separate limitation regime in respect of sexual abuse only. No separate provision is made for non-sexual abuse.

2.054 It follows that cases concerning non-sexual abuse are covered by the general limitation provisions contained in the 1995 Act, namely a limitation period of two and six years respectively, with a suspension of time during disability.<sup>105</sup> A person under a “disability” is defined in the Act as someone who is:

- “(a) less than 18 years of age; or
- (b) incapable of the management of his or her affairs because of disease or impairment of his or her physical or mental condition; or
- (c) for the purpose of an action for misconduct of a sexual nature not under subsection 8(2), incapable of commencing that action by reason of his or her mental or physical condition resulting from that sexual misconduct.”<sup>106</sup>

2.055 The 1995 Act also introduced for the first time a discoverability test in respect of personal injury actions and a limited range of other actions.<sup>107</sup> Applying this test, once a person is aware that they have a cause of action they have two years within which to bring proceedings.<sup>108</sup> However the discoverability provisions are subject to a ten year ultimate limitation period from the date of the relevant act or omission.<sup>109</sup> This ten year period can be overridden by the disability provisions. All actions are subject to a 30 year long stop after which time no action can be brought.<sup>110</sup>

**(g) Alberta**

2.056 The law relating to limitation periods in Alberta is contained in the *Limitations Act, 1996*, which came into force on March 1, 1999. This Act is based on recommendations made by the Alberta Law Reform Institute.<sup>111</sup> The 1996 Act reformed the entire law concerning limitation periods and established one of the most simple and novel limitation regimes in the common law world.

2.057 This piece of legislation introduces a single limitation scheme for all classes of action, based on a discoverability test, thereby eliminating the need to categorise or

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<sup>105</sup> *Limitations Act, 1995*, ss. 5(a)(b) and 6(c).

<sup>106</sup> *Ibid.*, s.15.

<sup>107</sup> *Ibid.*, s.14(1).

<sup>108</sup> *Ibid.*, s.14(1).

<sup>109</sup> *Ibid.*, s.14(3).

<sup>110</sup> *Ibid.*, s.22.

<sup>111</sup> *Limitations* (Report No. 55, 1989).

characterise claims for the purpose of the law of limitations. Instead, all claims are subject to two limitation periods; one is the 'discovery period' and the other is the 'ultimate limitation period'. All claims must be commenced within two years of discovery of the claim and the legislation sets out criteria for when the plaintiff is deemed to have sufficient knowledge to have discovered the claim.<sup>112</sup> The ultimate limitation period is ten years from the date when the claim arose, after which time an action cannot be commenced, regardless of the state of knowledge of the claimant.<sup>113</sup> These limitation periods are prescribed by section 3(1) of the Act, which states:

"Subject to section 11, if a claimant does not seek a remedial order within  
(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,  
    (i) that the injury for which the claimant seeks a remedial order had occurred,  
    (ii) that the injury was attributable to conduct of the defendant, and  
    (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding, or  
(b) 10 years after the claim arose,  
whichever period expires first, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability in respect of the claim."

2.058 The Act establishes the discoverability principle for the first time in Alberta law. Prior to this the courts in Alberta refused to apply such a rule.<sup>114</sup>

2.059 The 1996 Act makes limited provision for victims of sexual abuse, by suspending the limitation periods set out above while a person is under a disability. However, minority does not automatically constitute a disability, as section 1(i) defines a person under a disability as: "(i) a minor who is not under the actual custody of a parent or guardian".

2.060 There is an exception to this provision in respect of victims of sexual abuse who wish to sue an abuser who was either a parent or guardian. Section 5(2) of the Act provides:<sup>115</sup>

"Where a claimant brings an action against  
    (a) a parent or guardian of the claimant, or  
    (b) any other person for a cause of action based on conduct of a sexual nature including, without limitation, sexual assault,

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<sup>112</sup> *Limitations Act, 1996*, s.3(1)(a).

<sup>113</sup> The Alberta Law Reform had recommended 12 or 15 years. The ten year ultimate limitation period has been criticised as being too short.

<sup>114</sup> *Costigan v. Ruzicka* (1985) 13 DLR (4th) 368 (Alta CA).

<sup>115</sup> As amended by the *Justice Statutes Amendment Act, 1997*.

and the claim arose when the claimant was a minor, the operation of the limitation periods provided by this Act is suspended during the period of time that the claimant is a minor."

2.061 Prior to this amendment the position was (and still is in respect of cases other than sexual misconduct actions) that minority is not a disability where the minor is under the custody or control of a parent or guardian.<sup>116</sup> Section 5(2) now relieves victims of sexual abuse from the presumption that minors in the actual custody of a parent or guardian are not under a disability but does not extend the disability beyond majority. Accordingly, once a person attains majority, he/she then has two years after discovery within which to institute proceedings with an ultimate limitation period of ten years. Presumably such persons could seek to postpone the running of time after the age of majority by invoking "functional disability", which is defined in the Act as follows: "where the claimant is unable to make reasonable judgments in respect of the claim".<sup>117</sup>

2.062 It has been seen that the Alberta legislature singled out sexual abuse cases for special attention in respect of the law of limitations. However, the 1996 Act does not contain any special provisions in respect of victims of non-sexual abuse. Such persons are subject to the two year discovery period up to an ultimate limitation period of ten years, with postponement of time during disability as stated in the preceding paragraph.

**(h) Nova Scotia**

2.063 In Nova Scotia, sexual abuse cases are treated under a separate limitations regime. The *Limitation of Actions Act RSNS, 1989* suspends the running of time in sexual abuse cases. Section 2(5) provides:

"In any action for assault, menace, battery or wounding based on sexual abuse of a person,  
(a)...the cause of action does not arise until the person becomes aware of the injury or harm resulting from the sexual abuse and discovers the causal relationship between the injury or harm and the sexual abuse; and  
(b)...the limitation period...does not begin to run while that person is not reasonably capable of commencing a proceeding because of that persons physical, mental or psychological condition resulting from the sexual abuse."<sup>118</sup>

2.064 This combines both a discoverability test and postponement during disability. It is similar in terms to the Ontario model. Once discovery has been made or the

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<sup>116</sup> The Alberta Law Reform Institute had recommended that minority should constitute disability.

<sup>117</sup> *Limitations Act, 1996*, s.1(i)(iii).

<sup>118</sup> As amended by the *Limitation of Actions Act, 1993* (c.27).

disability has ceased, a plaintiff has one year within which to institute proceedings.

2.065 No separate provision is made for non-sexual abuse cases. Such actions are subject to a two year limitation period based on an action of trespass to the person.<sup>119</sup> The 1989 Act does not provide for an action for damages in respect of personal injuries arising out of negligence and breach of duty save with regard to medical negligence and road traffic accidents. However, the 1989 Act does provide for judicial discretion not to apply the limitation period to actions in tort if it appears equitable to do so having regard to the risk of prejudice to both the plaintiff and defendant.<sup>120</sup> In exercising this discretion the court must have regard to certain factors one of which involves consideration of the date of knowledge of the plaintiff.<sup>121</sup>

**(i) New Brunswick**

2.066 There has been no recent legislation in New Brunswick concerning the law of limitations. The *Limitation of Actions Act RSNB, 1973* provides for a two year period for the institution of proceedings in assault and battery cases.<sup>122</sup> No special limitation regime has been introduced for either sexual or non-sexual abuse cases.

**Part IV: Australia**

**(a) Overview**

2.067 The States and Territories of Australia each have their own statutory limitation rules. Most of the current law of limitations in force in Australia is based on early English statutes, particularly the *English Limitation Act, 1939*,<sup>123</sup> with the result that much of this legislation is quite antiquated and there are no specific provisions in respect of child abuse. However in Western Australia and Queensland proposals have been put forward recommending major changes. These are discussed in detail below. Interestingly, Australian statutes, unlike other common law jurisdictions, provide for judicial discretion to extend limitation periods in certain circumstances.

2.068 There has been an increased awareness of child sexual abuse throughout

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<sup>119</sup> *Limitation of Actions Act, RSNS 1989*, s.2(1)(a).

<sup>120</sup> *Ibid.*, s.3(2).

<sup>121</sup> *Ibid.*, s.3(4).

<sup>122</sup> S.4.

<sup>123</sup> The states of Victoria, Queensland and Tasmania adopted the *English Limitation Act, 1939*. New South Wales did not adopt the 1939 Act *verbatim* but the overall effect of its provisions is the same. The legislation in the Northern Territory and the Australian Capital Territory is based on the New South Wales model. The law in Western Australia dates back to the pre-1939 English reforms as does the law in South Australia with a few minor exceptions.



Australia in the past ten to twenty years. The response of governments in the state and in the territories has been to establish inquiries to report on the extent of such abuse.<sup>124</sup> However these reports have focused solely upon child sexual abuse and addressed reform of the criminal law and child welfare law in that context. In 1993 the first civil action arising from child abuse was heard in Queensland.<sup>125</sup>

**(b) Western Australia**

2.069 The law on limitations in Western Australia is currently governed by the *Limitation Act, 1935*. This Act merely consolidates the provisions of the English limitation statutes between 1623 and 1893,<sup>126</sup> which had been inherited by Western Australia or incorporated by the adoption or replication of English statutes on the foundation of the State in 1829.<sup>127</sup> Pursuant to the 1935 Act, a plaintiff has six years<sup>128</sup> within which to bring an action based on negligence and four years<sup>129</sup> for an action based on trespass to the person, with the possibility of postponement of time until the age of majority (*ie* 18 years).<sup>130</sup> Unlike other Australian jurisdictions, there is no judicial discretion to extend time in Western Australia.

2.070 In light of the fact that this is an antiquated piece of legislation, the Law Reform Commission of Western Australia recommended a complete overhaul of the law of limitations in its 1997 report.<sup>131</sup>

2.071 The Commission recommended that there should be a single limitation regime for all causes of actions, based on a three-year discovery period with an ultimate limitation period of 15 years. This is similar to the *Alberta Limitations Act, 1996*. However, unlike that Act, the Commission recommended that there should be a very narrow judicial discretionary power to extend time in appropriate cases.<sup>132</sup> The Commission felt that, without such a discretionary power, the limitation rules would be

<sup>124</sup> *Eg Child Sexual Abuse Task Force: A Report to the Government of Western Australia* (1987); *Final Report of the New South Wales Child Sexual Assault Task Force* (1985); *Final Report of the Task Force on Child Sexual Abuse* (South Australia, 1986).

<sup>125</sup> *Tiernan v. Tiernan*, Supreme Court of Queensland, unrep., 22 April 1992.

<sup>126</sup> *Limitation Act, 1623; Crown Suits Act, 1769; Civil Procedure Act, 1833; Real Property Limitation Acts 1833 and 1874; Trustee Act, 1888; Public Authorities Protection Act, 1893.*

<sup>127</sup> Minor amendments were made to the 1935 Act, the most important of which was the extension of time in respect of a latent injury attributable to asbestos.

<sup>128</sup> *Limitation Act, 1935*, s.38(1)(c)(vi).

<sup>129</sup> *Ibid.*, s.38(1)(b).

<sup>130</sup> *Ibid.*, s.40.

<sup>131</sup> *Report on Limitation and Notice of Actions*, Project No.36 Part II (1997).

<sup>132</sup> *Ibid.* at 180.

too rigid and could work an injustice against a plaintiff. One situation considered by the Commission was child sexual abuse claims in which a plaintiff may not appreciate the connection between the injuries sustained and the abuse for many years.<sup>133</sup> In such cases, it could take many more years before a plaintiff could contemplate legal proceedings. The Commission recommended that, in exercising this discretion, a court should take into account the length and reasons for the delay on the part of the plaintiff, the nature of the injury, the position of the defendant, the conduct of the defendant, the duration of any disability which the plaintiff might have suffered, as well as all the other circumstances of the case.<sup>134</sup>

2.072 The problem of child abuse gained much recognition in Western Australia in the 1980's which resulted in the establishment by the government of a Child Sexual Abuse Task Force in 1986 to look into the problem. The report of the Task Force proposed changes in the criminal law in this respect but did not consider the possibility of civil action.<sup>135</sup> The specific problems posed by the law on limitations in the context of civil actions arising from child abuse, first came to light in Western Australia in the case of *Reidy v. Trustees of the Christian Brothers*.<sup>136</sup>

2.073 The Law Reform Commission of Western Australia addressed specifically the issue of child abuse and considered the approach taken in other jurisdictions, particularly Canada, New Zealand, England and Wales.

2.074 The Commission considered the question as to whether special limitation rules should be enacted to deal with child abuse cases but concluded that there was no need to do so as these cases would be adequately covered by the proposed general limitation scheme based on discovery with the possibility of the exercise of judicial discretion.<sup>137</sup>

2.075 It is of note that the Commission considered the possibility of introducing a presumption of incapacity in respect of non-sexual assault cases where there is a relationship of trust or dependency, similar to the Ontario proposals. This proposal was rejected however, on the basis that such a presumption would run counter to the uniformity which the Commission was seeking to encourage in its general proposals.<sup>138</sup> Therefore, on the basis of the Commission's general proposals for the reform of the law of limitations, the only recourse open to victims of non-sexual abuse whose claims are statute barred is to attempt to persuade the court to exercise its discretion in their favour.

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<sup>133</sup> *Ibid.* at 180.

<sup>134</sup> *Ibid.* at 181.

<sup>135</sup> *Child Sexual Abuse Task Force: A Report to the Government of Western Australia* (1987).

<sup>136</sup> (1994) 12 WAR 583.

<sup>137</sup> Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions*, Project No.36 Part II (1997) at 238.

<sup>138</sup> Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions*, Project No.36 Part II (1997) at 237.

(c) *Queensland*

2.076 The *Limitation of Actions Act, 1974*<sup>139</sup> provides for a limitation period of three years<sup>140</sup> for personal injury cases resulting from negligence, trespass, nuisance or breach of duty<sup>141</sup> with the normal postponement of time during minority.<sup>142</sup> In addition, the court has discretion to extend time if any material fact of a decisive character relating to a right of action, came within the means of knowledge of the plaintiff after the beginning of the final year of the limitation period.<sup>143</sup> In such circumstances, a court can extend the limitation period to a date one year after the date of such discoverability. With regard to child abuse claims, these provisions are not altogether satisfactory. The extension provisions are based on an objective test of what a reasonable person acting upon knowledge of, and advice concerning, certain facts, would have done. This could work to the disadvantage of a plaintiff.

2.077 However, in the Queensland case of *Tiernan v. Tiernan*,<sup>144</sup> which was the first Australian decision to deal with the issue of limitation periods in a sexual abuse context, the extension provisions of the 1974 Act were applied. Byrne J, in exercising his discretion in favour of the plaintiff, held that a material fact of a decisive character relating to the right of action was not within the plaintiff's means of knowledge until after the end of the limitation period. The material fact in question was the fact that there might be an association between the abuse and the psychological problems. As this was a material fact which was not capable of being ascertained by the plaintiff before the expiry of the limitation period, time was extended. In that case, the Court applied the provisions governing the law of limitations in Queensland, which are based on personal injuries arising from trespass, negligence, nuisance and breach of duty, to a case arising from abuse. It is significant that the Court found the plaintiff had suffered a personal injury within the meaning of that legislation.

2.078 The Report produced by the Law Reform Commission of Queensland in 1998<sup>145</sup> reviewed the entire area of limitations and recommended that there should be one limitation scheme for all causes of action. This regime would consist of a three year period from the date of discovery with a 15 year long-stop period. It was recommended that there should be a judicial discretion to extend the period of limitation

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<sup>139</sup> This Act adopted the provisions of the English *Limitation Acts 1939 and 1963*.

<sup>140</sup> *Limitation of Actions Act, 1974*, s.11.

<sup>141</sup> This includes disease and impairment of a person's physical or mental condition.

<sup>142</sup> *Limitation of Actions Act, 1974*, s.29(1).

<sup>143</sup> *Ibid.*, s.31.

<sup>144</sup> Supreme Court of Queensland, unrep., 22 April 1992.

<sup>145</sup> QLRC, *Review of Limitation of Actions Act, 1974* (Report No. 53, 1998).

in cases where a 15 year period would cause hardship to plaintiffs. It was further recommended that the exercise of this discretion should be limited to exceptional circumstances and take into account various factors, including the length of, and the reasons for, the delay, the extent of any likely prejudice to the plaintiff, the position and conduct of the defendant and the conduct of the plaintiff.

2.079 The Commission also considered in detail the issue of child abuse and the problems posed by limitation periods in that context. The Commission considered the effects of such abuse on adult survivors and studied the various submissions of interested groups, before concluding that claims for childhood sexual abuse should not be excluded from the general proposed scheme and could be adequately provided for by the exercise of judicial discretion.<sup>146</sup> The Commission recommended that the following factors should be taken into account by a court when exercising this discretion:

- length and reasons for delay on plaintiff's part;
- nature of injury;
- conduct of defendant;
- conduct of defendant after cause of action arose;
- position of the defendant;
- duration of any disability of the defendant;
- extent to which the plaintiff acted properly and reasonably once the injury was discovered;
- the steps taken by the plaintiff to obtain medical, legal or other expert advice.<sup>147</sup>

2.080 The Commission did not consider the issue of non-sexual abuse of child victims. However, in light of the recommendation made in respect of sexual abuse claims, it would appear that cases of non-sexual abuse would also fall within the general limitation scheme proposed by the Commission, which would be supplemented by the possibility of the exercise of judicial discretion.

**(d) Victoria**

2.081 The statutory rules of limitation in Victoria are to be found in the *Limitation of Actions Act, 1958*, which is based on the English *Limitation Act, 1939* and the subsequent amending legislation. The limitation period for an action in respect of personal injuries arising out of negligence, nuisance or breach of duty is six years from the date of accrual of the cause of action.<sup>148</sup> However, with regard to personal injuries which consist of a 'disease or disorder', there is an alternative six year limitation period running from the date on which the plaintiff becomes aware of the injuries.

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<sup>146</sup> *Ibid.* at 170.

<sup>147</sup> *Ibid.* at 165.

<sup>148</sup> *Limitation of Actions Act, 1958*, s.5(1)(a).

2.082 In 1983 the legislation was amended to provide the courts with a discretion to extend time in personal injury actions where it is just and reasonable to do so.<sup>149</sup> However, this only applies to causes of action accruing on or after 11 May 1977.<sup>150</sup>

2.083 With regard to child abuse claims there are no specific legislative provisions. The present provisions governing the law of limitation are clearly unsatisfactory in respect of such claims.<sup>151</sup> While the courts in Victoria have judicial discretion to extend time, which could be availed of by victims of child abuse, this discretion is only available to causes of action accruing on or after May 1977. Therefore, not all abuse cases would come within this provision. An alternative option for victims of child abuse would be to rely upon the “discovery” provisions. “Disorder” is not defined under the Act, but the courts have interpreted it as meaning “traumatic injury” which could cover sexual abuse cases.

**(e) Tasmania**

2.084 The *Limitations Act, 1974*<sup>152</sup> provides for a six year limitation period for torts and three years for personal injuries. There is a judicial discretion to extend time for a period of no more than three years.<sup>153</sup> Clearly these provisions are unsuitable for child abuse claims.

2.085 The Law Reform Commissioner of Tasmania produced a Report in 1992<sup>154</sup> in which she recommended the extension of the limitation period, in a similar manner to Victoria, so as to make provision for the problems arising in respect of sexual abuse claims. However, as seen above, the provisions in Victoria are also unsuitable for such claims. There was no discussion of the issue of claims arising from non-sexual abuse and the Commissioner made no recommendations in this regard.

**(f) New South Wales**

2.086 The *Limitation Act, 1969* governs the law relating to limitation periods in New South Wales. Unlike other Australian states and territories, the 1969 Act is far more

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<sup>149</sup> *Limitation of Actions Act, 1958*, s.23A(1)-(2), as amended by s.5, *Limitation of Actions (Personal Injury Claims) Act, 1983*.

<sup>150</sup> *Limitation of Actions (Personal Injury Claims) Act, 1983*, s.11.

<sup>151</sup> O'Halloran, “Sexual abuse claims and the Limitation of Actions Act” (1994) LJ 503 at 505, suggests that without further amendment, the Act remains unsatisfactory for victims of sexual abuse.

<sup>152</sup> Adopted the English *Limitation Act, 1939*.

<sup>153</sup> *Limitation Act, 1974*, s.5(3).

<sup>154</sup> *Limitation of Actions for Latent Personal Injuries* (Report No. 69, 1992).

than an enactment of existing English statutes. Under the law of New South Wales, the limitation period is six years for torts<sup>155</sup> and three years for personal injuries arising from negligence, nuisance or breach of duty.<sup>156</sup> In 1990, provision was made for the extension of time in personal injury cases which accrue on or after 1 September of that year.<sup>157</sup> In such cases, there is a judicial discretion to extend time for a period of up to five years, if it is just and reasonable to do so. The legislation enumerates the factors to be taken into consideration when exercising such discretion.<sup>158</sup>

2.087 If a cause of action accrued before 1 September 1990, the provisions for the extension of time are based on the same premise as the provisions applicable in Queensland, namely knowledge of a material fact of a decisive character relating to the cause of action.<sup>159</sup>

2.088 Where there is a latent personal injury, such that the plaintiff was unaware of the fact, nature, extent or cause of the injury, disease or impairment, time can be extended indefinitely by the court. This is subject to the condition that the court must be satisfied that the plaintiff was unaware of the injury or of the connection between the injury and the defendant's act or omission. The application to court must also be made within three years of the plaintiff becoming aware of these matters.<sup>160</sup>

2.089 The legislation makes no specific provision for victims of childhood sexual or non-sexual abuse. Presumably, the provisions pertaining to latent personal injuries could be relied upon by these victims.

**(g) Northern Territory**

2.090 The *Limitation Act, 1981* is modelled on the New South Wales legislation. There is a limitation period of three years in respect of tort claims,<sup>161</sup> which can be extended in cases of latent damage, provided the plaintiff becomes aware of the material facts within a period of twelve months before the expiration of the limitation period, or after the expiration of that period, and proceedings are commenced within twelve months of discovery of the relevant facts.<sup>162</sup> In the case of *Forbes v. Davies*,<sup>163</sup> Kearney

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<sup>155</sup> *Limitation Act, 1969*, s.14(1)(b).

<sup>156</sup> *Ibid.*, s.18A(2).

<sup>157</sup> *Limitation Amendment Act, 1990*.

<sup>158</sup> *Limitation Act, 1969*, s.60(E)(1).

<sup>159</sup> *Ibid.*, s.58(2).

<sup>160</sup> *Ibid.*, ss.60(G)(2) & 60(I)(1).

<sup>161</sup> *Limitation Act, 1981*, s.12(1)(b).

<sup>162</sup> *Ibid.*, s.44.

<sup>163</sup> (1994) Aust Torts Reps 61 at 392.

J suggested that a court should also consider the extent to which the delay may have caused the evidence to become less cogent than if the action had been brought within the time allowed.

In the more recent decision of *Cubillo v. the Commonwealth of Australia*,<sup>164</sup> section 44 was considered in detail by the Federal Court of Australia Northern Territory. The Court observed that,

"[t]he failure by an applicant to satisfy one of the preconditions in subs. 44(3) of the Limitation Act means that the Court lacks power to grant an extension of time and the statutory bar will apply... On the other hand, satisfaction of one of the preconditions does no more than empower the Court to grant such an extension and does not of itself require that time be extended."<sup>165</sup>

2.091 There is no specific provision in the law of limitations of the Northern Territory for dealing with cases arising from either sexual or non-sexual child abuse.

**(h) South Australia**

2.092 The *Limitation of Actions Act, 1936* governs the law of limitation in South Australia. There is a three-year limitation period for personal injury claims<sup>166</sup> and six years for other torts.<sup>167</sup> The extension provisions are the same as those contained in the legislation of the Northern Territory.<sup>168</sup> There are no special provisions for cases arising from child abuse.

**(i) Australian Capital Territory**

2.093 The *Limitation Act, 1985*<sup>169</sup> is based on the New South Wales model. Prior to this Act, the law on limitations in the Capital Territory was very outdated as it consisted of the English *Limitation Act, 1623*. The law was reformed on foot of a Working Paper prepared by the Commonwealth Attorney General's Department.<sup>170</sup>

2.094 Under the 1985 Act, all tort claims are subject to a six-year limitation period

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<sup>164</sup> Federal Court of Australia Northern Territory, 11 August 2000.

<sup>165</sup> *Ibid.* at para. 1311.

<sup>166</sup> *Limitation of Actions Act, 1936*, s.36(1).

<sup>167</sup> *Ibid.*, s.35(c).

<sup>168</sup> *Ibid.*, s.48.

<sup>169</sup> Original title: *Limitation Ordinance Act, 1985* but renamed the *Limitation Act* in 1990.

<sup>170</sup> *ACT Working Paper* (1984).

running from the date of accrual of the cause of action.<sup>171</sup> “Personal injury” is defined under the Act as including “any disease and any impairment of the physical or mental condition of a person”.<sup>172</sup> The Act provides for the possibility of extension of limitation periods in personal injury actions where the court considers it just and reasonable to do so.<sup>173</sup> The court can extend the period for such time as it determines. The legislation also sets out the factors which are to be taken into account by a court when exercising this discretion.<sup>174</sup> These factors are similar to those applicable in Victoria. However, unlike Victoria, the provisions permitting an extension of time in the Capital Territory are fully retrospective. These provisions were applied in the case of *A v. D*<sup>175</sup> where the court found it was not just and reasonable to extend time in a case concerning sexual assault which occurred 25 years previously during a medical examination. More recently in the case of *Paramasivan v. Flynn*,<sup>176</sup> the Supreme Court considered the extension provisions and in particular, the factors listed and concluded that it was not just and reasonable to extend time in the circumstances of the case. In this case, the plaintiff was sexually abused in childhood by his guardian. This demonstrates that, while allowing judicial discretion does give flexibility to the court and can further the interests of justice and fairness, there is no guarantee that time will be extended. This is particularly applicable to abuse cases, where the onus is on the plaintiff to justify the exercise of the discretion within the context of the factors to be considered by the court. Once again, there are no specific provisions relating to child abuse claims.

## Part V: New Zealand

2.095 The statutory rules on limitation periods in New Zealand can be found in the *Limitation Act, 1950*. As is the case in Canada and Australia, the relevant legislation in New Zealand is based on an English statute, in particular the *Limitation Act, 1939*. Pursuant to the 1950 Act, actions for damages in respect of “bodily injury” have a two year limitation period from the date of the accrual of the cause of action.<sup>177</sup> This period can be extended with the consent of the defendant or at the discretion of the court (if it thinks it is just to do so) at any time within six years of the accrual of the cause of action. All other actions founded on tort have a limitation period of six years from the date of accrual.

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<sup>171</sup> *Limitation Act, 1985*, s.11.

<sup>172</sup> *Ibid.*, s.8(1).

<sup>173</sup> *Ibid.*, s.36(2).

<sup>174</sup> *Ibid.*, s.36(3).

<sup>175</sup> Supreme Court ACT, unrep., 20 September 1995.

<sup>176</sup> Supreme Court ACT, unrep., 2 March 1998.

<sup>177</sup> *Limitation Act, 1950*, s.4(7).



2.096 In 1988, the New Zealand Law Reform Commission examined the law of limitation of actions. The issue of latent damage had posed serious problems and was “at least indirectly responsible” for the ministerial reference to the Law Reform Commission.<sup>178</sup> The Commission in its Report<sup>179</sup> recommended a new limitation regime based on the following:

- (i) A standard three-year limitation period commencing on the date of the act or omission which is the subject of the claim.
- (ii) The extension of this period in certain circumstances, in particular where the claimant shows absence of knowledge of relevant matters of fact.
- (iii) A long-stop limitation period of fifteen years measured from the date of the act or omission and overriding postponements or extensions of the standard period.

2.097 These proposals are similar to the Alberta *Limitations Act, 1996* in that they advocate a uniform limitation scheme for all classes of action. The Commission points out that in many cases the date of the act or omission will coincide with the date of accrual under the existing legislation. These proposals have not been implemented.

2.098 Neither the 1950 Act nor the recommendations of the Law Reform Commission make any provision for claims arising from child abuse. The courts have addressed the problems presented by such cases by invoking the discoverability test, which had previously been applied by the courts in cases of latent damage in relation to building defects.

2.099 *S. v. G*<sup>180</sup> was the first New Zealand case in which damages were sought in respect of childhood sexual abuse. The plaintiff brought actions in negligence, trespass to the person and breach of fiduciary duty and invoked section 4(7) of the 1950 Act to extend the time within which to bring the proceedings. The Court of Appeal adopted the reasoning of the Canadian Supreme Court in *M(K) v. M(H)*<sup>181</sup> and applied the reasonable discoverability rule. The Court held that the plaintiff’s cause of action in negligence only accrued when the plaintiff discovered, or should reasonably have discovered, the causal link between the damage and the abuse. With regard to the claim in trespass, the Court held that the discoverability test could be applied to the plaintiff’s lack of consent. The Court recognised that this could mean that time would run in respect of claims of trespass before starting to run in claims of negligence on the same set of facts, but the rules relating to fraudulent concealment could operate to delay time. However, the Court of Appeal refused to grant leave to extend time on the basis that the abuse had taken place in a community, of which both the plaintiff and her mother were members, where free and open sexual practices were an integral part of the lives of the

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<sup>178</sup> *Limitation Defences in Civil Proceedings* (Report No.6 NZLCR 6 1988).

<sup>179</sup> *Ibid.*

<sup>180</sup> [1995] 3 NZLR 681.

<sup>181</sup> (1992) 96 DLR (4<sup>th</sup>) 289; see above at para.2.028.

residents. The Court felt that the prejudice to the defendant outweighed the desirability of allowing the plaintiff to proceed with her claim.

2.100 In the case of *H v. R*<sup>182</sup> a court of first instance applied the principles developed in *S v. G*. The plaintiff claimed damages for sexual abuse inflicted on him by his uncle twenty years previously when he was in his teens. The abuse had a significant effect on the plaintiff and caused him to suffer from a psychiatric disorder. The action was based on battery and breach of fiduciary duty. In relation to the claim for battery, the trial judge accepted that “bodily injury” in section 4(7) of the 1950 Act extended to psychiatric conditions. The judge went on to apply the discoverability rule and held that it was only when the psychiatric damage was identified and linked to the abuse that it could be said that the cause of action had accrued. As regards the claim for breach of fiduciary duty, the judge held that the statutory limitation period should be applied by analogy. Thus, the claim was brought within the time prescribed by law.

2.101 The recent decision of *T v. H*<sup>183</sup> demonstrates that the use of the discoverability test is not a satisfactory means of dealing with sexual abuse cases. In that case the plaintiff was abused during childhood by a friend of her father’s and was aware of the effects of the abuse, but was mentally incapable of disclosing this abuse or of contemplating litigation at that time. It was only after his death that she instituted proceedings for assault and battery against his estate. The Court of Appeal, by majority, held that the discoverability principle could not be applied, as the plaintiff had always been aware of the abuse and its effects but had been mentally incapable of acting on this knowledge. As a result, the claim was held to be statute barred.

## **Part VI: United States**

2.102 During the past decade, the US courts have considered how cases of sexual abuse should be treated within the context of the law of limitations. This has centred mainly on whether a discoverability test should be applied in such cases. The cases can be divided into two main categories: those where the plaintiff was aware and continued to be aware of the abusive acts but did not discover a causal connection between the abuse and the damage suffered until later and those where the plaintiff’s memory of the abusive acts has been repressed altogether and not discovered until later, usually during therapy. The courts have generally appeared more willing to postpone the running of time in the second of these types of case than in the first.

2.103 In *Johnson v. Johnson*<sup>184</sup> the plaintiff alleged that she had been abused between the ages of three and thirteen. However, she had retained no memory of the

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<sup>182</sup> [1996] 1 NZLR 299.

<sup>183</sup> [1995] 3 NZLR 37.

<sup>184</sup> 701 F Supp 1363 (ND. Ill. 1988).

abuse until she underwent psychotherapy some twenty years later. The Court drew a sharp distinction between the two categories of case and held that, where a plaintiff claimed that due to the trauma of the experience he or she had delayed knowledge of the abuse itself, a discoverability test could be applied. This contrasts with the approach taken by the Supreme Court of Washington in *Tyson v. Tyson*<sup>185</sup>. In that case, the court emphasised the need to prevent the bringing of stale claims and the possible unreliability of the memories of some plaintiffs. The Court therefore held that discoverability would only be applied in cases where “the objective nature of the evidence makes it substantially certain that the facts can be fairly determined even though considerable time has passed since the alleged events occurred.”

2.104 The other category of case discussed in *Johnson* involves a delay in realisation, not of the facts themselves, but of their causal relationship with the damage experienced by the plaintiff. Such a situation arose in *Hammer v. Hammer*<sup>186</sup> where the Court of Appeals of Wisconsin focused on the need to provide justice for abuse survivors. The Court acknowledged that, in the absence of a discoverability rule, few plaintiffs would ever be in a position to bring an action. However, American courts have seemed reluctant to follow this approach in other cases. In *EW v. DCH*<sup>187</sup> the Supreme Court of Montana refused to apply the discovery doctrine.

2.105 Some states have now introduced legislation, which provides expressly for discoverability in abuse cases. In California the limitation period applicable to actions arising from childhood sexual abuse, ends on the later of the following two dates: eight years after the plaintiff attains majority or three years after he discovered, or reasonably should have discovered, that the psychological illness or injury was caused by sexual abuse.<sup>188</sup>

## **Part VII: Concluding Comments**

2.106 Having considered the limitation rules of other jurisdictions, it can be observed that, where a legislature has amended, or a law reform commission has reviewed, the statutory limitation rules in the context of claims arising from child abuse, the focus has

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<sup>185</sup> 727P 2d 226(1986).

<sup>186</sup> 418 NW 2d23 (1987).

<sup>187</sup> 754P 2d 817(1988).

<sup>188</sup> *California Code of Civil Procedure*, s.340.1.

been primarily upon cases of child sexual abuse. Many common law jurisdictions have recommended and introduced separate limitations regimes for dealing with child sexual abuse but less attention has been paid to cases arising from non-sexual child abuse. Most jurisdictions which did consider the limitation of actions arising from non-sexual child abuse as a discrete issue, concluded that a separate limitations regime was not necessary.

**Part I: Introduction**

3.01 As was seen in the previous chapter, there have been a number of different models and approaches adopted in other jurisdictions for the limitation of actions arising from child abuse. Some of these differentiate between actions founded on sexual abuse, while others apply a core regime to all cases. We will now consider the advantages and the disadvantages of these models, among others, in order to make a recommendation as to the most appropriate regime for the limitation of actions arising from non-sexual child abuse in Ireland.

Before considering the individual models, however, there are some preliminary matters which we wish to emphasise.

**(a) *The need for a special regime***

3.02 There are some jurisdictions, such as England, Scotland and Australia, that have no separate limitation regimes for child abuse and therefore apply a core regime to the limitation of all actions. In the light of this approach, it is important to have regard to the existing legal framework for the limitation of actions in Ireland.

3.03 At present, the general law of limitations in Ireland is governed by the *Statute of Limitations, 1957*, as amended by the *Statute of Limitations (Amendment) Act, 1991* and the *Statute of Limitations (Amendment) Act, 2000*. This legislation was not drafted with the victim of non-sexual child abuse in mind and does not deal appropriately with the particular issues affecting such plaintiffs, particularly since, unlike other jurisdictions which extend the core limitations regime to all causes of action, there exists no judicial discretion to extend time under Irish law. We consider that it would be unsatisfactory to apply the existing legislation to cases that were not intended to come within its ambit.

3.04 *We recommend that a special limitations regime is necessary to accommodate the particular problems of the law of limitations in cases arising from the non-sexual abuse of children.*

**(b) Differing regimes for sexual and non-sexual abuse**

3.05 In a later section of this Chapter, we will consider in detail the terms of the *Statute of Limitations (Amendment) Act, 2000*, which deals with the limitation period for cases of sexual abuse.<sup>189</sup> At this stage, we wish to set out the reasons why we consider that the two categories of child abuse differ and, consequently, why there is no reason that there should be the same limitations regime for dealing with cases arising from sexual and non-sexual abuse of children.

- As noted above, standards and perceptions of what conduct is acceptable have changed dramatically in the context of the discipline of children.<sup>190</sup> The danger exists that a court may apply the standards prevailing at the moment to conduct which was viewed at the time of the alleged tort to be “reasonable chastisement”. There is no equivalent risk in relation to sexual abuse.<sup>191</sup>
- Recent statistics show that physical abuse, neglect and emotional abuse of children are far more widespread than incidents of sexual abuse.<sup>192</sup> While this does not mean that a harsher rule of limitations should be adopted for cases of non-sexual abuse, it does indicate the greater scale of the problem, as well as the fact that the gravity and the magnitude of the abusive conduct in question can be more wide-ranging, than in the context of sexual abuse. In these circumstances, the demands of certainty, finality and clarity are all the more pressing.
- There are certain effects of abuse, which are unique to, or more characteristic of, cases of sexual abuse than cases of non-sexual abuse. For instance, a young person may associate an act of sexual abuse with feelings of guilt. This may be exacerbated by the fact that the perpetrator of such abuse is often a person whom the victim is expected to love and obey. As a result, effects such as repressed memory syndrome, which was described earlier,<sup>193</sup> may be more prevalent in the case of sexual abuse, although there is some dispute among psychiatrists on this point.
- There is a view that the reliability of evidence is less likely to be damaged by the passage of time, in the case of sexual abuse of children. This view was expressed by La Forest J of the Supreme Court of Canada in *M(K) v. M(H)*<sup>194</sup>: as follows: “I am not convinced that in this type of case [incest] evidence is automatically made

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189 See paras.3.12-14.

190 Para.1.45.

191 See statement of Minister for Justice, Equality and Law Reform, above at para.1.06.

192 See ISPC, “Preventing Child Abuse, Supporting Happy Families: A Submission to Government” (1995) at 7-8.

193 Para.1.38.

194 (1992) 96 D.L.R. (4<sup>th</sup>) 289, above at para.2.028.

stale merely by the passage of time.” He said there is usually no corroborative evidence in these types of cases, as the acts in question typically take place in secret and the only evidence is therefore the uncorroborated evidence of the parties themselves. While this may be true in cases of sexual abuse, it is less likely to apply to cases of non-sexual abuse of children. It is therefore questionable whether this justification for the removal of time limitations in relation to sexual abuse can be extended to cases of non-sexual abuse.

- As Chapter 2 demonstrates, while a number of other jurisdictions have a special liberal regime for child sexual abuse, few jurisdictions have such a regime for non-sexual abuse. Some jurisdictions have requested their Law Reform Commissions to research the law regarding limitations for actions arising out of child abuse. However, the proposals of two Commissions to adopt a special regime for non-sexual abuse, were never enacted into law in those jurisdictions.<sup>195</sup>

3.06 *We recommend that there should be separate limitations regimes for cases of sexual abuse and cases of non-sexual abuse of children.*

**(c) *No period of limitation?***

3.07 In a number of Canadian states, there is no limitation period in cases of sexual abuse of children (eg Saskatchewan and British Columbia).<sup>196</sup> One justification for this approach is the seriousness of the wrong committed. In the case of *M(K) v. M(H)*,<sup>197</sup> La Forest J expressed this justification in the specific context of sexual abuse, as follows:

“...[while] the public interest is served by granting repose to certain classes of defendants...there is absolutely no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful action. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose.”

In addition, he said that any delay on the part of the plaintiff was understandable and outweighed the policy of “penalising” plaintiffs who sleep on their rights.

3.08 As against this, there are strong reasons for retaining some limitation regime in the context of non-sexual abuse of children. First, it is always preferable that actions be taken as close in time to the events in question as possible. By contrast, the removal of limitation periods would remove the incentive for a victim of abuse to commence an action as soon as he or she is capable of doing so. Secondly, the aims of a limitation

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<sup>195</sup> See Chap. Two.

<sup>196</sup> See Chap. Two.

<sup>197</sup> (1992) 96 DLR (4<sup>th</sup>) 289.

regime, to bring about certainty and finality and to protect a defendant against stale claims, require the retention of some form of limitation upon actions. Thirdly, and in further support of the previous point, the European Court of Human Rights, in the case of *Stubbings v. United Kingdom*<sup>198</sup> held that a limitation period of six years from the age of majority in the case of child sexual abuse, was not a violation of the human rights of the plaintiff. The Court, in that case, emphasised the need for certainty, finality, the need to protect the defendant against stale claims and the need to prevent injustice due to unreliable evidence. Fourthly, the 2000 Act retains a limitation period in respect of sexual abuse, and it is not desirable that the regime governing non-sexual abuse be more lenient than that contained in the Act.

3.09 *The Commission recommends the retention of periods of limitation in respect of causes of action arising from non-sexual child abuse.*

**(d) Provisional nature of the recommendations**

3.10 Finally, we emphasise that the recommendations of the Commission in this Paper are provisional in nature. This is true, by definition, of all our Consultation Papers. But the provisional quality of our recommendations in this Paper is heightened by: the uniquely sensitive interests that are at stake, the high profile nature of these issues and the difficult policy considerations which arise. The Commission is therefore anxious to receive the views of consultees, including experts and interested persons and groups, in relation to these provisional recommendations, so that they may be considered and taken into account in the preparation of our final Report.

3.11 The following are the options for the reform of the law of limitation of civil actions arising from non-sexual child abuse, which are under consideration by the Commission:

**Option One:**

Test of “disability”: *Statute of Limitations (Amendment) Act, 2000*.

**Option Two:**

Test of “discoverability”: *Statute of Limitations (Amendment) Act, 1991*.

In this context, there are three possibilities:

- (1) Legislation to provide that the Act does apply.
- (2) Legislation to provide that the Act does not apply.
- (3) No legislation, leaving it to the courts to determine the applicability of the Act.

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<sup>198</sup> (1997) 23 EHRR 213.



**Option Three:**

Presumption of incapability: the Ontario Model

**Option Four:**

Fixed period of time.

In the context of this Option, the following additional points need to be addressed:

- (1) What should the duration of the period of limitation be?
- (2) Should there be a judicial discretion to extend this period?
- (3) If so, should this discretion be subject to guidelines or restrictions?

**Part II: Options for Reform**

**Option One: Test of “disability”; *Statute of Limitations (Amendment) Act, 2000***

**(a) Introduction**

3.12 The *Statute of Limitations, 1957* provides for the suspension of periods of limitation while a person is under a “disability”, until six years from the date the person ceases to be under the disability. Section 48 states:

- “(1) For the purposes of this Act, a person shall be under a disability while –
- (a) he is an infant, or
  - (b) he is of unsound mind, or
  - (c) he is a convict...”

3.13 The *Statute of Limitations (Amendment) Act, 2000* is based on the recognition that individuals who have been sexually abused during childhood are likely to have suffered trauma as a result of such abuse and to have been hindered from taking legal action within the prescribed timeframe. The Act therefore proposes to extend the definition of ‘disability’ in the 1957 Act to include cases of child sexual abuse. Section 2 provides that, where a person brings an action founded on a tort in respect of an act of sexual abuse perpetrated on that person before they had reached the age of majority, they shall be deemed to be under a disability while they suffer from any “psychological injury” that,

- “(i) is caused in whole or in part, by that act, or any other act, of the person who committed the first mentioned act, and
- (ii) is of such significance that his or her will, or his or her ability to make a reasoned decision, to bring such action is substantially impaired.”<sup>199</sup>

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<sup>199</sup> *Statute of Limitations (Amendment) Act, 2000*, s.2.

As already stated, the 2000 Act expressly does not apply to acts of non-sexual abuse.

**(b)      *Arguments in favour of Option One***

- It is desirable, on one view, that cases of sexual and non-sexual abuse be treated in the same manner, in recognition of the effects, the magnitude and the similarity of the two types of abuse.
- A related argument is that treating the two categories of child abuse in the same manner, would overcome the need for definitions in this difficult area, and would also overcome the risk of artificial distinctions.

**(c)      *Arguments against Option One***

- The principal argument against this test is that the decision as to whether the plaintiff has suffered a “psychological injury” will be based on psychiatric and psychological evidence. It is likely that the defence would argue that the plaintiff was not, and had not during the preceding three years been, suffering from any such injury. Both sides would then adduce evidence of a psychological or psychiatric nature to determine the question and thus the issue would turn on a dispute between the expert evidence adduced. As will be seen, reliance upon psychological evidence is a feature which this Option shares with two of the other options. The criticisms of such reliance are as follows:
  - (i) There is some disagreement amongst psychologists and psychiatrists concerning the effects of non-sexual abuse upon victims. As the assessment of the extent of “psychological injury” caused by non-sexual abuse, would be based on the evidence of psychiatrists and psychologists, the lack of a consensus within the profession, could create uncertainty and inconsistency in the application of the law of limitations.
  - (ii) The evidence required to establish whether the plaintiff is, or was, under a “disability”, relates to events which will usually have occurred many years before the proceedings, and the consequences of such events. It is difficult to rely wholly on evidence of psychiatrists in this regard, as to do so requires an assumption that the psychiatrist can assess what was going on in the mind of the plaintiff years previously. As one psychiatrist who was consulted by the Commission, has remarked, “we do not have a retrospectoscope”.
  - (iii) Quite apart from assessing the actual state of mind of the plaintiff, the psychiatrist or psychologist would be called upon to assess whether or not a plaintiff was capable of bringing proceedings at an earlier date. This determination would depend, apart from an understanding of the plaintiff’s state of mind, on a policy determination as to the standard

to be applied. For instance, if the plaintiff decided not to pursue a cause of action because of the memories and the trauma it would revive, should this person be described as choosing not to litigate, or as being incapable of litigating? To rely exclusively on psychiatric or psychological evidence to make what is essentially a legal policy determination, is to confer upon such evidence a role for which it may not be appropriate.

- (iv) It is important to recall that there have been relatively few studies into the long-term effects of non-sexual child abuse. The focus for many years has been primarily on the long-term effects flowing from sexual abuse. This highlights a possible inadequacy of psychiatric and psychological evidence in this sphere.
- (v) A further disadvantage of giving prominence to psychiatric or psychological evidence, is that, rather than concentrating upon the cause of action and the actual evidence of the alleged events, there is a risk the focus may shift to the condition and the mind-set of the plaintiff. From a policy, as well as from a practical, point of view, this is undesirable.

The Commission is of the view that, where possible, expert psychological or psychiatric evidence should not be the determining factor in respect of limitation rules, particularly as the very essence of statutory rules of limitation is to import certainty into the law. There are other legal factors which also point towards the same conclusion.

- The phrase “psychological injury” in section 2 is not defined in the Act and its potential scope is very broad. In essence it could cover any form of impairment of a psychological nature or trauma from repressed memory syndrome to emotional incapacity. Therefore, even if the evidence of psychiatrists and psychologists was uniform and clear in this area, the framework within which the evidence is to be presented is not. This could create uncertainty and contradictions.
- A further argument against the application of the 2000 Act to cases of non-sexual abuse, is that the Act would require a preliminary assessment by a judge of the extent, if any, of “psychological injury” which the plaintiff has suffered. This is objectionable for two reasons:
  - (i) If there is a preliminary assessment by the judge as to whether the plaintiff did suffer psychological injury, and the jury is subsequently called upon to consider the same question at the substantive hearing of the action, there is a danger that the first determination could colour or affect the jury’s assessment of the effects of the abuse.<sup>200</sup>

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S.1(1) of the *Courts Act, 1988* abolishes trial by jury in relation to actions for damages arising from “negligence, nuisance or breach of duty”. S.1(3)(a) of the Act states that s. 1(1) does not apply in relation to “...an action where the damages claimed consist only of damages for false imprisonment or intentional trespass to the person or both”. S.1(3)(b) further provides that s.1(1) does not apply to “...an action where the damages claimed consist of damages for false imprisonment or intentional trespass to the person or both and damages (whether claimed in addition, or as an alternative, to the other damages claimed) for another cause of action in respect of the same act or omission...”. It

Alternatively there may be a risk of conflicting decisions in the same case.

- (ii) The plaintiff must adduce expert evidence to prove psychological injuries were suffered before the action can be taken. Placing this burden on the plaintiff raises questions concerning the fairness of the procedure and also the constitutional right of access to the courts<sup>201</sup>

- Section 3 of the 2000 Act states:  
“Nothing in section 48A of the Statute of Limitations, 1957 (inserted by section 2 of this Act) shall be construed as affecting any power of a court to dismiss an action on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal”.

This provision may go some way towards protecting the defendant against stale claims. However, it also introduces uncertainty and a lack of transparency into the limitations regime, as the availability of the protection is premised on the exercise of judicial discretion, the dangers of which will be expanded upon below.

- A final argument against this Option is that the need to assess the disability of the plaintiff involves focusing upon the condition and the state of mind of the plaintiff from the outset. This involves shifting the emphasis away from the allegations made by the plaintiff and the evidence adduced by the plaintiff in support of the claim.

**(d) Recommendation**

*3.14 Taking into account the undesirability of an over reliance on psychological evidence, the Commission makes the recommendation that the approach adopted in the 2000 Act should not be adopted in the context of non-sexual abuse.*

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therefore appears that a jury hearing could arise in actions arising from child abuse, whether the action is framed as an action for intentional trespass, or as an action for both intentional trespass to the person and “negligence, nuisance and breach of duty”, where these claims arise from the same act or omission. This is subject to the right of the plaintiff to elect not to have a jury trial. See Order 36, Rule 6 of the *Rules of the Superior Courts*. It is also subject to the qualification that an action for less than £30,000 will be heard in the Circuit Court and presided over by an individual judge.

<sup>201</sup> See James Nugent, “The Statute of Limitations in Sexual Abuse Cases” (1998) 3 Bar Rev 222 at 223.

**Option Two: Test of “discoverability”; *Statute of Limitations (Amendment) Act, 1991***

**(a) Introduction**

3.15 The test of “discoverability” contained in the 1991 Act was described in Chapter One.<sup>202</sup> Section 3(1) of the Act states:

“An action ... claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty ... shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured.”

3.16 The expression “date of knowledge” is defined in section 2 of the Act by reference to the knowledge of the plaintiff of the fact of the injury, the significance of the injury, the identity of the defendant, among other matters. The option we consider here involves applying this “discoverability” test to actions arising from non-sexual abuse.

**(b) *Applicability of the 1991 Act to cases of non-sexual abuse***

3.17 We need to consider, as a preliminary matter, the applicability of the 1991 Act to cases of non-sexual child abuse under the present state of the law. Two points of doubt arise in this regard. The first point is that the scope of the Act is defined by the phrase: “[a]n action ... in respect of personal injuries to a person caused by negligence, nuisance or breach of duty...”.<sup>203</sup>

3.18 Controversy has arisen in England as to whether the equivalent provision, section 11 of the English *Limitation Act, 1980*, applies to intentional torts, such as abuse. This background and its implications in this jurisdiction, will be considered in more detail in Chapter 4.

3.19 The second matter, which raises doubts as to the extent, if any, of the application of the 1991 Act to cases of non-sexual child abuse, is that victims of such abuse may be aware of the injury, the significance of the injury, the identity and the responsibility of the defendant, within the meaning of the 1991 Act, and yet be inhibited from acting upon this knowledge due the emotional and psychological effects of the abuse. In these circumstances, unless the expression “date of knowledge” is given an artificial interpretation, the plaintiff would not be able to rely upon the “discoverability” test of the 1991 Act.

3.20 There is no Irish case-law dealing with the application of the test of

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<sup>202</sup> Above at paras.1.24-27.

<sup>203</sup> S.3(1).

“discoverability” to cases of child abuse. However, there is some divergent case-law in Canada, New Zealand, Australia and the US in this regard. Recently, the New Zealand Court of Appeal were confronted with such a problem in the case of *T v. H*.<sup>204</sup> The Court found that the “discoverability” test could not be applied as the plaintiff had always been aware of the abuse and of its effects but had been rendered unable to act on this knowledge. The Court considered the law to be inadequate in this regard, but felt there was no option but to deem the plaintiff’s claim to be statute barred.

**(c) Possible approaches regarding “discoverability”**

3.21 In the light of these substantial doubts as to whether non-sexual abuse falls within the scope of the 1991 Act, it appears to us that there are three possible approaches which could be adopted:

1. Legislation should be adopted to clarify that the 1991 Act does apply to situations of non-sexual abuse.
2. Legislation should be adopted to clarify that the 1991 Act does not apply to non-sexual abuse.
3. No legislation should be adopted. The issue should await judicial resolution.

*1. Legislation applying discoverability to non-sexual abuse.*

3.22 The arguments against applying a test of discoverability to cases of non-sexual abuse are the following:

- The “discoverability” test was originally conceived to address situations of “latent damage”, where it is not possible for a plaintiff to have knowledge of the facts giving rise to a cause of action, until a date later than the expiry of the existing limitation period. In cases of child abuse, it is not ‘knowledge’ or discovery of facts which are the definitive criteria. On the contrary, the problem facing plaintiffs in the case of non-sexual abuse are due to the emotional, psychiatric and psychological effects of the abuse. It is therefore inappropriate to rely upon a factual analysis of the cause of action and the “knowledge” of this cause of action.
- It is clear from the foregoing that the “discoverability” test was not framed to deal with the case of a victim of child abuse. As a result, it does not take into account the various effects of abuse on the victim and, in particular, the many cases where victims have knowledge of the abuse and of the connection between the abuse and their injuries, but lack the emotional capacity or strength to act on this knowledge and institute proceedings. This is a problem that has been acknowledged by many commentators.<sup>205</sup>

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<sup>204</sup> [1995] 3 NZLR 37.

<sup>205</sup> *Ibid.*

- The preceding criticism gives rise to another argument against the application of the test of “discoverability” to cases of non-sexual child abuse. As was observed above and demonstrated in the case of *T v. H*,<sup>206</sup> victims who are unable to commence proceedings due to a lack of emotional capacity or strength, would not come within the terms of the ‘discoverability’ test. The adoption of this test of “discoverability” in these circumstances could therefore have the effect of discriminating between victims of abuse who have suffered different types of emotional and psychological injuries.

3.23 Several of the criticisms made in relation to Option One apply equally in this context. First, expert psychiatric and psychological evidence would be necessary to determine the “date of knowledge” under the 1991 Act and, for the reasons given earlier, it is undesirable that expert evidence be given undue prominence in fixing the appropriate limitations regime for cases of non-sexual abuse. Secondly, the criticism made of the need for a preliminary assessment by a judge of the psychological effects of abuse also applies in this context.

3.24 *Because of these disadvantages, and because of the considerable uncertainty in this area, the Commission recommends that legislation should not be adopted providing that the limitations rule in the 1991 Act does apply to cases arising from non-sexual child abuse.*

(2) *Legislation providing that discoverability does not apply to cases of non-sexual abuse.*

3.25 In this Paper, the Commission will design a limitations regime which will endeavour to balance appropriately the rights of victims of non-sexual child abuse, the rights of defendants and the rights of society, while acknowledging the particular problems and complexities of this area of the law and the effects of abuse on the victim. For the reasons given above, we do not consider that the test of discoverability meets these requirements.

3.26 This gives rise to an argument in favour of enacting legislation to provide that the 1991 Act does not apply to cases of non-sexual abuse. The argument is that, without such a clarification, a plaintiff may assert that the 1991 Act does apply in these cases, and, if such an argument were accepted, it would entirely undermine any alternative limitations regime which we may recommend. In this manner, the existence of that Act in tandem with other limitations rules could re-introduce all of the disadvantages of the discoverability test of the 1991 Act. Its retention would also endanger the certainty and finality which every limitations regime aims to attain.

3.27 However, it is not in the interests of fairness or justice to prevent worthy plaintiffs from relying on legislation which may rightfully apply to them. The frailties of the ‘discoverability’ test, outlined above, are unique to the present context of non-

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<sup>206</sup> [1995] 3 NZLR 37.

sexual abuse. The fact that the 1991 Act was not framed for these cases, and the fact that it may operate arbitrarily, in certain circumstances, as a result, is not a reason to preclude its application to non-sexual abuse cases, whatever the circumstances, and however strong the arguments in favour of its application or its exclusion.

3.28 *The Commission recommends that no legislation should be adopted to provide that the 1991 Act does not apply to cases arising from the non-sexual abuse of children.*

(3) *No legislation*

3.29 As stated at the outset, it has never been determined by an Irish court whether the 1991 Act applies to cases of child abuse. The uncertainty surrounding this question is heightened by the fact that other jurisdictions have divergent case-law in this regard.

3.30 There is a wide range of views as to the character and the severity of psychiatric conditions and effects which can arise from abuse. It is quite likely, as described above, that some of these cases would be interpreted as falling outside the test of 'discoverability' and therefore outside the scope of the 1991 Act. It is also possible that certain victims of non-sexual abuse may be treated as lacking 'knowledge' within the meaning of section 2 of the 1991 Act. These plaintiffs may therefore benefit from the limitations regime in the Act, if the courts do decide that cases of abuse are within the scope of the Act. We do not favour foreclosing this avenue of recourse to such plaintiffs and we do not favour removing the benefit of the 1991 Act, because of potential problems with its operation in this context. The Commission does not favour the approach of "throwing the baby out with the bathwater".

3.31 *The Commission recommends that no changes be adopted with respect to the 1991 Act. The determination as to whether the Act does apply to cases of non-sexual abuse of children, should be made by judicial decision.*

### **Option Three: Presumption of incapability; the Ontario model**

(a) *Introduction*

3.32 The Ontario Limitations Consultation Group suggested postponement of limitation periods in the context of non-sexual child abuse, on the basis of a presumption of incapability.<sup>207</sup> The 1991 Report of the Group provided,

"...unless the contrary is proven on a balance of probabilities, the plaintiff shall be presumed to be a person...incapable of pursuing the claim because of physical, mental or psychological condition."<sup>208</sup>

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<sup>207</sup> See above at paras.2.030-43.

<sup>208</sup> *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991) at 10.



3.33 The Group were motivated by the view that victims of non-sexual abuse are generally as incapable of pursuing litigation as victims of sexual abuse. The Group further commented that,

“the focus should be on the validity of the claim and not on the condition of the plaintiff. Thus instead of compelling every victim to prove inability to pursue the claim, the limitation period should be postponed unless the defendant can prove that the victim was capable of bringing the proceedings within the relevant [period of time].”<sup>209</sup>

3.34 These recommendations were embodied, with slightly different wording, in the Ontario *Limitations (General) Bill, 1992*, but it should be noted that this was never enacted into law.<sup>210</sup> In the context of child abuse the Act provided a presumption:

“Unless the contrary is proved, a person with a claim based on an assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced if at the time of the assault one of the parties to the assault had an intimate relationship with the person or was someone on whom the person was dependent, whether or not financially”.<sup>211</sup>

3.35 There are two aspects to this test: first, it favours a psychological capacity test. This aspect was already considered in the context of the 2000 Act. We shall therefore focus here on the second aspect, namely the fact that the onus is placed on the defendant to prove that the plaintiff was not incapacitated, rather than the plaintiff having to prove an inability to institute proceedings.

**(b) Arguments in favour of Option Three**

- The use of a presumption of incapacity strengthens the plaintiff’s case, as it reduces the burden of evidence of psychological incapacity which the plaintiff must adduce. This is justified as the plaintiff will usually have been psychologically damaged and will frequently have endured a troubled upbringing. At the same time, the operation of this presumption of incapacity would not pre-judge the culpability of the defendant, as the plaintiff would still have to prove the case substantively. What the presumption would do is lift the immunity based on passage of time, upon which the defendant would usually rely. This can be justified on the basis that the alleged wrong-doing is so serious that the plaintiff should be given the opportunity of laying evidence before the court in spite of the usual disadvantages of litigating a stale claim (possible injustice to defendant, clogging of the courts etc).

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<sup>209</sup> *Ibid.* at 31.

<sup>210</sup> See above at para.2.044.

<sup>211</sup> S.9(2), *Ontario Limitations (General) Bill, 1992*.

- A further advantage of the adoption of a presumption of incapacity, is that it acknowledges the fact that, if the plaintiff's substantive claim is made out, the cause of the delay in the bringing of proceedings in these cases will often be the existence of a power of dominion of the abuser over the victim which hinders the victim from approaching the authorities and seeking legal redress<sup>212</sup> It would be unjust to allow the defendant to benefit from the abuse of the relationship of trust or dependence between the defendant and the plaintiff

**(c) Arguments against the adoption of Option Three**

- One criticism of this approach is that it becomes necessary to ascertain when the plaintiff recovered, thereby shifting the attention away from the alleged misconduct of the defendant and focusing on the situation of the plaintiff
- For reasons expounded in relation to Option One, over-reliance on psychological evidence is an unsatisfactory aspect of any model for reform In this context, rebutting the presumption of incapacity would require the defendant to adduce evidence that the plaintiff was capable of instituting proceedings before proceedings were in fact instituted This in turn would be dependent on the view of an expert psychologist
- The concerns about the need for a preliminary assessment by a judge of the effects of abuse, already expressed in relation to Option One, also apply to the Ontario model

**(d) Recommendation**

3 36 *The Commission's recommendation is that Option Three should not be adopted*

**Option Four: Fixed period of time**

**(a) Introduction**

3 37 This Option involves the introduction of a long fixed limitation period, commencing from the age of majority, within which to bring legal proceedings The virtue of this proposal is that it would go some distance towards accommodating the plaintiff's incapacity to commence proceedings, while also importing certainty and clarity into this area of the law

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<sup>212</sup> *B v DPP* [1997] 2 ILRM 118

**(b)      *Arguments in favour of Option Four***

- It is preferable that psychiatric or psychological evidence should not be the main determining factor in deciding whether an action should be barred by the Statute of Limitations. This Option would avoid reliance on expert evidence and help to guarantee certainty.
- With a fixed limitation period, it would not be necessary to ascertain the precise moment at which the plaintiff ceased to suffer from the effects of the abuse and became aware of the right to commence an action. This would avoid focusing too much on the state of the mind of the plaintiff and not on the claim and the evidence.
- If a fixed limitation period were adopted, no preliminary assessment of the effects of the abuse, or of any other matter, would be necessary. This would remove from the plaintiff the burden of establishing his or her state of mind and psychological status at the outset of the proceedings and would ensure respect of the plaintiff's constitutional right of access to the courts.
- While the abolition of limitation periods would leave defendants subject to open-ended claims and possible abuse of the law, this model would provide defendants with ascertainable and clear protection against stale claims. From the point of view of fairness to the defendants, such a limitation would mean that they would be exposed to a lesser risk of open-ended claims and the problems of stale evidence.

**(c)      *Arguments against Option Four***

- A criticism which could be made of this option is that it could, in certain circumstances, be perceived as operating somewhat arbitrarily and there could be a perception of potential unfairness to a particular plaintiff, although the Commission does not envisage that the limitation period in question will operate unfairly or unjustly, as it is being pitched at a generous level.

3.38      It is worth noting the approach taken in California, which is similar to many other US states, where it is provided that the limitation period in respect of sexual abuse is the later of eight years after the plaintiff's majority or three years after he or she could reasonably have discovered that his or her illness was caused by abuse. The proposal made by the Commission in this Paper, namely a fixed limitation period of 12 years, with the possibility of 'discoverability' being applied by a court under the 1991 Act, would resemble the Californian model, but the provisions proposed here are more favourable to the plaintiff.

**(d) Recommendation**

3.39 *The Commission recommends that a plaintiff in a case concerning non-sexual abuse of children, should have a fixed period of time from the date of their majority within which to bring an action.*

**(e) Content of proposed regime**

3.40 We now turn to consider three important points in connection with the operation of this regime.

- (1) Length of the limitation period;
- (2) Whether there should be a judicial discretion;
- (3) If so, whether this discretion should be subject to guidelines or restrictions.

**(1) Length of the limitation period**

3.41 Option Four requires a decision as to the appropriate duration of a fixed limitation period. The first point to note in this regard, is that it is difficult to find an entirely justifiable numerical basis for a limitation period, no matter what the cause of action may be.

3.42 The concept of maturity could be used as one basis for fixing a period of time. This concept arises from the view of some psychiatrists that, despite being abused, a person will have reached full maturity by the age of 30 and so should be in a position to take decisions or action concerning the abuse, such as legal action. On the other hand, other psychiatrists take the view that maturity or awareness may come later with some significant event such as counselling.

3.43 *There are two views within the Commission. One recommends a fixed period of limitation of 15 years from the age of majority for the commencement of actions arising from non-sexual abuse of children. The other view favours a fixed period of limitation of 12 years from the age of majority, to be supplemented by the recommendations on judicial discretion addressed below.*

**(2) Judicial discretion**

3.44 The issue to be considered, is whether there should be a judicial discretion to vary the period of limitation, where the justice of the case so requires.

3.45 An advantage of the inclusion of a judicial discretion, which would be particularly important in the present context, is that it would remove the risk of injustice or inflexibility, and permit the court to consider any particular factors or aspects of a case which would justify an additional extension of time. The inclusion of a judicial discretion would enable the courts to deal with exceptional cases, where the plaintiff's claim would otherwise be defeated by the limitations regime.

3.46 The principal disadvantage with legislating for judicial discretion is the uncertainty which it would create. This uncertainty undermines the very objectives of a limitation period. A further problem is the perception that different judges may exercise their discretion differently, resulting in potential hardship and injustice for plaintiffs. What may appear to one judge to amount to good reasons to extend time may not produce the same result with another judge. In an earlier report of the Commission, the possibility of allowing judicial discretion to extend periods of limitation, was rejected firmly on these grounds.<sup>213</sup>

(3) *Whether a judicial discretion should be subject to guidelines or restrictions.*

3.47 One solution to the problem of the perception of unpredictability of the exercise of judicial discretion, would be to introduce a set of guidelines or restrictions for the exercise of such discretion. This is a method which is employed in many Australian States and Territories. Interestingly, guidelines were included in section 33 of the *Limitation Act, 1980*, in England and Wales. However, the operation of that provision in England has given rise to difficulties, and over 220 judicial decisions recorded on Lexis refer to the section.<sup>214</sup> This is clearly an argument against the adoption of such a provision here. Of note in this regard is the fact that the Law Reform Commission, in an earlier report on personal injuries, previously considered the option of a statutory judicial discretion not to apply the limitation period and concluded that such a discretion would either have to be drawn in broad and unfettered terms introducing uncertainty, or with more qualifications, like that under section 33 “whose subsequent history does not suggest it is a desirable model”.<sup>215</sup> Finally, it is worth noting that the imposition of strict guidelines may jeopardise the main benefit of a judicial discretion, namely flexibility.

3.48 *The Commission recommends that guidelines should not be included to govern the exercise of a judicial discretion to extend a fixed period of limitation.*

3.49 An alternative to the introduction of a set of guidelines to govern the exercise of a judicial discretion, is to limit the scope of the discretion to a fixed term of years. This was the approach adopted in Tasmania, for example, where there is a judicial discretion to extend the limitation period for up to three years.<sup>216</sup> This may counter the criticism that judicial discretion leaves the defendant and insurers subject to open-ended

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<sup>213</sup> Law Reform Commission, *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (LRC 21, 1987) at 42.

<sup>214</sup> Figure of 220 cases valid June 2000 (Lexis). See N. H. Andrews, “Reform of Limitation of Actions: The Quest for Sound Policy” (1998) 57 C.L.J. 589, 608: reference to a figure of 115 appellate decisions arising from s.33.

<sup>215</sup> Law Reform Commission, *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (LRC-21, 1987) at 46.

<sup>216</sup> *Limitations Act, 1974*; see above at para.2.084.

claims and considerable uncertainty. It may also go some way towards countering allegations that the fixed period of limitation of 12 years, as recommended by some Commissioners, is insufficient and does not allow any consideration of the individual circumstances of a case, or any flexibility in the treatment of such cases.

*3.50 The recommendation that there should be a fixed period of limitation of 12 years from the age of majority for the commencement of actions arising from non-sexual abuse of children, would be supplemented by the introduction of a judicial discretion to extend this period for an additional period of not more than three years. The alternative recommendation of the Commission, that there should be a fixed period of limitation of 15 years, would not be supplemented by any judicial discretion.*

4.01 In Chapter Three we considered the appropriate test for the limitation of actions arising from non-sexual abuse of children. In this Chapter, we will examine the scope and the operation of this test. A number of different questions must be addressed:

1. The meaning of the expression “non-sexual abuse”;
2. The cause of action;
3. The relationship of trust and dependency which must exist between the plaintiff and the defendant;
4. Vicarious and other secondary liability;
5. Retrospectivity.

**Part I: “Non-Sexual Abuse”**

4.02 As stated in the Attorney General's Reference, the measure we are considering must be confined to acts of non-sexual abuse. It is necessary, therefore, to consider this key concept.

**(a) Definition of “non-sexual abuse”**

4.03 There are two elements to this expression: first, the meaning of “abuse”, which will be considered below;<sup>217</sup> and secondly, the non-sexual aspect, to which we now turn. The most important factor here is the existence of the *Statute of Limitations (Amendment) Act, 2000*, which is grounded on the term, “sexual abuse”. Given that we recommend a significantly different limitations regime for non-sexual abuse to that which is proposed in the *Statute of Limitations (Amendment) Act, 2000* for sexual abuse, the question of the borderline between the forms of abuse coming within each regime is critical. Put simply, the line at which one regime ends and the other commences ought to be the same. Otherwise there would be a danger of overlap or, alternatively, of a gap between the two regimes, so that certain acts would be covered by neither. This question of the borderline is of particular importance since, in most circumstances, the regime contained in the 2000 Act will be more favourable for the plaintiff, than the regime proposed in this Paper. Accordingly, it is easy to anticipate a heavy pressure of legal argument as to its precise meaning.

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<sup>217</sup> See below at paras.4.14-17.

4.04 *We recommend the formulation of a clear definition of the term “sexual abuse”. This definition will set out the borderline between the two limitation regimes, and it will clarify the parameters of the term “non-sexual abuse” for the purposes of this Paper.*

**(b) Interpretation of section 48A(4)**

4.05 An “act of sexual abuse” is the trigger for the application of the limitation regime in the Act. This is defined in section 48A(7) of the *Statute of Limitations, 1957* (as inserted by section 2 of the 2000 Act) as follows:

- “(a) any act of causing, inducing or coercing a person to participate in any sexual activity,
- (b) any act of causing, inducing or coercing the person to observe any other person engaging in any sexual activity, or
- (c) any act committed against, or in the presence of, a person that any reasonable person would, in all the circumstances, regard as misconduct of a sexual nature.”

4.06 For the reason given below, one question which is significant here is whether these provisions would cover a situation in which abuse which, while it is overtly non-sexual, is undertaken for the sexual gratification of the perpetrator. With this issue in mind, we turn to a brief analysis of the relevant provisions of the 2000 Act.

**Paragraph (a)**

The key concept in paragraph (a) is “sexual activity”. It seems to us reasonable to take the word “activity” as referring to acts which are objectively sexual. There is no scope for a subjective appraisal of the act, in terms of the motivation of the perpetrator or the victim’s perception or understanding of the activity. There must be an activity which is of itself sexual and the victim must have been caused, induced or coerced to participate in such activity. The other two paragraphs are wider.

**Paragraph (b)**

Paragraph (b) is directed at the particular circumstance of the plaintiff being forced to observe “any other person engaging in any sexual activity”. Its width is increased by the fact that it may not be necessary for the observer (who may have been a young and uninformed person) to have appreciated that the activity going on was sexual, so long as it was objectively sexual activity. It is easy to think of circumstances where this is the case and yet the plaintiff was troubled by the action, possibly because later and/or subsequently he appreciated that it was sexual in character.

**Paragraph (c)**

Widest of all is paragraph (c). It speaks of an act “...that any reasonable person would, in all the circumstances, regard as misconduct of a sexual nature”. We believe this is very wide and indeed embraces much of the ground caught by the previous two paragraphs and goes beyond it. In particular, if we contrast the term “misconduct of a sexual nature” in paragraph (c) with the expression “sexual



activity” in paragraphs (a) and (b), it seems to us that the former expression is significantly wider simply because “sexual nature” requires merely a flavour of sexuality whereas “sexual activity” requires more of a substantive act.

A further feature widening paragraph (c) is the phrase “in all the circumstances”. Some moderating element is introduced by the adoption of the stance of the hypothetical reasonable person. Nevertheless, we consider that the “reasonable person” would be an adult of more sophistication and sexual awareness than a child victim. Therefore, conduct which a child victim may not realise or perceive to be of a sexual nature, may nonetheless fall within paragraph (c), if a reasonable person would regard the conduct as sexual.

4.07 As mentioned, one issue which is of practical significance in the present context is the categorisation of physical abuse which is undertaken for the sexual gratification of the perpetrator. To take well-known examples: beating a child regularly or keeping him or her bound or in a cupboard are not in themselves sexual acts; yet they may be carried out because of the sexual gratification which they give the perpetrator. Do they not then become sexual in character? Consequently, it seems probable that they would fall within at least paragraph (c).

4.08 The salience of this tentative conclusion as to the meaning to be given to “non-sexual abuse” and, hence, the scope of the 2000 Act, is as follows: as noted in Chapter 1, the aims of a statute of limitations include the need to attain some element of certainty and repose of legal actions; the defendant’s right to fair treatment; and the public interest in speedy resolution of disputes. It is therefore essential that there be clarity and certainty in defining the terms “sexual abuse” and “non-sexual abuse” in this particular context.

4.09 Plainly this is a most important policy choice. From a practical perspective, if the legal test is centred upon the sexual gratification of the perpetrator, the categorisation of the abuse would be peculiarly difficult to establish, particularly years after the abuse in question. The consequence of such a situation would be that in almost all cases, whether sexual gratification was or was not actually involved, it would be found to be present. The 2000 Act would be applied, despite this possibly not being the intention of the legislature.

4.10 *The Commission does not support a definition of “sexual abuse” which would permit an act of abuse, which is overtly non-sexual, to be interpreted as “sexual” on the basis that the perpetrator gained sexual gratification from the act in question. We are of the view that the act, to constitute an act of sexual abuse, must be objectively of a sexual nature, in the sense that a reasonable person, with no insight into the motivation of the perpetrator, would categorise it as sexual abuse.*

#### **(c) Conclusion**

4.11 We have taken the policy position that, if an act is not overtly sexual, such that a reasonable person would categorise the conduct as sexual in nature, it should not be characterised as sexual for the purpose of determining which limitations regime – that in the 2000 Act or in the measure we propose – should be adopted.

4.12 If there is any doubt regarding the borderline between the 2000 Act and the scope of this Paper, it may be better to clarify it beyond dispute by including a definition which deals specifically with the point covered in this paragraph. This definition should reflect the recommendation of the Commission that the sexual character of the act in question should be assessed objectively, from the perspective of a reasonable person. It should also be clarified that the same definition would have to apply not only to the measure which we propose but also to the 2000 Act, as otherwise, the danger referred to earlier of an overlap, or a gap, between the two regimes would re-surface.

4.13 *The Commission recommends that the definition of “an act of sexual abuse” should be sufficiently clear, certain and ascertainable to set out the borderline between the limitations regime contained in the Act and the regime proposed in this Paper. It should also be made clear that it applies to both the legislation arising from this Paper and to the 2000 Act. The definition recommended is as follows:*

*‘an act of causing, inducing or coercing a person to participate in, observe or experience, any sexual activity, provided that a reasonable person with no insight into the motivation of the perpetrator, would consider the act to be objectively of a sexual nature.’*

**(d) Types of abuse**

4.14 Earlier, we noted that a key concept in the measure which we propose is the term, “non-sexual abuse”. At this point, we turn to examine the meaning of “abuse”. The first point to emphasise is that the alteration of the substantive law of torts it is not within the terms of reference and we do not intend to consider such topics. Accordingly, in order to make it clear beyond a doubt that the measure we propose would not have this effect, we recommend the inclusion of the following form of words, which is also used in section 48(A)(7) of the 2000 Act: “Provided that the doing or commission of the act concerned is recognised by law as giving rise to a cause of action”. We do not intend to enter into a detailed discussion as to the definition of the term “abuse”. In the first place, as just indicated, the Reference does not invite consideration by the Law Reform Commission of amendments to the substantive law. Secondly, determining whether there was abuse will not be contentious in most cases potentially affected by this Paper, for the reasons to be given below.

4.15 The term “abuse” might seem to give rise to a problem since it is not often used in legal terminology and consequently has not been stamped with a precise legal meaning. In lay parlance, it is a long-established and vivid, if inexact, term. As outlined in Chapter One, the Irish Department of Health and Children has issued a publication which categorises child abuse as follows: neglect, emotional abuse, physical abuse and sexual abuse.<sup>218</sup> However it should be emphasised that some of the acts described in this publication, for instance those categorised under the

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<sup>218</sup> Irish Department of Health and Children, *Children First: National Guidelines for the Protection and Welfare of Children* (September 1999). See para.1.50, above.

heading of “Emotional Abuse”, may not be torts or other civil wrongs.

4.16 Nevertheless we believe that the term “abuse” can be used as one of the concepts determining the scope of the measure regarding limitation of actions, which we propose. The reason is that, as mentioned already, the measure only applies to acts of abuse which are, under the existing law, actionable. If they are not actionable, then no question of limitation of actions arises. Thus the only theoretical danger is that there might be an act which constitutes an actionable wrong, yet which might or might not amount to abuse so that there is a consequential doubt as to whether the limitations regime in the proposed measure would apply or not. However in this field - a tort done to an infant by a person in a position of trust and dependence - it seems most unlikely that the tort would not constitute “abuse”. A doubtful case would be most unlikely. And if such a case arose, we believe that the definition of “abuse” could safely be left to the judge to determine using a dictionary or whatever other aid he considered best. We, therefore, do not recommend that a statutory definition of “abuse” is necessary.

4.17 *The Commission recommends that no statutory definition of the term “abuse” should be adopted.*

**(e) Mixed Cases**

4.18 The question to be considered here is what limitation regime should apply where a victim has suffered both sexual and non-sexual abuse at the hands of the perpetrator. The significance of this question is that, as noted, the 2000 Act proposes a particular limitation regime for sexual abuse, while the Commission is confined to considering a regime for the limitation of actions arising from non-sexual child abuse. As a result of the view which Commission provisionally takes as to the appropriate limitations regime for non-sexual abuse, this will result in two different regimes operating in tandem. We do not consider this to be unworkable, particularly as there are strong reasons for differentiating between the limitations regimes applicable to cases of sexual and non-sexual abuse.<sup>219</sup>

4.19 However, in a case in which both sexual and non-sexual abuse are perpetrated against the victim, it is necessary to ascertain which limitations regime should apply. The difficulty in this regard is exacerbated by the fact that most of the damage, for which compensation is claimed, will be psychological in character. If psychological damage were caused by an incident which involved acts of both sexual and non-sexual abuse, it would naturally be difficult to distinguish between damage caused by one form of abuse and damage caused by the other. In these circumstances, the plaintiff may claim that the psychological damage was caused by sexual abuse, when the abuse was in fact non-sexual in nature. This appears to be one of several major difficulties of proof which are inherent in the area.

4.20 In most cases, therefore, the only way this matter could be resolved would be by the attribution of a proportion of the injury to the sexual abuse and the

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<sup>219</sup> See the justifications advanced above at paras.3.05-6, for differentiating between the limitation of actions arising from sexual and non-sexual abuse.

remainder to acts of non-sexual abuse. There is neither an evidential basis for making this type of distinction, nor is there any fair or accurate means of carrying out such an allocation. A judge with responsibility for determining which proportions of the injury were caused by which category of abuse, would face an impossible task. We therefore believe that the same regime should apply to both types of abuse, where the abuse is perpetrated together.

4.21 A further matter to be considered is the fact that many judges may be reluctant to make a decision in this regard which would deprive the plaintiff of the benefit of a particular limitations regime. There may therefore be a temptation to classify the abuse in such a way as to bring the case within the limitation regimes which is the most lenient towards the plaintiff in the circumstances.

4.22 It is important to overcome this risk of a case which should properly be categorised as a case of non-sexual abuse, for example, being framed as a 'mixed case' and falling within the wrong limitations regime. We therefore make the following proposal: in cases where both sexual and non-sexual abuse are committed, each type of abuse must be sufficiently serious to be actionable, of itself, under the existing civil law, in order to constitute a "mixed case" for the purposes of determining which limitations regime should apply.

4.23 If this view is accepted, then the question which arises is what form the regime should take. There are three possibilities:

- (i) the sexual abuse regime;
- (ii) the non-sexual abuse regime; or
- (iii) whichever of options (i) and (ii) is most favourable to the plaintiff.

4.24 If option (ii) is applied, it could have the consequence of a claim being barred, even though the plaintiff had suffered sexual abuse and would have been able to litigate in respect of this, if it had occurred alone. It is therefore recommended that (ii) should be rejected. As will be seen below, there may be circumstances in which the regime for sexual abuse is less favourable to the plaintiff than the regime for non-sexual abuse. In these circumstances it would be unfair to apply option (i), for the same reasons as option (ii) was rejected. We therefore recommend that option (iii) is the most appropriate of the three possibilities.

4.25 This conclusion is based on the policy view which we adopt, that where both sexual and non-sexual abuse have been committed, the regime which is most favourable to the plaintiff in the circumstances should apply. Our conclusion is also based on the factual assumption we have made that the most favourable limitations regime will be the regime applicable to cases of sexual abuse. While this will usually be an accurate assumption, there may be rare cases in which the regime which we propose in this Paper is more favourable to a plaintiff than the regime contained in the 2000 Act. The following are examples of such cases:

- (a) The victim of sexual abuse may not in fact have suffered any psychological injury within the meaning of the 2000 Act.
- (b) Where the victim ceases to be under a disability before attaining the age of 27, the cause of action would be barred under the 2000 Act six years later, *ie* at some point before the victim reaches the age of 33. On the other

hand, our recommendation is that a victim of non-sexual abuse would have 15 years or 12 years with an additional discretionary period of 3 years, from the age of majority, to take an action. Plaintiffs within the regime proposed in this Paper, would therefore have until the age of 33 to bring an action.

4.26 *To take account of situations in which the non-sexual regime is the more favourable to the plaintiff, the Commission makes the following recommendation:*

*Where both sexual abuse and non-sexual abuse are committed against the victim by the perpetrator, and both types of abuse are actionable under the civil law, the limitations regime which is most favourable to the plaintiff in the circumstances of the case, should apply to the cause of action.*

## **Part II: Cause of Action**

### **(a) Introduction**

4.27 In order to explain the problem which we seek to avoid here, it is necessary to refer briefly to section 11 of the English *Limitation Act, 1980*, as considered by the House of Lords in *Stubbings v. Webb*.<sup>220</sup> In that decision, Griffith LJ delivering the judgment of the Court, interpreted the phrase “any action for damages for negligence, nuisance or breach of duty”, in section 11 of the 1980 Act as follows:

“[T]he phrase [breach of duty] lying in juxtaposition with negligence and nuisance carries with it the implication of a breach of duty of care not to cause personal injury, rather than an obligation not to infringe any legal right of another person.”<sup>221</sup>

4.28 *Stubbings* is naturally of considerable significance for the interpretation of the Irish *Statute of Limitations (Amendment) Act, 1991*, since this Act reproduces the form of words used in the English 1980 Act. It is conceivable that the literal interpretation adopted in *Stubbings* would be adopted here. It is also possible that the more purposive and generous interpretation followed in England before the decision of the House of Lords in *Stubbings* may be adopted here. There is no Irish authority on this point and all that can be said is that the matter is in considerable doubt. In most of the cases flowing from non-sexual abuse, the cause of action would be trespass to the person.

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<sup>220</sup> [1993] 1 All ER 322.

<sup>221</sup> *Ibid.* at 329. The Court also observed that this legislation was enacted to give effect to *the Report of the Tucker Committee on the Limitation of Actions*, a Report which the Committee emphasised did not apply to cases such as trespass to the person or battery. Earlier decisions, for example, the decision of Lord Denning in *Letang v. Cooper* [1965] 1 QB 232, held that the phrase breach of duty covered the breach of any duty under the law of tort. This may well have been the result intended by the British legislature, but, on the other hand, it is easy to see how the House of Lords, applying the conventional literal-logical interpretation, reached the reverse conclusion.

**(b) Recommendation**

4.29 The short, but important point which flows from this, is that it should be made clear that when there is an act of non-sexual abuse of a child, the special limitations regime which we propose should apply irrespective of the legal form of action, be it negligence, nuisance, assault, battery, trespass to the person (or even chattels, for example clothes), breach of contract or breach of fiduciary duty or any other.

4.30 *We recommend that the wording used should make it clear that the proposed limitations regime applies to all instances of abuse irrespective of the particular cause of action in which they are cast.*

4.31 Section 2 of the *Statute of Limitations (Amendment) Act, 2000* uses the phrase “bringing an action...founded on tort in respect of an act of sexual abuse” which takes into account the possibility that the cause of action might be something other than tort, for instance breach of duty. We would not use the phrase “founded in tort” since it appears to subtract rather than to add anything.

4.32 *We recommend that the following formulation should be used: “bringing an action... in respect of an act of non-sexual abuse”.*

**Part III: A Relationship of Trust and Dependency between the Plaintiff and the Defendant**

**(a) Introduction**

4.33 It is necessary to consider the category of defendants to whom the limitations regime proposed in this Paper will apply.

4.34 As mentioned earlier, it is fundamental that the plaintiffs, whose claims are under consideration, are suing because of (non-sexual) abuse in childhood. Accordingly, they should be allowed an exceptional limitations regime not only because they had been abused; but also because they had been abused by those close to them at an age when they would be so affected by the abuse that they would be likely to suffer psychological damage. The fact that the relationship between the perpetrator and the victim was one of trust and dependency, is a factor which goes a long way to explain why some plaintiffs in this category have been unwilling or unable to initiate proceedings until long after the time of the wrong. For this reason, the Commission believes that the limitations regime which we recommend should be confined to plaintiffs in this category.<sup>222</sup> The remaining plaintiffs would fall under the general regime established by the *Statute of Limitations Acts, 1957-91*. This policy is in line with the regime proposed in the Ontario Model as outlined in Chapter Two.

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There is no comparable restriction in the 2000 Act so that a once-off attack of a sexual nature could fall within the special regime established by that Act. This may reflect a view that a victim is more likely to be traumatised into silence for several years, where the abuse is sexual in character.

**(b) Ontario Model**

4.35 The remaining question is the form of words which should be used to articulate this limitation. The Ontario Limitations Act Consultation Group<sup>223</sup> provide a useful model. They define the necessary relationship in the following way:

- “... One of the parties to the assault was
- (i) living with the plaintiff in an intimate and personal relationship, or
  - (ii) a person with whom the plaintiff was in a relationship of financial, emotional, physical or other dependency.”

4.36 This wide form of words appears to us to cover abuse occurring in a family setting, in a foster care situation, in institutions such as orphanages, or in another context which may be anticipated. It also caters for a situation in which the person who abused the plaintiff met him or her seldom yet enjoyed a position of ascendancy, for example a rich uncle. The other persons within the definition would, where appropriate, include

- Immediate family members;
- Persons outside the immediate family such as uncles, aunts, grandparents;
- Foster parents, adoptive parents;
- Persons *in loco parentis*;
- Persons living with one of the parents even though not married and not the natural parent of the child;
- Persons who take care of children in institutions or other child placement centres.

**(c) Recommendation**

4.37 We believe that the formula proposed by the Limitations Act Consultation Group of Ontario for defining the relationship which must exist between the plaintiff and the defendant is all-embracing, unambiguous and comprehensible.

*The Commission recommends that the limitations regime proposed in Chapter Three of this Paper, should be confined to situations where the relationship between the parties falls within the definition adopted in the Ontario recommendations, namely that one of the parties to the assault was*

- (i) *living with the plaintiff in an intimate and personal relationship, or*
- (ii) *a person with whom the plaintiff was in a relationship of financial, emotional, physical or other dependency.*

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<sup>223</sup> *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991) at 10.

## **Part IV: Vicarious Liability and Liability of Supervisory Authorities**

### **(a) Introduction**

4.38 The doctrine of vicarious liability provides that one person may be liable for a wrong committed in the context of employment relationships where employers are held liable for the torts committed by their employees in the course of their employment. Other relevant examples are where a principal is held liable for the wrongs of his agent, a firm liable for the wrongs of its partner or other situations where one person has sufficient control over the actions of another even though the person held liable is not actually at fault or is not the perpetrator of the wrongdoing. This form of liability is most often applied in the employment context.<sup>224</sup>

4.39 Vicarious liability could be a very useful doctrine for plaintiffs to invoke in cases of child abuse. The use of this doctrine would enable institutions and other bodies or persons who have employed the perpetrator of the abuse to be held accountable for the effects of the abuse. A further and more important point is that, while a plaintiff may succeed against the perpetrator of the abuse, this may well prove to be only a pyrrhic victory in terms of obtaining compensation. The employer who may be held vicariously liable for the acts of the abuser is likely to have greater resources.

### **(b) Test for vicarious liability**

4.40 The test in respect of vicarious liability is that an employer is only liable in respect of an act committed by an employee within the scope of his employment. The traditional test in defining an employer's liability is as follows:

“A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be done so if it is either (1) a wrongful act authorized by the master or (2) a wrongful and unauthorised mode of doing some act authorized by the master...”<sup>225</sup>

4.41 Therefore, the issue which would fall to be determined by a court is whether an employee was acting within the scope of his employment when the abuse took place. It is not clear that a court would find an employer to be vicariously liable in these circumstances, as the abuse of a child is evidently not envisaged as part of an employee's duty. However, if the institution or other employer had knowledge of the abuse this would be a ground for a finding of vicarious liability. Furthermore, there have been some indications that an employer could be held to be vicariously liable even where the acts of a servant done outside his or her employment did not amount to tortious misconduct.<sup>226</sup> The case of *Kearney v. Ireland*<sup>227</sup> expanded the scope of vicarious liability in this manner,

<sup>224</sup> McMahon & Binchy, *Irish Law of Torts* (2<sup>nd</sup> Ed) at 749; *Moynihan v. Moynihan* [1975] IR 192.

<sup>225</sup> *Salmond & Heuston on the Law of Torts* (21<sup>st</sup> Ed.) at 443.

<sup>226</sup> See Binchy, “Constitutional Remedies and the Law of Torts” in O'Reilly (ed.), *Human Rights and Constitutional Law* (Round Hall Press 1992) at 213.

<sup>227</sup> [1986] IR 116.



holding the State liable for breaches of constitutional rights, not amounting to torts, committed by its servants. Costello J stated, "The State may be liable for the acts of a servant of the State which amount to an infringement of a constitutionally protected right, even though done outside the State servant's employment...". This statement was *obiter*. However, it is relevant in the present context to note that gratuitous acts of violence committed by servants of the State do not give rise to the vicarious liability of the State, where the acts were not committed in the course of employment.<sup>228</sup>

Two recent decisions of the Supreme Court of Canada considered the vicarious liability of institutions or organisations for acts of child abuse committed by their employees. In the first of these, *Bazley v. Curry*,<sup>229</sup> the Court analysed whether the abuse committed "...was so connected to an authorized act that it could be regarded as a mode of doing that act."<sup>230</sup> The Court examined the nature of the authority which must have been conferred on an employee to satisfy this test and concluded that

"... there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks."<sup>231</sup>

In another decision of the Supreme Court of Canada, *Jacobi v. Griffiths*,<sup>232</sup> the same approach was adopted. In that case, the Court elaborated upon the nature of the connection which must exist between the enterprise and the act, stating that, "[t]o find a strong connection, there must be a material increase in the risk of the harm occurring in the sense that the employment significantly contributed to the occurrence of the harm."<sup>233</sup> In Ireland, on the other hand, the appropriate test to govern the allocation of vicarious liability in the context of child abuse remains in doubt, until there is an authoritative Supreme Court decision to settle the matter.

#### (c) *Liability of supervisory authorities*

4.43 A further area of likely controversy in much of litigation in the present area would be the extent to which public supervisory authorities like the Garda Síochána, Department of Social Community and Family Affairs (or one of its predecessors) and the health boards (or their predecessors before 1970, the County Councils) could be made liable for failing to detect offenders and protect the victims. In a concrete case, such a claim would involve difficult questions of

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<sup>228</sup> See Binchy, *op.cit.* fn.10 at 214.

<sup>229</sup> [1999] 2 S.C.R. 534.

<sup>230</sup> *Ibid.* at para.6.

<sup>231</sup> *Ibid.* at para.42.

<sup>232</sup> [1999] 2 S.C.R. 570

<sup>233</sup> *Ibid.* at para.79.

statutory interpretation of the governing statutes; as well as the application of the standards of awareness and conduct which were contemporary at the time of the abuse. There could also be a claim that the State failed to perform a possible duty to supervise education facilities under Article 42 of the Constitution.

4.44 But the Law Reform Commission's remit in this paper does not involve consideration of law reform in any of these complex fields, as our brief is simply to consider the application of the proposed exceptional limitation period. However it is within our remit to address the issue of whether whatever limitations regime is advocated for defendants, who are personally liable, should also apply to all other categories of defendant.

**(d) *Arguments in favour of vicarious liability in the context of non-sexual child abuse***

- While one objective of the law of limitations is to protect defendants against stale claims, the particular rationale underlying our recommendations in this Paper is that account must be taken of the effects of non-sexual abuse upon the victim. Therefore, if the protection afforded to the individual defendant/perpetrator by the law of limitations is curtailed due to the effect on the victim of the abuse which occurred, there is no reason this curtailment should not also apply to institutional defendants or employers. In other words, our recommendations are victim-focused and so, if one category of defendant is less culpable than another, that is not a reason for a more lenient limitations regime, as the most stringent limitations rule was not introduced, in the first place, to punish a defendant.
- There are several factors which can affect the duration of the period of limitation, including the "discoverability" of an injury, the "date of knowledge" of the plaintiff, the plaintiff's "awareness" of the damage and the disability of the plaintiff. As seen in Chapter Two, many jurisdictions, including Ireland, provide for limitation periods of different durations based on these factors. However, these factors all focus upon the plaintiff and the nature of the damage or the injury sustained. In line with this, in no situation and in no jurisdiction is there any differentiation based on the category of the defendant. Where the cause of action can be brought against a defendant vicariously there is therefore no precedent for suggesting that the limitation period applicable to that cause of action should not apply to that defendant.
- A more practical consideration is that, given the lapse of time and other circumstances, not to apply the proposed new limitations regime to employers, institutions and other relevant bodies, who are liable for the wrong would, in many cases, mean that there would be no realistic defendant.

**(e) *Recommendation***

4.45 *The Commission recommends that where a cause of action arises from an act of non-sexual abuse of a child, any action in respect of vicarious liability or other associated liability, including the responsibility of supervisory authorities should also be subject to the special limitations regime which we recommend in chapter 3.*

## **Part V: Retrospective Effect of Statutes of Limitation**

4.46 The background to this Paper is that of claims which have been brought or are on the point of being brought by plaintiffs whose case is that they were abused in the past. In this context, it is a very significant question whether the legislation which we recommend should be accorded retrospective effect.

### **(a) General rule**

4.47 As a general rule, the law leans against the retrospectivity of statutes. This policy is of most significance in the context of the interpretation of statutes. In the case of *Hamilton v. Hamilton*,<sup>234</sup> O'Higgins CJ described the justification for this rule as follows: "[r]etroactive legislation, since it necessarily affects vested rights, has always been regarded as being *prima facie* unjust."<sup>235</sup> He then considered the scope of this rule and quoted from *Craies on Statute Law* (7<sup>th</sup> edn, page 387), where a retroactive statute is described as one which,

"takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."<sup>236</sup>

4.48 It is important to note at this stage, that the focus of this Consultation Paper differs from the analysis of the rule against retrospectivity which has been conducted in the caselaw. Most of the caselaw has focused upon construing statutes and applying the presumption against retrospectivity. The question we must address is whether the limitations regime we recommend in this Paper, should contain an express provision to the effect that it operates retrospectively. The primary concerns in this regard are whether such retroactivity would have implications from the point of view of fairness to the defendant or from a constitutional perspective. In order to answer these questions, it is useful to first outline the manner in which the presumption against retrospectivity has been applied to statutes of limitation within the caselaw.

### **(b) Retrospectivity of statutes of limitation**

4.49 The application of the rule against retrospectivity is different in the context of statutes of limitation. To apply the test cited above, the issue is whether a "vested right" is affected by a change in the law of limitations. A number of cases have drawn a distinction between procedural and substantive laws, with the former having retrospective effect, and the rule against retrospectivity applying only to

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<sup>234</sup> [1982] IR 467.

<sup>235</sup> *Ibid.* at 474.

<sup>236</sup> *Ibid.* at 474.

substantive laws.<sup>237</sup>

4.50 The Law Reform Commission of Tasmania considered this question and concluded that,

“... limitation statutes do not confer any specific rights or liabilities of themselves. Limitation statutes do not declare actions to be void but merely unenforceable. They are, in essence, procedural, allowing a plaintiff to proceed to a resolution of the substantive claim.”<sup>238</sup>

4.51 The Law Reform Commission of Western Australia noted that, “[a]lthough these principles are easy to state, they have proved difficult to apply in practice, since they rest on the somewhat elusive distinction between substance and procedure”.<sup>239</sup>

In *R v. Chandra Dharma*,<sup>240</sup> Lord Alverstone CJ stated at page 338-9 that,

“It has been held that a statute shortening the time within which proceedings can be taken is retrospective (*The Ydun*), and it seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should not also be held to be retrospective...”

4.52 In *Yew Bon Tew v. Kenderaan Bas Mara*,<sup>241</sup> Lord Brightman indicated that the distinction between substantive and procedural laws was not always decisive and he proceeded to state that a right to plead a time bar was “in every sense a right, even though it arises under an Act which is procedural.”<sup>242</sup>

4.53 There is therefore some divergence as to whether limitation acts are procedural or substantive, and as to the implications this has for the question of retrospectivity.

**(c) Fairness to the defendant**

4.54 It is reasonable to suppose that, when a person is committing an act, which may be an infringement of the civil or the criminal law, they will have in mind the substantive law and may adapt their behaviour accordingly. A person who so

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<sup>237</sup> As stated in *The Ydun* [1899] P 236: “[T]here is abundant authority that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts”, *per* Vaughan Williams LJ at 246.

<sup>238</sup> Law Reform Commission of Tasmania, *Report on the Limitation of Actions for Latent Personal Injuries* (Report No. 69, 1992) at 39.

<sup>239</sup> Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions* (Project No. 36, Part II, 1997) at para.8.33.

<sup>240</sup> [1905] 2 KB 335.

<sup>241</sup> [1982] 3 All ER 833.

<sup>242</sup> *Ibid.* at 839.

adapts their conduct to avoid infringing existing legislation, would have a ground for complaint, if there was a subsequent retrospective change in the law. The position is different, however, where the question is one of procedure. The alleged perpetrator of an infringement of the civil or the criminal law, is unlikely to have in mind procedures which would govern a claim or action against him. Such a defendant could not therefore allege that he conducted himself in reliance upon the existing law of limitations or that he had an expectation that his conduct would be governed by that law.

4.55 Furthermore, the manner in which the law of limitations operates does not relate to the conduct of the perpetrator. Limitations relate to delay by the plaintiff, and neither the defendant's knowledge of the existence of limitations periods, nor any aspect of his conduct, could have any bearing upon such delay or its consequences, since this is not something within the control of the defendant.

4.56 A final point in this regard is that the law of limitations aims to protect a variety of interests. It has the aims of achieving certainty, finality and of respecting the public interest, as well as the aim of protecting the defendant against stale claims.<sup>243</sup> This is a further reason why it would be inappropriate to categorise a limitation period as a right of the defendant.

**(d) Constitutional dimension**

4.57 The topic of retrospectivity is only addressed expressly in one provision of the Constitution. Article 15.5 provides: "The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission."

4.58 In the case of *Sloan v. Culligan*,<sup>244</sup> Finlay CJ stated,

"The Court is satisfied that the provisions of Article 15, s. 5 of the Constitution are an expressed and unambiguous prohibition against the enactment of retrospective laws declaring acts to be an infringement of the law, whether of the civil or the criminal law. It does not contain any general prohibition on retrospection of legislation, nor can it be by any means interpreted as a general prohibition of that description".<sup>245</sup>

4.59 Legislation with retroactive effect does not therefore infringe Article 15.5 of the Constitution, provided no new infringement of the law is created. Statutes of limitation do not create new infringements of the law. The limitation period may bar the plaintiff from pursuing a claim, but the cause of action is not extinguished (unlike the rules of prescription in Scotland, for instance). As the liability of the defendant is not altered by a change in the limitations regime, the constitutional protection contained in Article 15.5 is not affected by retrospective changes in the law of limitations.

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<sup>243</sup> See Chap. One at para.1.17.

<sup>244</sup> [1992] 1 IR 223.

<sup>245</sup> *Ibid.* at 272.

4.60 Secondly, we should consider whether Article 40.3 of the Constitution which protects "...the personal rights of the citizen" may be of relevance. In this regard, there is an important distinction drawn between personal rights protected under Article 40.3 of the Constitution and rights conferred by law. In *The State (Nicolaou) v. An Bord Uchtála*,<sup>246</sup> the Supreme Court considered it to be

"...abundantly clear that the rights referred to in section 3 of Article 40 are those which may be called the natural personal rights and the very words of sub-section 1, by the reference therein to 'laws' exclude such rights as are dependent only upon law."<sup>247</sup>

4.61 It appears, therefore, that the right of a defendant to plead the statute of limitations, being a right created and defined by statute, is not a personal right within the meaning of Article 40.3 and the modification of this right is therefore not an infringement of a constitutional right.

4.62 Even if the constitutional provisions could be of relevance in this context, conflicting interests and rights which are protected under the Constitution must be balanced. Where the rights of the plaintiff are of such importance, and where the alleged conduct is so egregious, there may be a shift in the balancing of the rights of the defendant and those of the plaintiff, in favour of the rights of the plaintiff.

4.63 In any case, the defendant's right to a fair trial, from the point of view of not admitting stale evidence, is protected, as is evident from the case of *Toal v. Duignan*.<sup>248</sup> That case, which has been endorsed by a subsequent line of authority, established that an action can always be struck out by the courts, in the exercise of their discretion, and in furtherance of their duty to protect constitutional rights, where to allow the action to proceed would create unfairness and lead to a denial of justice to the defendant. This case concerned a claim based on events which had occurred several years previously, when the plaintiff was an infant.

4.64 Section 3 of the *Statute of Limitations (Amendment) Act, 2000* preserves this jurisdiction:

"Nothing in section 48A of the Statute of Limitations, 1957 (inserted by section 2 of this Act), shall be construed as affecting any power of a court to dismiss an action on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal."

4.65 *We recommend that a similar provision be included in our proposals.*

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<sup>246</sup> [1966] IR 567.

<sup>247</sup> *Ibid.* at 642, *per* Walsh J. See also *Loftus v. AG* [1979] IR 221 where the Supreme Court distinguished between "...a right which is created by law and which depends for its exercise and enjoyment on the conditions laid down by law being complied with..." and a personal right within the meaning of Article 40.3.

<sup>248</sup> [1991] ILRM 135. See also *O'Domhnaill v. Merrick* [1984] IR 151, the case in which this principle was first established.

(e) **General recommendation**

4.66 The essential issue is whether the proposed changes to the law of limitations should have retrospective effect. In this regard it is important to note the approach which has been adopted previously by the Law Reform Commission to a similar question. In our *Report on the Statute of Limitations: Claims in respect of Latent Personal Injuries*,<sup>249</sup> we considered the effect of the proposals on existing causes of action and stated that,

“The normal rule is that legislation does not affect vested rights in existence at the time legislation takes effect. Accordingly, in the absence of any legislative provision, our proposals would only apply to causes of action which had not been barred at the date of commencement of new legislation. This would clearly frustrate in a number of cases the objective of the proposed reform of the law... We recommend that the proposed legislation should apply to causes of action accruing before its commencement. We also recommend that it should apply to proceedings pending at its commencement.”

4.67 It is also worth noting that the English Law Commission, when considering the question of retrospectivity, noted that,

“[t]he continuance of the old regime might be of particular concern in relation to victims of sex abuse, where the shortcomings of the current law are very evident and delay in correcting them may be thought unacceptable”.<sup>250</sup>

4.68 While this comment relates to the inadequacies of the current law in relation to sex abuse, many of the same criticisms are also relevant in relation to cases of non-sexual abuse arising in this jurisdiction, as was seen earlier. This provides a strong justification for according retrospective effect to legislation reforming the law of limitations in this context.

4.69 The Commission is mindful of the effect which the changes in the limitation periods applicable to causes of action arising from non-sexual abuse of children, would have on the defences open to the alleged perpetrators. However, we consider that, in the present context, precedence should be accorded to the right of the plaintiff to avail of the changes in the law.

4.70 *We recommend that the retrospective effect of the proposed legislation should be clearly expressed, thus avoiding ambiguity, eliminating the need to interpret whether the statute has retrospective effect, and overcoming the uncertainty of the application of presumptions or general maxims in this regard.*

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<sup>249</sup> LRC 21 – 1987 at 53.

<sup>250</sup> English Law Commission, *Limitation of Actions – A Consultation Paper* (No. 151, 1998) at 14.33.

*(f) Scope of retrospective effect*

4.71 In the light of this general recommendation that the proposed changes to the law of limitations should have retrospective effect, the precise scope of this retrospectivity must now be determined.

4.72 In particular, we must consider this issue in relation to the following situations, which are defined by reference to the status of the cause of action at the date of the enactment of the change in the law:

- (i) Causes of action which are not yet statute barred under the existing law of limitations.
- (ii) Causes of action which would be statute barred under the existing legislation.
- (iii) Actions which are pending at the time of the enactment of the new statute of limitations.
- (iv) Cases which have been settled or in which judgment has been delivered, prior to the change in the law of limitations.

*(i) Causes of action which are not statute barred under the existing legislation*

4.73 Much of the limitations legislation which has been enacted in the United Kingdom, Australia and Canada has expressly applied to causes of action which accrued under the existing legislation, but which were not yet statute barred and in respect of which no proceedings had been commenced.<sup>251</sup>

*(ii) Actions which would be statute barred under the existing legislation*

4.74 Many jurisdictions provide expressly that changes in the law of limitations are not to apply to actions which would have already become barred under the pre-existing limitations legislation, at the time of the enactment of the amending legislation.<sup>252</sup>

4.75 However, there are jurisdictions which provide expressly for the retrospectivity of limitations laws, irrespective of whether the action was barred under the previous state of the law,<sup>253</sup> while the limitations legislation of certain other countries are silent on this question.<sup>254</sup>

4.78 We consider that the current law governing the limitation of actions is not appropriate for dealing with cases arising from non-sexual abuse of children. Many

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<sup>251</sup> *Limitation Act, 1939 (UK); Limitation Act, 1980 (UK); Latent Damage Act, 1986 (UK); Limitation Act, 1969 (NSW); Limitation of Actions Act, 1969 (Queensland); Limitation Act, 1974 (Tasmania); Limitations of Actions Act, 1968 (Victoria); Limitation Act, 1950 (New Zealand); Limitation Act, 1979 (British Columbia).*

<sup>252</sup> See *Statute of Limitations, 1957 (Ireland).*

<sup>253</sup> *Limitation Act, 1963 (UK); Limitation Act, 1975 (UK); Limitation Act, 1981 (Northern Territory); Limitation of Actions Act, 1974 (Queensland).*

<sup>254</sup> *Limitation of Actions Act, 1979 (Manitoba); Limitation of Actions Act, 1973 (New Brunswick).*



meritorious cases may be statute-barred under the 1957 and the 1991 Acts. We therefore consider that our proposals should apply to cases which would otherwise be barred under the current legislation.

(iii) *Pending actions*

4.79 Most statutes of limitation, as noted above, do not apply to causes of action which are pending before a court under the existing limitations regime, at the date of the enactment of the statute.<sup>255</sup> However, particularly in the context of personal injuries, there are legislative provisions which apply retrospectively even where there is an action pending under the previous limitations regime.<sup>256</sup> In particular, our *Statute of Limitations (Amendment) Act, 1991* provides in section 7 that, “This Act shall apply to all causes of action whether accruing before or after its passing and to proceedings pending at its passing.” This is also the approach adopted in the *Statute of Limitations (Amendment) Act, 2000*, section 48A(2) of which provides,

“This section applies to actions referred to in subsection (1) whether the cause of action concerned accrued before or after the passing of the *Statute of Limitations (Amendment) Act, 2000*, including actions pending at such passing.”

4.80 While there is no definition in either of these provisions of the term “actions pending” and while this may be seen as a source of potential ambiguity, we consider that the interpretation of this term, and the decision as to the appropriate cut-off point for the retrospectivity of limitations legislation, should be within the remit of the courts.

4.81 We therefore agree with the approach adopted in the 1991 and the 2000 Acts and we consider that our proposals should apply retrospectively to causes of action which are pending, but in respect of which no final judgment has been delivered. This qualification is expanded upon below.

4.82 The view might be advanced that including such pending cases could violate the concept of the independence of the judicial organ, in the same manner as arose in the *Sinn Féin Funds* case.<sup>257</sup> We do not accept this proposition. There are certain keywords in the judgment of Gavan Duffy J in that case which demonstrate the distinction between the two situations.

“This Court cannot, in deference to an Act of the Oireachtas, abdicate its proper jurisdiction to administer justice in a case whereof it is duly seized. This Court is established to administer justice and therefore it cannot dismiss the pending action without hearing the plaintiffs; it can no more dispose of the action in that arbitrary manner at the instance of the Attorney General than it can give judgment for the plaintiffs without

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<sup>255</sup> See *Statute of Limitations, 1957* (Ireland).

<sup>256</sup> See *Limitation Act, 1985* (Australian Capital Territory); *Limitation Act, 1969* (NSW); *Limitation Act, 1963* (UK); *Limitation Act, 1975* (UK).

<sup>257</sup> *Buckley v. Attorney General* [1950] IR 67.

hearing the Attorney General against their claim.”<sup>258</sup>

4.83 Unlike the situation addressed in that case, our recommendations would merely lengthen the period of limitation, thereby widening the jurisdiction of the court. The proposals would not have the effect of confining such jurisdiction, or of affecting the substantive rights of the parties.

(iv) *Cases in which judgment has been delivered or settlement has been reached*

4.84 A new law of limitations should not apply to cases which have been settled or in which final judgment has been delivered. To allow a plaintiff to re-open such a case in order to take advantage of the new law would be unconstitutional and impracticable.<sup>259</sup>

4.85 *We recommend that the limitations regime proposed in this Paper will not apply to cases which have been settled by agreement of the parties, or cases which have been determined by the delivery of final judgment, by arbitration, or by any other recognised means.*

**(g) *Summary of recommendations***

4.86 *The Commission proposes that it be clearly stated that the recommendations for the reform of the law of limitation of actions arising from the non-sexual abuse of children is to apply to all causes of action which accrued before the coming into force of the proposed legislation, as well as all causes of action accruing in the future. The recommendations will apply retrospectively to actions which are pending at the date of its enactment, but not to cases which have been settled by agreement of the parties, or cases which have been determined by the delivery of final judgment, by arbitration, or by any other recognised means.*

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<sup>258</sup> *Ibid.* at 70.

<sup>259</sup> It is interesting to note that s.48A(4) of the *Statute of Limitations (Amendment) Act, 2000* appears to provide in one situation for the retrospectivity of legislation enacted after the judgment of a court of first instance: “Subsection (3) [which allows for retrospectivity] shall not apply to an action... where final judgment has been given in respect of the action.” Section 48A(6) elaborates upon this by defining the term “final judgment” as follows: “... a judgment shall be deemed to be final where - (a) the time within which an appeal against the judgment may be brought has expired and no such appeal has been brought, (b) there is no provision for an appeal from such judgment, or (c) an appeal against the judgment has been withdrawn.”

## CHAPTER FIVE                      SUMMARY                      OF                      PROVISIONAL RECOMMENDATIONS

We indicate by the sign [L] where we consider legislation to be appropriate.

### **Part I:                      Preliminary Issues**

#### ***Provisional nature of recommendations***

The Commission emphasises that the recommendations in this Paper are provisional in nature. We welcome the views of consultees, including experts and interested persons and groups, in relation to these recommendations, in the hope of arriving at proposals which may reduce the injustices which can arise due to the peculiar nature of the effects of abuse on the victim, particularly their capacity to initiate legal proceedings.

#### ***The need for a special regime***

1. The Commission recommends that a special limitations regime is necessary to accommodate the particular problems of the law of limitations in cases arising from the non-sexual abuse of children. [para.3.04.]

#### ***Differing regimes for sexual and non-sexual child abuse***

2. The Commission recommends that there should be separate limitations regimes for cases of sexual abuse and cases of non-sexual abuse of children. [para.3.06.]

#### ***The elimination of periods of limitation***

3. The Commission recommends the retention of periods of limitation in respect of causes of action arising from non-sexual child abuse. [para.3.09.]

### **Part II: Options for Reform**

#### ***Option One:                      Test of “disability”; Statute of Limitations (Amendment) Act, 2000***

4. Taking into account the undesirability of an over reliance on psychological evidence, the Commission recommends that the approach adopted in the 2000 Act should not be adopted in the case of actions arising from non-sexual child abuse. [para.3.14.]

#### ***Option Two:                      Test of “discoverability”; Statute of Limitations (Amendment) Act, 1991***

5. The Commission considered the introduction of legislation either stating expressly that the 1991 Act does apply to cases of non-sexual abuse, or stating expressly that the 1991 Act is not applicable to these cases. In conclusion, the Commission recommends that no new legislation should be adopted with respect to

the application of the 1991 Act to cases of non-sexual abuse. The determination as to whether the Act does apply to a particular case of non-sexual abuse of children, should be made by judicial decision. [paras.3.24, 3.28, 3.31.]

***Option Three: Presumption of incapability; the Ontario model***

6. The Commission recommends that Option Three, which involves the postponement of limitation periods on the basis of a presumption that the plaintiff was incapable of pursuing the claim earlier than it was commenced, should not be adopted. [para.3.36.]

***Option Four: Fixed period of time***

7. The Commission recommends that plaintiffs in cases concerning non-sexual abuse of children, should have a fixed period of time from the date of their majority within which to bring an action. [L] [para.3.39.]

8. As regards the length of the period of limitation, there are two views within the Commission. One recommends a fixed period of limitation of 15 years from the age of majority for the commencement of actions arising from non-sexual abuse of children. The other view favours a fixed period of limitation of 12 years from the age of majority. [L] [para.3.43.]

9. The first recommendation of the Commission, that there should be a fixed period of limitation of 15 years, would not be supplemented by any judicial discretion. The second view of the Commission, that there should be a fixed period of limitation of 12 years from the age of majority for the commencement of actions arising from non-sexual abuse of children, would be supplemented by the introduction of a judicial discretion to extend this period for an additional period of not more than three years. [L] [para.3.50.]

10. The Commission recommends that guidelines should not be included to govern the exercise of a judicial discretion to extend a fixed period of limitation. [para.3.48.]

**Part III: Scope and Operation of the Test**

***Definition of “non-sexual abuse”***

11. The Commission recommends that the definition of “sexual abuse” should set out the borderline between the limitation regime for sexual abuse and the regime for dealing with cases of “non-sexual abuse”, and it should also clarify the parameters of the term “non-sexual abuse” for the purposes of this Paper. [para.4.04.]

12. The Commission does not support a definition of “sexual abuse” which would permit an act of abuse, which is overtly non-sexual, to be interpreted as “sexual” on the basis that the perpetrator gained sexual gratification from the act in question. We are of the view that the act, to constitute an act of sexual abuse, must be objectively of a sexual nature, in the sense that a reasonable person, with no insight into the motivation of the perpetrator, would categorise it as sexual abuse. [para.4.10.]

13. In the light of the preceding recommendations, the Commission recommends

that the definition of “an act of sexual abuse” should be sufficiently clear, certain and ascertainable to set out the borderline between the limitations regime contained in the Act and the regime proposed in this Paper. It should also be made clear that it applies to both the legislation arising from this Paper and to the 2000 Act. The definition recommended is as follows:

‘an act of causing, inducing or coercing a person to participate in, observe or experience, any sexual activity, provided that a reasonable person with no insight into the motivation of the perpetrator, would consider the act to be objectively of a sexual nature.’

[L] [para.4.13.]

14. The Commission recommends that no statutory definition of the term “abuse” should be adopted. [para.4.17.]

#### ***Mixed cases***

15. The Commission recommends that, where both sexual abuse and non-sexual abuse are committed against the victim by the perpetrator, and both types of abuse are actionable under the civil law, the limitations regime which is most favourable to the plaintiff in the circumstances of the case, should apply to the cause of action. [L] [para.4.26.]

#### ***The cause of action***

16. The Commission recommends that it should be made clear that when there is an act of non-sexual abuse of a child, the special limitations regime which we propose should apply irrespective of the particular legal form of the action, be it negligence, nuisance, assault, battery, trespass to the person, breach of contract or breach of fiduciary duty or any other. We therefore recommend that the following formulation should be used: “bringing an action... in respect of an act of non-sexual abuse”. [L] [paras.4.30, 4.32.]

#### ***Relationship of trust and dependency between the plaintiff and the defendant***

17. The Commission recommends that the limitations regime proposed in this Paper should be confined to situations in which one of the parties to the assault was

- (i) living with the plaintiff in an intimate and personal relationship, or
- (ii) a person with whom the plaintiff was in a relationship of financial, emotional, physical or other dependency. [L] [para.4.37.]

#### ***Vicarious liability and liability of supervisory authorities***

18. The Commission recommends that, where a cause of action arises from an act of non-sexual abuse of a child, any action in respect of vicarious liability or other associated liability, including any statutory or constitutional responsibility of the State or its agencies, should also be subject to the special limitations regime which we recommend in this Consultation Paper. [L] [para.4.45.]

#### ***Retrospective effect of statutes of limitation***

19. Section 3 of the *Statute of Limitations (Amendment) Act, 2000* preserves the jurisdiction of the courts “...to dismiss an action on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal.” We recommend that a similar provision be included in our proposals. [L] [paras.4.64, 4.65.]

20. The Commission recommends that the retrospective effect of the proposed legislation should be clearly expressed, thus avoiding ambiguity, eliminating the need to interpret whether the statute has retrospective effect, and overcoming the uncertainty of the application of presumptions or general maxims in this regard. [L] [para.4.70.]

21. The Commission recommends that it be clearly stated that the proposals in this Consultation Paper, for the reform of the law of limitation of actions arising from the non-sexual abuse of children, should apply to all causes of action which accrued before the coming into force of the proposed legislation, as well as causes of action accruing in the future. The recommendations will apply retrospectively to actions which are pending at the date of its enactment but not to cases which have been settled by agreement of the parties, or cases which have been determined by the delivery of final judgment, by arbitration or by any other recognised means. [L] [paras.4.78, 4.81, 4.85, 4.86.]

Appendix A: Table of the Law of Limitations of Other Jurisdictions (Overview of Chapter Two)*						
Jurisdiction	Legislation	Period of Limitation	Exceptions	Judicial Discretion	Long Stop	Special Regimes for Child Abuse
England & Wales	Limitation Act, 1980	3 years from date cause of action accrued (personal injuries due to negligence, nuisance or breach of duty), 6 years (torts)	Time postponed during 'disability'; 3 year limitation period from date of knowledge, <i>ie</i> discoverability	Judicial discretion to disapply limitation period in respect of personal injuries, subject to guidelines; Law Commission recommends removal of this discretion.	Law Commission proposes a long stop of 30 years in personal injury cases	No regime for child abuse, but proposals of the Law Commission recommend that discoverability could apply to cases of abuse.

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\* This Table aims to give an abbreviated overview of the law of the jurisdictions surveyed in Chapter Two. It is included for comparative purposes only. Note that the information contained in the Table may be inaccurate and over-simplify the complexities of this area of the law.

Scotland	Prescription and Limitation (Scotland) Act, 1973	3 years in respect of personal injuries, whatever the cause of action	Time extended until "reasonably practicable" for plaintiff to be aware of relevant facts	Discretion to extend time where 'equitable' to do so		
Ontario	Limitations Act, Revised Statutes of Ontario, 1990	4 years in respect of assault, battery, wounding or imprisonment	Time postponed during 'disability'			<p>Law Reform Commission recommend no limitation periods in the following circumstances:</p> <ol style="list-style-type: none"> <li>1. cases of sexual abuse, where there was a relationship of trust/dependency</li> <li>2. in cases of sexual abuse, where there was no trust/dependency</li> </ol> <p>a presumption of incapacity;</p>



							3. in cases of non-sexual abuse, where there was trust/dependency there is a presumption of incapacity
Saskatchewan	Limitation of Actions Act, RSS 1978, as amended by the Limitation of Actions Amendment Act, 1993		Time postponed during 'disability'				No limitation period for sexual abuse cases, or non-sexual abuse which occurred in a situation of trust/dependency

Prince Edward Island	Statute of Limitations Act, 1988, as amended by Statute of Limitations Act, 1992	2 years for trespass, assault, battery, wounding, or other injury arising from an unlawful act or from negligence	Time postponed during 'disability'			In cases of sexual abuse, time begins to run when the plaintiff can understand the injuries and recognise the effects of the abuse
British Columbia	Limitation Act 1979; Limitation Amendment Act, 1992; Limitation Act, 1996	2 years	Time postponed during 'disability'; time postponed until reasonable date of knowledge		Long stop of 30 years (six years in case of medical negligence)	No limitation periods in cases of sexual abuse

Newfound-land	Limitations Act, 1995	2 years (personal injuries), 6 years (torts)	Time postponed during 'disability'; discoverability test in respect of personal injuries (2 years from date of discovery)		Long stop of 10 years if discoverability applies, 30 year long stop in all cases	No limitation period in cases of sexual abuse, where there was relationship of trust/dependency/authority
Alberta	Limitations Act, 1996		Time postponed during 'disability'; 2 years from date of discoverability, with possible extension for 'functional disability'.	No judicial discretion	10 years from discovery of cause of action or date act or omission occurred	Limitations suspended during 'disability'. In the case of child sexual abuse, limitations suspended until age of majority
Nova Scotia	Limitations of Actions Act, RSNS 1989	2 years for actions for trespass	Time postponed during 'disability'	Judicial discretion to disapply limitation periods in respect of tort actions, where equitable to do so, subject to certain guidelines		In sexual abuse cases, from time the plaintiff becomes aware of injury/harm, the causal connection and is reasonably capable of litigating, has 1 year to take action

Western Australia	Limitation Act, 1935	6 years (negligence actions); 4 years (trespass to the person)	Time postponed during 'disability'; proposal of Law Reform Commission that time be postponed until 3 years from date of discoverability	Law Reform Commission proposes a narrow discretion to extend time in appropriate cases	Law Reform Commission proposes long stop of 15 years	
Queensland	Limitations of Actions Act, 1974	3 years (personal injuries, due to negligence, trespass, nuisance, breach of duty)	Time postponed during 'disability'; Law Reform Commission proposes time be postponed until 3 years from date of discoverability	Limited judicial discretion to extend time to one year from date of discoverability based on the 'means of knowledge' of the plaintiff; Law Reform Commission proposes a more general discretion to extend time in appropriate cases	Law Reform Commission proposes long stop of 15 years	No special regime, but Law Reform Commission proposes the judicial discretion would deal with cases of sexual abuse, under the guidelines laid down by the Commission
Victoria	Limitations of Actions Act. 1958; Limitation of Actions (Personal Injury	6 years (personal injuries due to negligence, nuisance, breach of	Time postponed during 'disability'; in the case of personal injuries caused by disease or disorder, limitation period is 6 years from date of	There is judicial discretion to extend time where 'just and reasonable' (only for causes of action accrued after May 1977)		

	Claims) Act, 1983	duty)	awareness			
Tasmania	Limitations Act, 1974	3 years (personal injuries), 6 years (torts)	Time postponed during 'disability'	Judicial discretion to extend limitation period for up to 3 years, where just and reasonable		
New South Wales	Limitation Act, 1969; Limitation Amendment Act, 1990	3 years (personal injuries due to negligence, nuisance, breach of duty), 6 years (torts)	Time postponed during 'disability'	In the case of personal injuries, judicial discretion to extend for 5 years, if just and reasonable, can subject to guidelines; can extend indefinitely in the case of latent damage		
Northern Territory	Limitation Act, 1981	3 years for actions in tort	Time postponed during 'disability'; extension of 1 year from discovery in the case of latent damage	Discretion to extend limitation period for 12 months as court thinks fit, if plaintiff becomes aware of material facts later than 12 months before the expiry of the limitation period		

South Australia	Limitation of Actions Act, 1936	3 years (personal injuries), 6 years (torts)	Time postponed during 'disability'; extension of 1 year from discovery in the case of latent damage	Discretion to extend limitation period for 12 months as justice of the case requires, if plaintiff becomes aware of material facts later than 12 months before the expiry of the limitation period		
Australian Capital Territory	Limitation Ordinance, 1985	6 years (torts)	Time postponed during 'disability'	In the case of personal injuries, extension possible where just and reasonable, subject to the particular factors listed in the Act		
New Zealand	Limitation Act, 1950	2 years (personal injuries), 6 years (torts)	Can be extended within 6 years of accrual of cause of action. Law Reform Commission proposes an extension from the date of knowledge		Law Reform Commission proposes long stop of 15 years	Courts have applied the discoverability test to cases of child sexual abuse (S. v. G. [1995] 3 NZLR 681; H. v. R. [1996] 1 NZLR 299). However, there is controversy in this regard (T. v. H. [1995] 3 NZLR 37).



## The Law Reform Commission

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