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Justice Policy

Department of Justice

GPO Box 6

Sydney NSW 2001

By email: justice.policy@agd.nsw.gov.au

10 March 2015

Dear Sir/Madam

**Re: Limitation Periods in Civil Claims for Child Sexual Abuse**

People with Disability Australia welcomes the opportunity to respond to the NSW Department of Justice Discussion Paper regarding options to change the limitation periods in civil claims for cases concerning child sexual abuse.

In doing so we commend the NSW Government for taking a national leadership role in responding proactively to findings of the Royal Commission into Institutional Responses to Child Sexual Abuse as they relate to the effectiveness of the civil law to provide redress for survivors of child sexual abuse.

We encourage the NSW Government to strengthen this progressive approach by developing and implementing a Disability Justice Strategy to address other legislative impediments to accessing justice faced by survivors of sexual abuse, particularly those with disability. The South Australian Disability Justice Plan 2014-17 provides a useful model in this regard[[1]](#footnote-1) and we would welcome the opportunity to discuss this further.

For the reasons elaborated upon below, **PWDA supports Option A of the Discussion Paper – removal of limitation periods in claims for child sexual abuse.** We also support retrospectivity in claims following any amendment to the Limitation Act 1969 (NSW).

About People with Disability Australia

People with Disability Australia (PWDA) is a NSW and national peak disability rights, advocacy and representative organisation of and for all people with disability. We represent the interests of people with all kinds of disability, including psychosocial disability and mental illness acquired through trauma. We are a non-profit, non-government organisation.

PWDA’s primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.

We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.

Disability Support for the Royal Commission

PWDA is a Department of Social Services (DSS) funded service providing support to people with disability who may be affected by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Commission). We provide individual advocacy to people with disability who are effected including information, advice and support for individuals to decide whether to engage in the inquiries of the Commission, and support for people to tell their story to the Commission.

In addition, PWDA is rolling out a nationwide training program for people with disability, disability service providers and mainstream services to develop awareness of the sexual and human rights of people with disability, strengthen violence prevention strategies, and improve institutional responses to sexual abuse of people with disability. PWDA is also providing the Commission with policy advice regarding the key dynamics which make children with disability vulnerable to sexual abuse in institutional settings.

The particular vulnerability of children with disability

Children with disability are 3.4 times more likely to experience some form of violence than other children.[[2]](#footnote-2) They are also at a far higher risk of experiencing sexual abuse and although the actual prevalence is difficult to ascertain, some studies suggest that children with disability are at a risk 4 times greater than other children.[[3]](#footnote-3) The most significant contributing factors to this heightened risk are:

1. the continued provision of disability services to children and adults with disability within congregate, isolated, and segregated settings such as residential institutions, group homes, respite centres, day services and special schools;
2. the scant access to trustworthy, supportive, and effective reporting and complaints processes that institutionalised disability service provision creates;
3. a lack of human rights based oversight mechanisms monitoring the rights of people with disability in institutional settings and disability services; and
4. continued barriers to participating in the criminal justice system for people with disability.

These factors contribute to the disempowerment of children and adults with disability by creating dependence on service providers, limiting avenues of disclosure and redress, and curtailing participation and inclusion in the community.

Through over 30 years of advocating for people with disability seeking resolution of issues involving sexual violence, abuse and discrimination and our recent specific work with the Commission, we can see clear patterns that emerge in the lives of people with disability who were sexually abused as children – whether they had an existing impairment as a child or developed disability as a result of abuse related trauma.

* Firstly, clients have not been provided with adequate support to identify and deal with the trauma they experienced resulting in an inability to disclose details of the abuse for many years. Children who were abused in residential institutions, for example, may have felt unable to disclose until they left that institution many years later. Children with disability may have continued to receive services from the same staff or institution they were abused by well into their adult lives – the fear of losing essential supports remaining too high for many people to risk making a complaint against their service provider.
* Secondly, clients have developed mental illnesses, compromised well-being, and health problems as a result being unable to access adequate support to address their experience of abuse. In the majority of cases counselling support has been the only service offered to these clients, and even this has been limited in scope and application. We have also seen the withdrawal of mental health services from clients who are unable to engage appropriately as a result of their trauma.
* Third, in the vast majority of cases, people with disability who have experienced sexual abuse live in relative poverty. Positive employment outcomes are repeatedly hindered by the effects of trauma on their mental health, and economic security is further undermined by expensive ongoing health requirements such as clinical psychological care and the hidden costs of disability including the purchase of aids and equipment, transport, and more frequent visits to the doctor.
* Fourth, people with disability feel discouraged to report abuse due to the perception that they will not be believed. Indeed in many cases the criminal justice system does not view people with disability, especially those with cognitive impairment or psychosocial disability, as credible or reliable witnesses.
* Fifth, only a negligible proportion of clients have received compensation, financial settlement, or formal redress for the sexual abuse and trauma they experienced; or any other form of acknowledgement or recognition that the abuse took place and their lives have been profoundly and negatively shaped as a consequence.

**Support for Option A of the Discussion Paper:**

**Remove limitation periods in claims for child sexual abuse**

The Commission has found that it takes an average of 22 years for an individual to disclose past sexual abuse, a conclusion that our individual, group and systemic advocacy work supports. The reality is that the traumatic consequences of child sexual abuse are dramatic, long-lasting, and act as substantial impediments to disclosure, reporting, and providing testimony. With regard to the current formulation and interpretation of the Limitation Act 1969 (NSW) these consequences also act as impediments to justice.

PWDA agrees with the advantages of Option A as outlined in the Discussion Paper. In particular, the removal of the requirement for a plaintiff to prove psychological injury which is distressing, onerous, time-consuming and costly to establish. Overwhelming evidence to date would also suggest that psychological harm is a self-evident result of child sexual abuse.

Recognising the long-term disabling effect of this trauma within the legislation would also make the disability exception redundant (re Option C), and would not compel plaintiffs to medically establish or socially identify themselves as being a person with long term or ‘’substantial impairment’’[[4]](#footnote-4) in order for their case to progress. Currently, this process of self-identification is additionally confronting for many survivors who do not consider themselves to be people with disability.

For people whose disability was not acquired as a result of abuse, any ongoing requirement to prove that their disability has hindered their ability to commence proceedings earlier ignores the fact that the barriers to accessing justice for people with disability are already exceedingly high, as outlined above.

Establishing an exception based on the perpetrator of abuse, with those abused by family members having a longer period during which to commence proceedings than those who were abused by others (re Option E) may discriminate against children with disability. Children with disability are more likely to have a variety of people in their lives with whom they have consistent close contact but who are not ‘’close associates’’[[5]](#footnote-5) for instance carers, support workers and health professionals. As noted earlier, children with disability living in institutional settings or spending prolonged periods in segregated environments are at an increased risk of violence, abuse and neglect.

Type of actions covered and retrospectivity

PWDA supports the inclusion of both sexual and physical abuse as types of action to which the Option A amendment should apply. The terminology of “criminal child abuse”[[6]](#footnote-6) as used in the Victorian exposure draft Bill example is a useful starting point for this discussion.

PWDA supports retrospectivity in claims where the limitations issue was judicially determined as an interlocutory stage and for claims that are currently on foot. In both instances the merits of the case are unheard leaving room for the case to be determined in light of subsequent legislative amendments. As the Discussion Paper notes, prospective application would statute bar many potential plaintiffs who have not yet disclosed. This would be unfair and regressive particularly in light of the volume of cases being unearthed by the current Royal Commission, and the heightened expectation of redress for those who are now coming forward to tell their story, in many cases for the first time.

Consequently, PWDA does not regard the possible increase in the number, or scope, of claims following amendments of this sort as a compelling reason to retain the status quo. Moreover, the potential increase to the cost of insurance for organisations at risk of litigation is not a factor that should trump the right of an individual to receive acknowledgement and redress for harm done while in the care of that organisation.

All organisations with children in their care have a responsibility to protect those children and to uphold their right to bodily integrity; their right to be free from violence and abuse; and to facilitate their right to access justice when those rights are violated. All too often we have seen organisations fail to respond to allegations of serious abuse until the threat of litigation or reputational damage looms and this trend must cease.

Organisations with adequate quality and safeguards frameworks in place to mitigate sexual abuse of children should not find themselves in a position whereby allegations of abuse are made. Higher insurance premiums may even be a motivating factor for organisations to implement more robust preventative mechanisms. At a systemic level, for children with disability these preventative mechanisms include the closure of residential institutions, provision of adequate disability support in the community, removal of barriers to accessing justice, and increased social and economic inclusion in the community.

PWDA thanks the NSW Department of Justice for the opportunity to provide feedback on this Discussion Paper. We would welcome further consultation on any of the matters raised.

Yours faithfully



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1. <http://www.agd.sa.gov.au/initiatives/disability-justice-plan> [↑](#footnote-ref-1)
2. Sally Robinson (2011) Enabling and protecting: Proactive approaches to addressing the abuse and neglect of children and young people with disability, Children with Disability Australia, p. 9. [↑](#footnote-ref-2)
3. Lisa Jones, Prof Mark A Bellis, Sara Wood, MSc, Karen Hughes, PhD, Ellie McCoy, Lindsay Eckley, Geoff Bates, MSc, Christopher Mikton, Tom Shakespeare, Alana Officer (2012), “Prevalence and risk of violence against children with disabilities: a systematic review and meta-analysis of observational studies” in *Lancet* 380 (9845), pp.899-907. [↑](#footnote-ref-3)
4. Kotulski v Attard [1981] 1 NSWLR 115, see Discussion Paper page 13. [↑](#footnote-ref-4)
5. See Discussion Paper page 16. [↑](#footnote-ref-5)
6. See Discussion Paper page 17. [↑](#footnote-ref-6)