BEYOND ABUSE
ADVOCACY SUPPORT JUSTICE

Dr David Honey MLA
Chair
Community Development and Justice Standing Committee

Inquiry into the options available to survivors of institutional child sexual abuse in Western Australia who are seeking justice

Dear Chair and Committee

Thank you for the opportunity to make a submission on this important issue.

About Beyond Abuse

Beyond Abuse is a registered charity. For over twenty years we have provided support to victims of child abuse across Australia, including Western Australia, in particular victims of child sexual abuse in institutional contexts. Beyond Abuse operates a Peer to Peer program, as well as providing support with reporting to police, accessing health care and navigating the justice system (criminal and civil). Beyond Abuse operates a Multi-Disciplinary Team model including medical practitioner, psychologist and case managers.

As well, Beyond Abuse works with governments and institutions to advocate for improved legislation and policies for child protection and to improve the rights of victim/survivors of abuse. Beyond Abuse has been active with other survivors and organisations to advocate for the abolition of statutory limitation periods and also to allow a court to set aside an unjust past settlement. We are very familiar with the issues that the Committee are examining including the conduct of institutions during litigation and redress proceedings including misusing (or threatened) stay of proceedings applications.

We make frequent media appearances to provide a voice for survivors.

Impact of the *Civil Liability Legislation Amendment Act (Child Sexual Abuse Actions) Act 2018*

Stay of proceedings – institutions exploiting loopholes (they have caused)

Beyond Abuse applauds legislation to permanently abolish statutory limitation periods for actions arising from child abuse.

Beyond Abuse also applauds legislation that allows a court to set aside an unjust past settlement in cases of child abuse.

These laws have brought renewed access to justice for many survivors of child abuse and this must be remembered during any analysis of the current conduct of institutions who seek to exploit new loopholes. However, too many victims are still being trapped by stays.

During the Royal Commission into Institutional Responses to Child Sexual Abuse a number of stakeholders identified to the Royal Commission that once statutory limitation periods were removed the institutions would retreat to another battle line – and 'stays of proceedings' were identified as the probable refuge for the institutions to seek to hide.

Beyond Abuse supports legislation that either prohibits – or severely limits and restricts – the availability of making applications for permanent stays of proceedings by institutional offenders of child abuse.

Beyond Abuse acknowledges the legal ideology that underpins the existence of a court's power to stay a proceeding (either temporarily or permanently) in order to prevent injustice in certain instances. We are alert to the reasoning and legal virtues of such provisions in Australia's legal systems.

We acknowledge that removing or limiting such power would be a unique action. Beyond Abuse believes that such unique action is justified because the mischief the law is seeking to remedy here is also unique.

With appropriate safeguards, such as making it very clearly specific and narrow in the legislation that this only applies to cases of institutional child abuse occurring prior to the commencement of the legislation, it would be appropriate for the Western Australian Parliament to legislate to prohibit institutional defendants from seeking permanent stay of proceedings in certain instances.

For example:

- Where the institution is the cause of the passage of time;
- Where conduct of the institution has contributed to the delay in the victim bringing an action or where laws prevented the victim from bringing an action;
- Where evidence or a witness is unavailable (deceased or incompetent) – where the institutional conduct caused or contributed to the action not being brought while the offender was alive or competent.

After all, if the legal principle for having stays of proceedings is to *prevent* injustice, at the present time the conduct of institutions (yet again) is abusing stay of proceedings to *cause* injustice.

For this reason it would be reasonable and proportionate for the Parliament to take the otherwise unusual step of legislating to limit the availability of this defence in these cases.

A safeguard that may contribute to the proportionality of removing or limiting availability of this defence would be to reference that the removal or limit only applies to actions arising from abuse occurring *prior* to commencement of the new legislation. The reason this may be a reasonable safeguard is because it may be that the majority of cases where there are grounds for a stay are cases where the abuse has happened in the past few decades. It may be that for cases of child abuse that occur moving forward, society does not see the same delays in reporting or delays in bringing an action, due to increased social openness and support for reporting abuse, so usual grounds for a stay may be less likely to exist.

In other words, while the remedy proposed (removing or significantly reducing the availability of stay of proceedings to institutional defendants) may be considered substantial, it can still be considered appropriate because the mischief it is remedying is itself substantial and requires a substantial remedy, and the remedy can be 'ring fenced' to prevent from unintended consequences or over-reach.

It is acknowledged that the Royal Commission recommended to preserve stays but the Parliament is not bound to slavishly follow the Royal Commission if it has new evidence to the contrary – the current conduct of institutions has occurred *after* the closure of the national Royal Commission and so its recommendations at that time cannot necessarily be taken to be completely applicable to an analysis of conduct occurring that it was not aware of at the time of making its recommendations.

Example of draft reform:

Please see attached example of what draft legislation may look like.

In Queensland in 2016 a child abuse survivor worked with Independent Member of Parliament Mr Rob Pyne MP to produce a draft bill which included provision to limit the scope of institutions' options for applying for permanent stays of proceedings.

It turns out that survivor was prescient of the current problem as they understood the culture of institutions who will hide behind any legal loophole they can, regardless of the morality or ethics of using certain defence tactics.

Sadly the Queensland Parliament did not pass that draft into law (for various political reasons at the time). The draft is provided now to the Committee and the Western Australian Parliament as a starting point to work from.

Likely, there will be elements that could benefit from being changed to meet current Western Australian requirements but at least it is an example of a starting point in this space and an opportunity for Western Australia to take and build upon and improve.

It shows what reform in this space might look like. It is possible.

Physical Abuse

The Western Australian legislation only refers to 'sexual' abuse of a child. It does not include physical abuse. Western Australia is the only jurisdiction to make this distinction.

There were children in Western Australian institutions such as orphanages and religious run orders who were severely and horribly physically assaulted over and over again.

Every other jurisdiction has legislation to abolish time limits and set aside past unjust settlements and they have applied these laws to sexual abuse, physical or serious physical abuse and associated or connected psychological abuse.

Please see attached matrix of the legislation nationally.

There is no sound reason for Western Australia to continue to be the outlier on this matter.

The Royal Commission even recommended that State and Territory legislation go beyond just the sexual abuse – they noted in their final report that their narrow reference to sexual abuse was legally necessary by the Letters Patent which only tasked them to examine sexual abuse but that in the course of the hearings they had identified similar problems in relation to physical abuse. They urged governments to extend the lessons learnt with sexual abuse and make reforms for *all forms* of child abuse.

Beyond Abuse supports amendments to the Western Australian legislation to include all forms of child abuse, for example to include physical (or 'serious physical') abuse.

Court lists

Beyond Abuse supports the Western Australian Court having a dedicated institutional child abuse court list, if an analysis of Court resources and the statistics on the number of applications prove this to be advisable.

Effectiveness of Western Australia's support of the National Redress Scheme

Beyond Abuse acknowledges the release of the 'Kruk Report'.

The maximum compensation under the scheme should be the $200 000 recommended by the Royal Commission.

The reduction to $150 000 was arbitrary and the product of inappropriate collusion between the Catholic Church and the federal government at the time. For this reason it continues to be a slap in the face for survivors.

Given the tiny amount of compensation (when compared to a life time of suffering, lack of health care and impact on education and earning caused by the abuse) offered under the NRS, the amounts should *not* morally be reduced by any prior payment.

The Royal Commission recommended that the NRS be 'survivor focussed'. In this case, if amounts are to be reduced by any prior payment, only the money actually received by the survivor should be taken into consideration and *not* any amounts paid to lawyers or refunded to Medicare out of a settlement quantum.

Failure of the NRS to offer a fair option risks making the scheme irrelevant to some survivors who will be required to seek full compensatory damages via litigation.

<u>Health Care</u>

Beyond Abuse supports access to health care as the number one priority for survivors.

The power of any compensation or redress is not the dollar figure but what the money can achieve for the survivor: housing security, access to education remediation or the ability to provide for their own children, and access to appropriate and trauma informed *health care*, often for the first time in a survivors life.

It is vital to be able to access maintenance therapy, appointments, and medications.

Currently the token amount paid for health care under the NRS does not cover one year of a survivor's health care costs if they require regular psychiatrist appointments, psychologist appointments or similar.

The health care payment under the NRS does not cover one week of inpatient care in a private trauma / PTSD clinic.

Beyond Abuse supports a redress or compensation framework that properly puts health care at the front and centre of decision making.

Beyond Abuse would support a 'Survivors White Card' similar to the Defence Veterans White Card providing access to priority trauma care on a non-liability basis.

Resourcing and provision of services to support survivors in whichever path they take

Advocacy organisations are always stretched and need more resources to undertake their functions to deliver support to survivors of abuse. There is currently not enough funding being received to deliver these services.

By contrast the churches who abuse children receive millions of dollars from the tax payers every year in:

- Tax free status and subsidies
- Gifting and land from the Crown
- Free or reduced Council rates
- Direct funding from Commonwealth and State governments for wealthy church private schools and private hospitals
- Awarding of government tenders to church branded community service roles
- Funding of chaplains in public schools

Churches have acted like organised crime networks in the perpetrating of abuse (networked offending including perpetrators 'sharing' victims including across state borders – eg Church of England Boys Society) and the active role of senior executive leaders in the concealment of offending and protection of offenders.

Institutional liability in such cases is not simply a matter of legal vicarious liability of an unfortunate hapless employer – in far too many cases the institution was knowingly complicit in the offending.

Organisations like Beyond Abuse are left to pick up the broken pieces of damaged lives caused by the criminal misconduct of churches. Yet the churches get millions in funding and organisations such as ours do our work on a shoe-string budget.

It is heartbreaking if we do not have the resources to support a survivor in crisis or through their journey. So instead of turning them away, volunteers give more of their time, energy and commitment.

It would be appreciated if the government could levy a tax on the churches to fund this role for the foreseeable future. If the Catholic Church, Anglican Church, Adventist, Salvation Army and others paid a levy of just 1 per cent of their net wealth every year to the government to be distributed to organisations like Beyond Abuse, we would be able to provide the services that survivors deserve.

Other options to provide justice, resolution and / or compensation to survivors and their families, including lessons learnt from other jurisdictions.

See our comments above regarding health care.

Beyond Abuse supports increased focus on ensuring access to health care for survivors. It is health care that improves lives. Payment of money in the absence of access to health care does not lead to the same improvements as payment of money with increased access to health care.

The federal jurisdiction in its approach to Veterans is an example. They provide a Defence White Card (different from the DVA Gold Card for veterans of active service) which provides access to mental health treatment on a non-liability basis, including whether or not Defence service was the cause of the mental health issues. This program is intended to increase access to appropriate health care while decreasing adversarial litigation costs.

Presently victims who are not provided with targeted trauma care will fall back on the Medicare / public health system. That system is already over loaded and responds to mental health on a 'crisis response' model rather than preventative care model, which ultimately is of limited benefit to the survivor and their family, the community and the tax payer. If the same money was differently spent, it might likely result in superior outcomes.

As well, in some instances of extreme abuse (including orphans in Western Australian, child migrants and Indigenous Australians) there is multi-generational deficit caused by the abuse of the child. This means the impact continues into the lives of the survivor's children.

Defence provides for widows and family of serving members. There are parallels with this and with victims of institutional abuse in Western Australia such that it would be appropriate for there to be inter-generational support for example education assistance for children of survivors of abuse.

In the absence of any formal schemes (government, institutional) it is left up to survivors to fight for such reparations in the Court system, which by nature is adversarial, expensive and stressful and sometimes not fit for purpose.

Money spent on legal proceedings (for plaintiffs or defendants) is money that could have been better directed towards positive programs and delivery of outcomes.

Thank you for the opportunity to make a submission on this vital matter.

We would like to make a presentation to any Committee hearings to further present in support of improving balanced and sustainable laws and policies to address the dark chapter of Australia's recent past in abusing children so we may all heal moving forward.

Yours sincerely

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Attached:

- Example of draft bill to remove or reduce availability of 'stay of proceedings' for institutional offenders / defendants in certain circumstances

- Matrix of the national reforms – showing Western Australia remains out of touch re definition of abuse

Jurisdiction	Recommendations 85 – 88 Removing time limits	Recommendations 89 – 94 Duty of Institutions	Setting aside past unjust settlements and judgements	Case Law – setting aside past settlements	Defining Child Abuse (all forms or only 'sexual')
Queensland	Limitation of Actions Act 1974 - s11A	Civil Liability Act 2003 CH2, Pt2A, s33A-33Q	Limitation of Actions Act 1974 S48(5A)	TRG v The Board of Trustees of the Brisbane Grammar School [2020] QCA 190	Sexual, Serious Physical associated psychological
Northern Territory	Limitation Act 1981 - s5A	Personal Injuries (Liabilities and Damages) Act 2003, Part 3A	Limitation Act 1981 s53(2) and s54	*Pending*	Sexual, Serious Physical associated psychological
Western Australia	Limitation Act 2005 - s6A	Civil Liability Act 2002 Part 2A, s15A-15M	Limitation Act 2005 Part 7 – ss89-92	JAS v Christian Brothers [2018] WADC169 LAWRENCE v Christian Brothers [2020] WADC27 ARA v Perth Diocesan Trustees [2020] WASC188 WPM v Christian Brothers [2020] WADC112	**Sexual only**
Victoria	Limitation of Actions Act 1958 Par IIA Division 5 s27O – 27R	Wrongs Act 1958 Part XIII – ss88-93 Legal Identity of Defendants (Organisational Child Abuse) Act 2018	Limitation of Actions Act 1958 s27O – 27R	WCB v Diocese of Sale (No 2) [2020] VSC 639 Diocese of Sale v WCB [2020] VSCA 328 O'Connor v Comensoli [2022] VSC 313	Sexual, Physical and associated psychological
Tasmania	Limitation Act 1974 s5B	Civil Liability Act 2002 Part 10C s49C-49S	Limitation Act 1974 s5C	Significant out of court settlements: Anglican Church Tasmania Tasmanian Government ***Pending JTS v Anglican Diocese Tas***	Sexual, Serious/Physical and associated psychological
New South Wales	Limitation Act 1969 s6A	Civil Liability Act 2002 Part 1B, s6A-6Q	Civil Liability Act 2002 Part 1C	*Pending*	Sexual, Serious Physical, connected other
South Australia	Limitation of Actions Act 1936 s3A	Civil Liability Act 1936 Part 7A	Civil Liability Act 1936 Part 7B	*Pending*	Sexual, Serious Physical associated psychological
Australian Capital Territory	Limitation Act 1985 s21C	Civil Law (Wrongs) Act 2002 s114	Civil Law (Wrongs) Act 2002 Part 8A.1-8A.3 s114A – 114M	*Pending*	Sexual and Physical

Example of draft bill

to address issue of institutional tactic of inappropriate applications for permanent stay of proceedings in child abuse cases

This is the wording of Queensland draft bill in 2016. It is available to Western Australia as a starting point for drafting appropriate legislation in Western Australia. It addresses issues such as the unavailability of a witness (eg death of a perpetrator), particular where that death has occurred during a period of delayed reporting of abuse or delayed institutional response due to the conduct and culture of institutions concealing abuse.

Permanent stay or dismissal of child abuse proceeding

(1) This section applies to a proceeding if—

(a) the proceeding is brought against an institution (the ***defendant***) for a personal injury resulting from child abuse; and

(b) one or more of the following apply—

(i) acts or omissions of the defendant in the proceeding caused or contributed to delay in the start of the proceeding;

(ii) an inquiry has made a finding that the child abuse happened, or the defendant is liable for the child abuse;

(iii) the defendant has made an apology for the child abuse, or a circumstance related to the child abuse;

(iv) the defendant has otherwise admitted or acknowledged, either expressly or impliedly, the child abuse, or a circumstance related to the child abuse, happened;

(v) the defendant has made an express or implied admission of liability for the child abuse.

(2) Despite any other Act, law or rule of law, the following are not grounds on which the court may permanently stay or dismiss the proceeding—

(a) the period of time that has elapsed between the cause of action and the start of the proceeding;

(b) if subsection (1)(b)(iii) to (v) applies—the tendency of the period of time, or circumstances caused by or related to the period of time, to prevent, or make it difficult for, the defendant to deny or disprove admitted issues.

Examples of circumstances caused by or related to the period of time—
the loss of evidence or unavailability of witnesses

(3) Subsection (2) does not apply if the plaintiff in the proceeding delayed the start of the proceeding to prejudice the defendant or the fair trial of the proceeding.

(4) In this section—

admitted issue means—

(a) for an apology mentioned in subsection (1)(b)(iii)—the happening of any act, omission or other thing apologised for; or

(b) for an admission or acknowledgment mentioned in subsection (1)(b)(iv)—the happening of any act, omission or other thing admitted or acknowledged; or

(c) for an admission mentioned in subsection (1)(b)(v)—

(i) the liability for the child abuse; and

(ii) the happening of any act, omission or other thing admitted, either expressly or impliedly.

apology, in relation to child abuse, means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with the child abuse, whether or not the apology admits or implies an admission of liability in relation to the child abuse.

child abuse means any of the following perpetrated in relation to an individual while the individual is a child—

(a) sexual abuse;

(b) serious physical abuse;

(c) any other abuse (***connected abuse***) perpetrated in connection with sexual abuse or serious physical abuse of the child, whether or not the connected abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse.

inquiry means a Royal Commission, commission or committee of inquiry, or a similar body.

institution means any of the following, however described and whether or not incorporated—

(a) a public or private body, agency, association, club, institution or organisation;

(b) any other entity or group of entities.