

CHAPTER 9

LEGAL ACTIONS AND LIMITATION PERIODS

The Catholic Church used their considerable influence to have the case heard in Western Australia where the Statute of Limitations was such that the case could not be heard. Such legal tactics by those responsible for the abuse and my loss of childhood only serve to heighten the negative impacts on my life and demonstrate the empty words of apology.¹

9.1 This chapter canvasses the legal options open to child migrants to pursue both criminal and civil actions arising from abuses suffered during their time in institutional care.

Legal options open to former child migrants

9.2 From the evidence the Committee received during its inquiry, it is clear that some former child migrants suffered criminal assaults both physical and sexual. At the time of the incidents, some children had no one in authority to report these crimes to and in some cases, when assaults were reported the children were not believed. One former child migrant noted:

Many did complain. Complaints were made to principals of institutions, to police and welfare workers when they escaped, to families who they spend weekends with and to employers when they had left the institutions. When returned to the institution after escaping, they were brutally flogged, sometimes publicly. And worst of all, no-one would ever believe them. No-one. This in itself was cruel.²

9.3 Another former child related an incident at Castledare:

He chased me across the paddock near Castledare with a piece of three by two. He caught me as I got through the fence and broke the piece of three by two on me. There were people building houses across the road who saw this. They rang up the child welfare department. The child welfare department came and got me the next day, and I have a document that says that I came in with an inch and a half split on my scalp. They asked me if this happened all the time. I said, 'It happens all the time,' and they just said they could not prosecute the brothers. They said, 'We couldn't take the brothers to court.' They knew that the children were getting beaten but were not prepared to do anything about it.³

1 Submission (Confidential).

2 Submission No.95, p.36.

3 *Committee Hansard*, 15.2.01, p.57.

9.4 The issue of pursuing legal remedies now, both criminal and civil, for these actions was raised in evidence. One of the concerns identified in the pursuit of civil proceeds for financial recompense was the implications of statutes of limitation.

Civil proceedings

9.5 Each Australian jurisdiction has a limitation statute setting out the rules governing the period of time in which a plaintiff must commence a civil proceeding. The prescribed limitation periods ranges from 3 to 6 years for tortious claims. An application to extend the limitation period may be made in all States and Territories. However, in Western Australia extensions are only possible in relation to asbestos claims. (A more detailed description of limitation periods is provided in Appendix 6.)

9.6 In the late 1990s at least two Australian jurisdictions reviewed their limitations statutes:

- Law Reform Commission of Western Australia – *Report on Limitation and Notice of Actions*, January 1997, and
- Queensland Law Reform Commission – *Review of the Limitation of Actions Act 1974* (Qld), Report No. 53, September 1998.

Both Law Reform Commissions made special reference to proceedings involving child sexual assault. The Queensland Law Reform Commission concluded that although adult survivors of childhood sexual abuse may, for reasons beyond their control be prevented from commencing proceedings within the general limitation period, such claims can be adequately provided for by the exercise of judicial discretion.⁴ The Western Australian Law Reform Commission recommended that there was no need to enact provisions dealing specifically with sexual abuse, or with sexual abuse by a person in a position of trust. The Commission considered that its general recommendations on extensions of limitation periods would ensure that plaintiffs in sexual abuse cases would not be unfairly defeated by the running of the limitation period and would make it possible for actions to be brought in Western Australia in circumstances in which they can be brought in other States, such as New South Wales and Victoria.⁵

9.7 In addition to civil proceedings for injury, proceedings to recover unpaid wages were canvassed in evidence. The Department of Immigration and Multicultural Affairs noted that such action would be subject to the exercise of the statutes of limitation. The Department also stated that most States have small claims tribunals or courts but that ‘the biggest impediment, is the time...The lack of evidence, people’s memory, the prejudice of the employer as well as the employee: those are the sorts of

4 Queensland Law Reform Commission, *Review of the Limitation of Actions Act 1974* (Qld), Report No.53, September 1998, p.160.

5 Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions*, Project No35, Part II, January 1997, p.238.

things that might be considered by a judge in determining whether to extend the time limitation. That is probably more significant for many of these things than just the normal jurisdiction of a small claims tribunal'.⁶ The Department's more detailed examination of this issue is provided in Appendix 6.

Criminal proceedings

9.8 In general, limitation statutes do not apply to criminal proceedings. Crimes acts and statutes dealing with summary jurisdiction usually set out the general time limits which govern those proceedings. The statutory period in which proceedings must be commenced differs between different offences and different jurisdictions. In general, a limitation period applies to minor or summary offences and a limitation period would not apply in the prosecution of indictable sexual offences. Further details are provided in Appendix 6.

Impact on actions

Criminal proceedings

9.9 Some criminal proceedings have been taken successfully against perpetrators. Broken Rites informed the Committee that in the past seven years, 79 former church members had been convicted of criminal activity mainly against children. These included some former child migrants. Those convicted included members of the Salvation Army and Anglican Church but the majority were members or former members of the Catholic Church.⁷

9.10 In Queensland, criminal prosecutions have been brought against alleged perpetrators of sexual assault which occurred at Neerkol in the 1960s. The Queensland Government stated 'prosecutions against Father John Durham have resulted in convictions which were overturned on appeal on technical grounds arising from instructions given to the jury by the trial judge. Moves for a new prosecution of Father Durham have resulted in a decision that he is no longer fit to plead.'⁸

9.11 While there have been successful prosecutions, former child migrants have found that criminal action does not always proceed. In September 1993, the Western Australian police announced that they were investigating complaints of alleged sexual abuse involving 18 (increased to 23) Christian Brothers. In November 1993, the Director of Public Prosecutions announced that no prosecutions would be instituted. The reasons given included 'the passage of time, "advanced years" of the persons accused, public interest, and (by inference) the unlikelihood of conviction'.⁹ One former child migrant told the Committee that:

6 *Committee Hansard*, 6.2.01, pp.24, 26 (DIMA).

7 *Committee Hansard*, 15.3.01, p.249 (Broken Rites).

8 Submission No.146, Additional Information, p.1 (Qld Government).

9 Gill, A, *Orphans of the Empire: the shocking story of child migration to Australia*, Random House, 1998, pp.757, 759.

I have attempted to lay assault charges, and not just assault but sexual abuse charges, on one Killer Doyle. After the failure of trying to get Murphy into court, because they claimed dementia, the DPP said the same thing was going to happen in the case of Doyle, so he said they were going to drop it. I pushed and pushed and pushed, because I was in Murphy's class...I only want the persons who damaged me. I was particularly annoyed because I could think of people like Doyle, and Angus is dead, and I could not do a thing about it. 'One at a time,' the person said to me. 'First Murphy and then Doyle,' and when the thing about Murphy failed, due to dementia or whatever they had claimed, they said they were no longer going to proceed with Doyle.¹⁰

9.12 Another former child migrant stated:

...we tried and we tried and we tried to get the police and the Director of Public Prosecutions to prosecute people, the Murphys and the Doyles and all the people that you have been hearing about. We tried and tried to get them to prosecute and they just point-blank refused. They were prosecuting people who were not Christian Brothers—there was a case at the time that we were trying to get Murphy prosecuted of an 87-year-old man who had abused his daughters...He was sent to jail, but when it came to Murphy, he was too old, and this was almost in the same month.¹¹

9.13 The failure of legal actions against perpetrators has resulted in much bitterness with one former child migrant declaring:

Change the laws so that filthy paedophiles and child bashers are brought to justice, and can't hide behind old age or frail health. They had no mercy on their victims. They deserve no mercy now, only justice. Statutes of limitations save paedophiles from facing justice.¹²

9.14 Broken Rites also told the Committee that some who had been abused in institutions were reluctant to approach the police:

My contact with a number of men is that when they have come out of the institution and they get into cars and start boozing they often run foul of the law as young men anyway—not all of them but a number of them. So they are very reluctant to go to the police even with a criminal matter. They just think it will turn on them. They are still carrying around this suspicion and this reverence for the organisation that sheltered the perpetrators.¹³

10 *Committee Hansard*, 15.2.01, pp.41-42.

11 *Committee Hansard*, 15.2.01, p.52.

12 Submission (Confidential).

13 *Committee Hansard*, 15.3.01, p.263 (Broken Rites).

Civil proceedings

9.15 Courts are able, in certain circumstances and for certain causes of action, to extend the limitation period. There is evidence that this has occurred in actions brought by children who had been in institutional care. In a case involving children in a Barnardos home in New South Wales, the judge made orders granting an extension of time for the plaintiff to bring an action and made a declaration that the limitation period had not expired.¹⁴

9.16 However, in Western Australia extensions to limitation periods only apply to asbestos claims. Evidence was received about the impact of limitation periods on actions brought against the Christian Brothers. In 1993 applications were made to the New South Wales Supreme Court to bring actions after the expiration of the limitation period. One witness noted:

We took the case to the Supreme Court in New South Wales, and the Christian Brothers fought...to get the case sent back to Western Australia, knowing very well that if it was sent back to Western Australia it would never be heard. The judge, Mr Justice Levine, ruled against the Christian Brothers. His words were that if the case was sent back our case would be, and I quote, 'dead in the water' and that the complainants 'forever could well be deprived even of the chance to seek a remedy. They could well be shut out.' We thought that we had won a great victory, that the case would be heard in New South Wales.

...the Christian Brothers appealed. The appeal was upheld by the appeals court. The case was sent back to Western Australia and, of course, that was it. It never even got off the ground because of the inflexible statute in Western Australia which meant that it could not be heard. It meant that those men were pressured to accept a settlement with the Christian Brothers, and many of those 200 got \$4,000 for years of the sort of treatments that you have heard about, the sexual abuse and all the other abuse they suffered. The most any of them got was \$25,000—I think there were about 30 who got \$25,000, and they were the ones who were considered to have been raped and brutally assaulted, the worst cases.¹⁵

9.17 In 1993, an application was also made to the Victorian Supreme Court on the basis that some of the former Western Australian child migrants now lived in Victoria. The defendant's application for a transfer of proceedings to Western Australia was successful. The Supreme Court of Western Australia held that the *Limitation Act 1935* (WA) applied.¹⁶

14 Submission No.50, Additional Information, 3.5.01 p.1 (Barnardos).

15 *Committee Hansard*, 15.2.01, pp.48-49.

16 Marfording, A, 'Access to justice for survivors of child sexual abuse', *Torts Law Journal*, 1997 (5) p.247.

9.18 Witnesses called for the statute of limitation to be changed in Western Australia, to allow the same possibility of extension as exists in other States.¹⁷ The International Association of Former Child Migrants & Their Families argued:

Changes should be made to the Statute of Limitation that presently permit the criminals who bashed and raped us in Australian institutions to dodge justice. This could be achieved through a short-term amnesty to deal with historical charges, or a permanent amendment to the legislation.¹⁸

9.19 In its report, the UK House of Commons Health Committee commented on the impact of statutes of limitation:

...we would expect the full weight of the law to be felt in cases where physical and sexual abuse against former child migrants can be proven. Courts should award the maximum possible damages when a conviction is obtained. We would like to see the Statutes of Limitation suspended in all cases related to the abuse of former child migrants.¹⁹

9.20 In its response to the British Government's response to the Health Committee report, the Commonwealth stated that 'neither State and Territory Governments, nor the Commonwealth Government has plans to alter their Statute of Limitations legislation'.²⁰

9.21 The Western Australian Department for Family and Children's Services indicated that there are no current plans to change the Limitation Act:

It would appear that any retrospective change to the Act would need to be treated with considerable caution both because of its effect on the general principle against retrospective legislation and its effect on the general principle of limitation periods in relation to individual cases. Any such legislation would also have to be carefully considered as it could lead to unfair results for those who have proceeded on the basis of the current provisions.²¹

9.22 The Committee has been told that there appears to be a continuing series of civil legal cases around Australia being prosecuted on a 'no win-no fee' basis as well

17 *Committee Hansard*, 15.3.01, p.222 (Dr Coldrey); *Committee Hansard*, 22.3.01, p.512 (Mr A Gill).

18 Submission No.129, p.41. (IAFCM&F).

19 House of Commons Health Committee Report of its Inquiry into the Welfare of Former British Child Migrants, paragraph 111.

20 Australian Government Response to the British Government Response to the Recommendations of the British House of Commons Health Committee's Report of its Inquiry into the Welfare of Former British Child Migrants, Recommendation: paragraph 111: compensation.

21 Submission No.135, p.15 (WA Department for Family and Children's Services).

as at least two Class Actions against particular religious orders.²² The Committee is unaware if any former child migrants are involved in these cases.

9.23 In evidence, Broken Rites also noted that there were also difficulties because of the cost of litigation and that the Catholic Church has been successfully able to argue that it is not a legal entity and that clergy are not employees.²³ Broken Rites also stated that when a civil action is initiated outside the Catholic Church's own processes:

then the game plan is to protect the church's estate and assets at any cost. Broken Rites is aware of a number of cases where the church has been prepared to pay massive legal costs in order to prevent the case ever going to a judgement, rather than meet the genuine needs of victims in a realistic way. Thus we have the record in Australia that no case seeking financial compensation for the psycho-social damage resulting from sexual abuse, has ever gone to a judgement in any court in Australia.²⁴

Conclusion

9.24 While some former child migrants do not wish to take civil action over incidents that occurred during their time in care, the Committee considers that there should not be legal impediments to those who wish to do so. The Committee has noted the comments of the Western Australian Department for Family and Children's Services. However, the Committee considers that the Western Australian Attorney-General should urgently review the recommendations of the Law Reform Commission of Western Australia Report on Limitation and Notice of Actions with a view to bringing the Western Australian law into line with other Australian jurisdictions.

Recommendation 29: That the Commonwealth Government urge the Attorney-General of Western Australia to urgently review the recommendations of the Law Reform Commission of Western Australia Report on Limitation and Notice of Actions with a view to bringing the Western Australian law into line with other Australian jurisdictions.

Settlements received by former child migrants from receiving agencies

Christian Brothers' settlement

9.25 In August 1993, legal action was begun in the Supreme Court of New South Wales against 21 respondents including the Commonwealth and Western Australian Government and Catholic Church defendants. Proceedings were eventually discontinued against all except the Christian Brothers. The plaintiffs were some 200 former students (mostly, but not all former child migrants) of the Christian Brothers' homes in Western Australia. They sought damages for physical and sexual abuse,

22 Submission No.57, Additional Information, 15.5.01, p.3 (Broken Rites).

23 *Committee Hansard*, 15.3.01, p.263 (Broken Rites).

24 Submission No.57, Additional Information, 15.5.01, p.4 (Broken Rites).

alleging neglect and failure in administration and supervision of the homes by the Christian Brothers' leadership.

9.26 The case involved some complex legal issues, including jurisdictional ones. While the Christian Brothers accepted that some individual Brothers had physically and sexually abused some of their students, they did not accept the accusation that there had been neglect or dereliction of duty at the level of the Order's administration.²⁵

9.27 In 1996 an out of court settlement was reached. The Christian Brothers contributed \$5 million, of which \$1.5 million went to legal costs. An independent trust was set up to administer the remaining \$3.5 million. Of that sum, a little over one-third was allocated in direct payments to certain plaintiffs who alleged sexual abuse and who could document serious psychological difficulties. The payments ranged from \$4,000 to \$25,000.²⁶ The rest of the funds are administered by the trust to provide a range of services and support to the plaintiffs including travel and counselling. While the Christian Brothers had reached a satisfactory, for them, settlement, it had been largely forced on them.

9.28 Mr Gill reported that in issuing details of the offer from the Christian Brothers, the legal firm acting for the plaintiffs, Slater and Gordon, pointed out the difficulties of proceeding further through the courts. These included the difficulties in the application for an extension of time under the New South Wales Limitation Act, the attempt by the Christian Brothers to transfer the proceedings to Western Australia where the claims would be statute barred under the Western Australian Limitation Act, whether the Christian Brothers today could be held accountable for the actions of their predecessors, and the time it would take to finalise the proceedings.²⁷

9.29 The vast majority of plaintiffs agreed to settle. The Western Australian VOICES organisation encouraged its members to accept the settlement but without any sense of gratitude. There remains some bitterness. One former child migrant stated that many felt betrayed by the out of court settlement and a justice system which proved unsympathetic to their plight.²⁸

Other settlements

9.30 Churches and charitable organisations have provided other settlements as a result of the commencement of legal action by victims and as a result of internal processes such as the Catholic Church's *Toward Healing* initiative. For example, the Christian Brothers had also made an out of court settlement with former residents of the St Vincent's Orphanage in South Melbourne. Part of the settlement involved a

25 Gill, A, *Orphans of the Empire*, pp.767, 778-82.

26 *Committee Hansard*, 15.2.01, p.49.

27 Gill, A, *Orphans of the Empire*, p.781.

28 Submission No.95, p.37.

confidentiality clause.²⁹ The Sisters of Mercy have also agreed to legal settlements with children who had been in their care.³⁰ The Salesians have made ex gratia payments of \$1,500 to some of those who had been in their care.³¹ In 2000, after mediation, Barnardos settled with the victims of abuse which occurred in one of its homes in the 1950s.³²

9.31 Broken Rites submitted that in relation to settlements, it supported the appointment of advocates for victims in their negotiations with churches and the provision of a community legal service which would specialise in these types of cases.



Mr John Hennessey at the Sydney hearing

29 Gill, p.784.

30 *Committee Hansard*, 22.3.01, p.484 (JLG).

31 Submission No.118, p.5.

32 Submission No.50, p.3 (Barnardos).

