(a) the role, if any, of the Commonwealth Government, its policies and practices in contributing to forced adoptions; and (b) the potential role of the Commonwealth in developing a national framework to assist states and territories to address the consequences for the mothers, their families and children who were subject to forced adoption policies.

Evidence of legal proof in Attachment of Name Withheld Number 72

I am submitting some case histories of past Judges like Justice Michael Kirby and these are some of the parts of these cases that he presided in his duties of a high court Judge of great respect and a man who new the law and was so respected by his peers and High Counsels. Michael Kirby has been one of the greatest legal mines that have come out of Australia. I have heard that from many a law firm singing his praise.

Brisbane South Regional Health Authority v Taylor[49]

1. Lord Griffiths in *Donovan v Gwentoys Ltd*, explains the general rule behind the limitation bar "The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is, a claim with which he never expected to have to deal." The plaintiff submits that the defendants must have expected they would have to face this claim because they were acting contrary to the provisions set out in the *Child Welfare Act 1939* (NSW) which stipulated that no coercion or duress should be used in gaining a mother's consent to relinquish her child. The plaintiff submits that coercion was made out because the medical staff and social workers made false representations to the plaintiff and the plaintiff's family, with the intent of securing her child for adoption, and as stated by Justice Chisholm, up until the consent was signed the mother was the sole guardian of her child and to make false statements to the mother and her family amounted to fraud, because as Chisholm explains they are " trying to get something by a deceitful proposition (Report 21, 2000, p. 184). The plaintiff further submits that by pushing adoption onto her constituted duress (Chisholm, Report 21, 2000, p. 184) hence violating her rights under the *Child Welfare Act 1939.(Justice Richard Chisholm Family Law Court Judge. (Report made reference) from the 1996-1998 NSW Releasing the Past Inquiry into past adoption practices Final Report December 2000.*

I the plaintiff further submits that I had the same rights as any other parent and as such I state that by removing my child and placing the child in a room away from me amounted to false imprisonment of the child as explained by Justice Chisholm, who also used the word kidnap to describe the removal of babies by such deceptive means. (Report 22, Dec 2000,p. 184.) Not allowing the mother to have access to her baby constituted coercion and violated both the 1939 and 1965 *Adoption of Children Acts*

The plaintiff submits that the defendants should have expected her claim when they did not warn her of the "psychological consequences" of relinquishment and violated prescribed procedures. It was the Government policy of the day and clearly set out in the Government printed booklet 'Child Welfare in New South Wales' 1959, p. 30 and further

outlined by the Minister of Child Welfare (Bridges, the Hon. C.A.F. Legislative Council, 1965 Hansard p. 3056).

2. It was stated i**n** *Sola Optical Australia Pty Ltd v Mills*[51] [52]: "[T]he broad purpose of the Act was ... to eliminate the injustice a prospective plaintiff might suffer by reason of the imposition of a rigid time limit within which an action was to be commenced." The plaintiff submits that as she was a minor at the time this fact should be given relevant weight, as happens in the cases for instance of minors who have been sexually abused, but are allowed to bring their cases forward decades later. The plaintiff further submits that the power imbalance between her and the system was comparable to the power imbalance between the child and its abuser. And just as victims of child sexual assault are silenced by their trauma so it has been medically proven (Rickarby, 1998) that the plaintiff was silenced by her trauma and the attendant memory loss, only having fleeting images of a memory that was too painful for her to fully recollect or entertain.

3. The plaintiff submits as I do have my medical files in my possession, that because the nature of this case is such that it would have always depended upon evidence supplied by the plaintiff's medical files, not on conversations or the memory of individuals, and also the documented evidence of the effect of the trauma on her life along with the medical evidence of her present medical condition the plaintiff's submission is that the defendants are not in any worse position now than they were at the end of the limitation period, and as a consequence there is not any relevant prejudice, because if the prejudice has not increased, the only prejudice that there is, is up to the expiration of the limitation period and, the plaintiff submits, on the proper interpretation of the statute, that prejudice is not relevant. Because it has to be prejudice caused by an extension of the limitation period.

4. In the *Williams'* Case, the New South Wales Court of Appeal was called on to consider whether it was just and reasonable to extend the limitation period under section 60G of the New South Wales Act. There the court granted an extension of time to enable the plaintiff to litigate claims almost 50 years after the relevant events and almost 30 years after they had been statute barred. In the present case the time is long, although not as long, but it is the plaintiff's submission that if there is any prejudice, and it has already been submitted that there is no real prejudice, it is not great prejudice to the defendant, as the various medical staff, which are still in practice, can easily be located. As well as the defendant has access to the medical files and in any case it is not certain that the medical staff and social workers would have had any independent recollection of the plaintiff at the end of the limitation period anyway.

5. In the judgment of his Honour Justice Kirby in the *William's* case, the necessity to look at the question of prejudice both from the point of view of the defendant and the plaintiff is addressed,

> "One looks at the question of prejudice from the defendant's point of view in terms of the loss or the ability to defend himself. One looks at the question of prejudice from the plaintiff's point of view from the point of the view of the loss of the chance to run a case which may be meritorious".

In weighing the extent of that prejudice to the plaintiff it is, in our respectful submission, legitimate to have regard to material which may suggest objectively that that prejudice is not perhaps particularly serious, The plaintiff submits that she will be prejudiced though if she is not permitted to have an extension of time to proceed with her action.

The plaintiff submits the she was a minor at the time, that as far as she knew the medical staff were acting legally, this assumption was based on her observation that the entire medical staff were acting in a uniform manner in a public hospital and in concert with the staff at Scarba House. This observation combined with the post traumatic stress disorder the plaintiff suffered and dissociative disorder as a result of the trauma of being separated from her child caused her the loss of the chance to run a case which may have been meritorious and which is the prejudice against the plaintiff that must be weighed against the defendant's plaintiff.

-

-

Brisbane South Regional Health Authority v Taylor

Yes, and it does that by reference to a judicial discretion which enables the individual case to be dealt with on its merits, and so that one can say that in relation to this case, in relation, for example, to Kosky's Case, a decision of the Victorian Supreme Court, where the nature of the claim was a claim for negligence in the administration of a blood transfusion, now in that case, the decision went on the basis that all the evidence required in relation to making that claim, or nearly all of it, was documentary and was available. The lapse of time did not make any difference to the probability of a fair trial.

Your Honour, in a decision in the New South Wales Court of Appeal in Williams, which is a case in my learned friend's list which we will not take you to, but in the judgment of his Honour Justice Kirby, the necessity to look at the question of prejudice both from the point of view of the defendant and the plaintiff is addressed. **One looks at the question of prejudice from the defendant's point of view in terms of the loss or the ability to defend himself. One looks at the question of prejudice from the plaintiff's point of view from the point of the view of the loss of the chance to run a case which may be meritorious.** In weighing the extent of that prejudice to the plaintiff it is, in our respectful submission, legitimate to have regard to material which may suggest objectively that that prejudice is not perhaps particularly serious, or - - -

DAWSON J: The difficulty with that is that the section itself seems to suggest the reason why the discretion, if there is discretion, should be exercised in favour of the applicant because the applicant has to establish that a material fact of decisive character was not within the means of her knowledge.
KIRBY J: - - - and that may be no one's fault, in the sense it may not have been the plaintiff's fault or the defendant's fault, it just does, yet at that time it would be unthinkable that the defendant should be put to trial on the matter and that, therefore, at

the end of the preconditions you come to a question of whether or not, in the justice of a particular case, you can exercise a discretion.
MR KEANE: Yes, your Honour, that the court should sit in judgment of a case **which is about a conversation** - - - (only a conversation)
KIRBY J: Is there an absolute bar on the statute of twenty years or something like that?
MR KEANE: No.
KIRBY J: So long as it is something of a material fact that we did not know and so long as you act within speed of knowing it, then you can come back in an unlimited time.
MR KEANE: Yes, and you can ask the court to lift the bar.
MS WILSON: Well, in theory there are cases where one can infer prejudice from a lapse in time, but it is my submission that this is not one of those cases *****because the nature of the case is such that it would always have depended upon the doctor's notes of the consultation.**

MS WILSON: That may be so, your Honour, but in a case such as this, **where it has not been shown that the defendant is in any worse position now than it was at the end of the limitation period, then, in my submission, there is not any relevant prejudice, because if the prejudice has not increased, the only prejudice that there is up to the expiration of the limitation period and, in my submission, on the proper interpretation of the statute, that prejudice is not relevant. So that it has to be prejudice caused by an extension of the limitation period.**
The South Australian legislation is different again. I would refer your Honours to the decision in Napolitano v Coyle. There, one of the alternative preconditions to an order extending the limitation period is that facts material to the plaintiff's case were not ascertained by him until some time within the last year of the limitation period. But, unlike Queensland, there is no need to show that those facts were not within his means of knowledge until then. Napolitano v Coyle is a decision of Chief Justice Bray. At page 572, in considering prejudice to the defendant, his Honour compared the defendant's position at the time of the application with that in the last year of the limitation period. So that he applied a test similar to the one applied by the majority in the present case.
My learned friend referred to Williams' Case, where the New South Wales Court of Appeal was called on to consider whether it was just and reasonable to extend the limitation period under section 60G of the New South Wales Act. There the court granted an extension of time to enable the plaintiff to litigate claims almost 50 years after the relevant events and almost 30 years after they have been statute barred.
In the present case the time is long, although not as long, but it is my submission that if there is any prejudice, and I have submitted that there is no real prejudice, it is not great prejudice to the defendant, because he may still be able to locate Dr Chang. It has his notes, and it is unlikely that he would ever have had any independent recollection of the consultation.
KIRBY J: We would, of course, only exercise our discretion, if we show an error on the part of the Court of Appeal, if we are of the view that the primary judge had erred in the exercise of his discretion.
MS WILSON: Yes, you're Honour. And, it is my submission that he did err, because he did not go through this process of evaluation and weighing against competing factors.

Having found prejudice that was the end of the matter for him and, in my submission that was wrong.
Where prejudice is alleged by reason of the effluxion of time, the position is as stated by Gowans J in Cowie v State Electricity Commission of Victoria[4] in a passage which was endorsed by Gibbs J in Campbell v United Pacific Transport Pty Ltd[5]: 1966] Qd R 465 at 474.
"It is for the respondent to place in evidence sufficient facts to lead the Court to the view that prejudice would be occasioned and it is then for the applicant to show that these facts do not amount to material prejudice."
In the District Court McLauchlan DCJ outlined the facts as they emerged from the material before him. He then referred to the judgment of Tadgell J in Kosky v Trustees of Sisters of Charity[6] which concerned an application for extension of time under the Limitation of Actions Act 1958 (Vic). Tadgell J referred to the discretion under the Victorian Act and continued [7]:
"There are no doubt some cases in which a lapse of 14 years from the time of allegedly negligent conduct until the commencement of an action in respect of it would of itself render a fair trial of the issues impossible or so unlikely that a trial ought not to be countenanced. In such a case it would presumably be right to refuse to make an order ... even if the applicant were otherwise entitled to ask for one."
New South Wales Law Reform Commission, Limitation of Actions for Personal Injury Claims, (1986) LRC 50 at 3.

In Donovan v Gwentoys Ltd[49], Lord Griffiths explained the general rule behind the limitation bar[50]:
"The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is, a claim with which he never expected to have to deal." (They must have assumed they would have to face this claim because they
On the other hand, this Court explained the purposes of provisions such as s 31 in Sola Optical Australia Pty Ltd v Mills[51] thus[52]:
"[T]he broad purpose of the Act was .... to eliminate the injustice a prospective plaintiff might suffer by reason of the imposition of a rigid time limit within which an action was to be commenced."
See for example s 60G(2) of the *Limitation Act* 1969 (NSW): cf Thelander v C D Townsend (Eng) Pty Ltd (1993) 32 NSWLR 358 at 359; Forbes v Davies [1994] Aust Torts R 61,392. See also s 48 of the Limitation of Actions Act 1936 (SA): cf Napolitano v Coyle (1977) 15 SASR 559 at 560-561.

It is unnecessary to explore the question whether the Court must explicitly weigh the suggested disadvantages to the applicant and the proposed defendant respectively, if an extension were refused or granted Williams v Minister (1994) 35 NSWLR 497 at 514; cf Napolitano v Coyle (1977) 15 SASR 559 at 571 per Bray CJ.

In adding to this also that as the mothers could not get hold of there evidence until some many many years later because of Government Laws then that is giving the people that corrupted the system a way of escape so to speak. They can not hide behind a law they committed that they knew all along that what they were doing was illegal and still

thought that one day no one would open the records or allowed the evidence to be seen by the birth mothers. This was well past the Statue of Limitation Times which is certainly not legal or lawful to the Childs mother. The laws did not change until in some cases 35 years later. Then the people that committed these atrocities start to say we are past the limitation period time. This is a disgrace to the humans that had to endue this for all theses years and beyond.