*Regina Graycar and Jenny Morgan**

DISABLING CITIZENSHIP: CIVIL DEATH FOR WOMEN IN THE 1990'S

INTRODUCTION

THIS article[1] addresses an arguably narrow aspect of citizenship, the ability to initiate (or, in some cases, defend) a civil action. The notion of citizenship has generally been seen, at least until the recent spate of feminist scholarship,[2] as a gender-neutral phenomenon. However, as this scholarship has revealed, many aspects of citizenship are in fact highly gendered.

We commence with an exploration of the gendered nature of our current legal aid system. We explore the nature of legal claims generally made by women and men, the funding of such claims and we examine the extent to which access to the legal aid dollar is available to women and men. The second part focuses on one procedural aspect of civil actions for damages for childhood sexual abuse. There we examine the operation of the apparently prosaic doctrine of limitation periods, the time limits within which a civil cause of action must be commenced.

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* Associate Professor of Law, UNSW; Associate Professor of Law, University of Melbourne. We would like to thank Hilary Astor, Melissa Bray, Michael Bryan, Margie Cronin, Wayne Morgan, Lisa Sarmas and Prue Vines. Some of the work for this article was undertaken whilst we were Commissioners with the Australian Law Reform Commission in connection with the Equality Before the Law Reference (1993-1994).

1 Since this article was prepared, the Prime Minister announced The Justice Statement (18 May 1995). It includes a number of initiatives affecting women's access to legal services through, for example, The National Women's Justice Strategy and increased funding for women's legal centres. The Government also announced increased funding for legal aid in family and civil matters.

2 See, for example, Phillips, *Engendering Democracy* (Polity Press, Cambridge 1991); Bock and James (ed), *Beyond Equality and Difference: Citizenship, Feminist Politics, Female Subjectivity* (Routledge, London 1992); Thornton, "The Embodied Citizen" in Thornton (ed), *Public and Private: Feminist Legal Debate* (Oxford University Press, Melbourne 1995) (forthcoming); the essays in *Women and Citizenship: Australian Feminist Studies* No 19 (Autumn 1994) and of course, the articles in this issue of the *Adelaide Law Review*.

These issues, legal aid and limitation periods, both centrally concern citizenship in that they are about the ability to bring a civil claim, to assert a civil right. The ability to assert a civil right was at the centre of the well known case of *Dugan v Mirror Newspapers*.[3]

In 1978 Darcy Dugan, a convicted felon serving sentences of imprisonment (including a commuted death sentence), made a claim for damages arising out of an alleged defamation by a Sydney newspaper. The newspaper responded by arguing (successfully) that because he was a convicted felon, he had forfeited his right to bring civil proceedings. Dugan appealed to the High Court which decided that the old English doctrine of attainder had been "received" as part of the common law of NSW after settlement of the colony. By that doctrine, under which a person who is a convicted felon loses their right to bring civil proceedings, Dugan was classed as "civilly dead" Although not "civilly dead" in its full meaning, a person unable to pursue a legal claim either because they cannot afford to, and state resources in the form of legal aid are unavailable to them, or because the time limit for bringing the action has expired, has also lost a central part of citizenship. One aspect of citizenship is the ability to pursue a legal remedy when a civil wrong has been committed. The purpose of this discussion is to demonstrate that the two areas we discuss - legal aid and limitation periods - might have a particular impact on women, thereby impairing their rights to full citizenship.

LEGAL AID

Access to Justice

Women's access to justice is limited by their gender in a number of ways. As the NSW Women's Legal Resources Centre noted recently:

> [W]omen often feel intimidated at the thought of dealing with a lawyer. They may lack confidence or experience of the 'business' world which can disadvantage them in gaining information and advice. Women who do not work outside the home often do not know where to start to get information about a legal problem ... Women's domestic responsibilities often make it difficult or impossible for

3 *Dugan v Mirror Newspapers* (1978) 142 CLR 583 (Murphy J dissenting). In 1981, the NSW Government passed the *Felons (Civil Proceedings) Act* which removed this restriction on the rights of those convicted of serious offences.

> them to attend appointments with lawyers. They face the additional burden/expense of arranging childcare before they can venture to the appointment, or have to try to obtain advice in the presence of their children.[4]

And women have less access to costly legal services because of their reduced access to economic resources.[5] This means that they may be particularly dependent on public legal services - legal aid. This discussion looks at some of the ways in which women's access to legal aid might also be subject to gendered restrictions.

Recent Attention to Legal Aid

In 1994, the Access to Justice Advisory Committee reviewed the provision of legal aid services in Australia and recommended the establishment of an Australian Legal Aid Commission to oversee the allocation of federal government funds directed to legal aid. The report *Access to Justice: An Action Plan*, outlines the structure of legal aid services in Australia and explains the many different ways in which legal assistance can be provided to people.[6] This includes through legal aid commissions, community legal centres and the Aboriginal legal services. These bodies provide a variety of services and facilities, including legal advice and referral, community legal education, and, by far the most costly, legal assistance for litigation.

For women, it may be that legal advice (particularly legal advice by telephone) is essential to women's ability to pursue their legal rights. This is why the NSW Women's Legal Resources Centre has targeted telephone advice, and, in particular, 008 services as a priority.[7] Similarly, women may be assisted to pursue simple legal matters like divorce if they have access to "Do Your Own Divorce" Classes, as they do through some legal

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4 See Women's Legal Resources Centre, *Submission to the Australian Law Reform Commission Equality Before the Law*, Submission No 256.

5 See generally the data contained in *Women in Australia* (ABS, Canberra 1993) Cat No 4113.0.

6 See also Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (Report No 69, Pt 1 1994) Ch 4.

7 Submission by the WLRC to the Australian Law Reform Commission, Submission No 256; see also submission no 236 from SA Legal Services Commission which points out that in September 1993, 57% of callers for telephone legal advice were women. And see Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (Report No 69, Pt 1 1994) para 5.6.

aid commissions (for example, in South Australia). Further, three states have women's legal services or women's legal resources centres that operate as specialist community legal centres for women.[8] Yet while these types of non-litigation legal services may play a very significant role in assisting women, it is in the area of litigation legal aid - on which by far the largest proportion of the legal aid budget is spent - that data indicates the disadvantage experienced by women in access to legal services.

Litigation legal aid

In 1992, the High Court of Australia decided in *Dietrich v R*[9] that in a trial for a serious criminal offence, a person's right to a fair trial may require the state to provide the person with legal representation. The Court said:

> [N]o argument was put to the Court that recognition of such a right for the provision of counsel at public expense would impose an unsustainable financial burden on government. In these circumstances, we should proceed on the footing that if a trial judge were to grant an adjournment to an unrepresented accused on the ground that the accused's trial is likely to be unfair without representation, that approach is not likely to impose a substantial financial burden on government and it *may require no more than a re-ordering of the priorities according to which legal aid funds are presently allocated.*[10]

It has been suggested that this decision will have "a fundamental impact on the provision of legal aid for criminal matters in Australia."[11] An issues paper published in 1994 by the Legal Aid and Family Services (LAFS) branch of the Attorney General's Department points out that there

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8 These centres tend not to have sufficient resources to undertake extensive litigation and instead focus on advice and referral services. Similarly, a number of states and territories have also established specialist services for women who have been targets of domestic violence. These women's services are discussed by the Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (Report No 69, Pt 1 1994) ch5.

9 (1992) 177 CLR 292.

10 *Dietrich v R* (1992) 177 CLR 292 at 312 per Mason CJ and McHugh J (emphasis added). The High Court noted that while the Commonwealth and all States were given notice of the issues to be argued, only the Commonwealth and South Australian governments had participated in the case.

11 Aust, Attorney General's Dept, *Gender Bias in Litigation Legal Aid, Issues Paper* (1994) at 38.

is already a clear disparity in the quantum of resources being spent on criminal law matters as compared with family and civil matters and suggests that the High Court's decision will exacerbate this already existing trend. Figures in the issues paper demonstrate clearly the gendered consequences of this.[12]

The Gendered Distribution of Legal Aid Funds

The issues paper reported that women do not receive as much in legal aid funding for litigation as men do. In 1992/3, 63% of national legal aid expenditure on litigation assistance was paid on behalf of men.[13] Seventy two percent of grants of litigation legal aid were made for criminal matters (accounting for an expenditure of 43% of the total budget); 21% was spent on family law (32% of budget), while only 7% of allocations were made to civil matters (25% of the budget).[14]

When applications for legal aid were examined, LAFS found that "a female applicant has less chance of getting a grant of aid than a male applicant".[15] This, according to LAFS, "is explained by the current arrangements in which applications for aid in criminal matters, 80% of which are made by men, have a considerably higher success rate than applications in other law type".[16] The conclusion drawn is that:

> The gender bias in legal aid is largely, if not solely, a function of distribution of aid amongst law types - people applying for aid in criminal matters have a greater expectation of approval and a large majority of approvals are for criminal aid, and a large majority of applicants in criminal matters are men.[17]

At the state level, by way of example, figures from the SA Legal Services Commission indicate that in 1992-1993, over 50% of all expenditure on legal representation went on criminal law matters. Of this, 82% was for male clients. By contrast, women were over represented in family law matters where representation was funded (at 60% of family law expenditure) but family law accounted for only some one third of all

12 At 24-25 (see charts 7-10 inclusive).
13 At 25, chart 10.
14 At 24, chart 8.
15 At 12.
16 At 13.
17 At 37.

expenditure on legal representation. In the other major category of spending on legal representation, civil matters (14.5% of expenditure on legal representation), male clients received 59% of this part of the budget. Overall, women were the recipients of 35% of the legal representation budget: men received the other 65%.[18]

Figures provided to the ALRC from Victoria on applications for legal assistance indicate that men were much more likely to apply for assistance in criminal matters than women (21876 men as opposed to 5065 women in 1992/92) and 84% of the applications from men were approved as compared to 81% of applications from women.[19] Women were more likely than men to apply for assistance in family matters - 7323 women as opposed to 3584 men. In these family cases, applications were approved from some 60% of women and 55% of men.[20] In relation to civil cases, more applications for aid were received from men (2746 as opposed to 1968 for women), though 33% of the applications by men were approved compared to 38% of those from women.[21]

The Regulatory Framework

While the Commonwealth Government currently provides some 55-60% of funding for legal aid,[22] decisions on legal aid spending are made by state and territory bodies (usually a Legal Aid Commission). Currently there is no national regulatory body (apart from a National Legal Aid Advisory Committee) though the Access to Justice Advisory Committee (AJAC) has recommended the establishment of a national legal aid commission.[23] Generally speaking, grants of legal aid are made subject to consideration of both a means and a merits test, that is, the commission will consider what financial resources an applicant has and what are

18 Figures extracted from submission no 236 for Australian Law Reform Commission, *Equality before the Law: Justice for Women* (Report 69, 1994).

19 Submission No 292. Figures for 1992/1993 are similar, with 86.5% of applications for men in criminal matters being approved and some 85% of applications from women.

20 As above. Figures for 1992/1993 were again similar, although the approval percentage for women was approximately 60% while that for men was 52%.

21 Once again there is a similar pattern in 1992/1993.

22 See *Legal Aid Funding in the '90s, A Submission by the Law Council of Australia*, March 1994, at 10.

23 See Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994) Action 9.2.

her/his chances of success in the proceedings.[24] However, legislation in Victoria and Queensland specifically excludes the application of merits tests in relation to serious criminal offences, making the availability of legal aid dependent solely on a means test.[25] In other states and territories no such statutory priority is given. Nonetheless, guidelines in some states (eg NSW and WA) also limit the application of the merits test in some criminal matters. And while there is a great variety in guidelines from state to state, LAFS concluded that "they tend to indicate overall that the legal aid commissions favour applications in serious criminal proceedings to varying degrees".[26]

Civil Law

The figures noted above indicate that legal representation in civil law matters is not readily available through legal aid, and this is, of course, not unrelated to the priority given to legal representation in criminal matters. The priority accorded to criminal law representation and its impact on legal aid commissions became a particular problem in NSW when in January 1993 (shortly after the decision of the High Court in *Dietrich* in which it was held that legal representation in serious criminal cases is essential for a fair trial), a decision was taken to abolish virtually all legal aid in civil matters. This decision was reversed later in the year.[27] And in Queensland, the Legal Aid Commission decided in July 1992 that it would only fund civil matters where there was no power to award costs in the court or tribunal which would ultimately hear the matter.[28]

Generally, there is little financial support available for civil claims.[29] In this context, it is noteworthy that a comprehensive study of personal injury compensation undertaken in the UK has shown that women are less likely to contemplate the possibility of a legal remedy for their injuries, less

24 For a detailed account of the various means and merits tests applied around Australia see Law Council of Australia, *Legal Aid Funding in the '90s* (1994) Appendices B and C.

25 See *Legal Aid Commission Act* 1978 (Vic), s4(2) and *Legal Aid Act* 1978 (Qld) s29(8)(c). See also van Moorst and Deverall for Women's Legal Resource Group Inc, "Justice for All: Women's Access to Legal Aid and Justice in Victoria" (1993) 1 *Australian Feminist Law Journal* 147.

26 LAFS, note16 above, at 33.

27 As above.

28 As above. However, funding was still available for crimes compensation and discrimination matters (Qld Government submission, No 286, p5).

29 For the circumstances in which the various legal aid commissions grant legal aid for civil matters, see *Legal Aid Funding in the '90s: A Submission by the Law Council of Australia*, Appendix C.

likely to seek legal advice when they have a potentially compensable claim, and less likely to recover damages for their injuries.[30] The study showed that of those who were incapacitated for two weeks or longer, 30% of men considered claiming damages, but only 20% of women did so; 18% of men consulted a lawyer, but only 9% of women did. Overall, 14% of men obtained damages but only 8% of women did so.[31] For all types of accident, 12% of people recovered damages of some kind. Twenty nine percent of road accident victims and 19% of those who suffered injuries at work recovered some damages, while less than 2% of all other victims recovered damages. Men recovered tort damages almost twice as often as women; victims between the ages of 25 and 54 three times as often as those younger or older; the employed more often than the unemployed; and "housewives" less than a third as often as their proportion of the injured population would predict.[32]

While no comparable study has been undertaken in Australia, these findings are widely cited here and it is assumed that similar patterns would be revealed in this country.[33] And, this situation would almost certainly be exacerbated by the lack of availability of civil legal aid. As well as personal injury claims, actions for criminal injury compensation, or claims of sex discrimination and applications for restraining orders are all examples of civil actions. While some commissions have given priority to some of these actions, more broadly, the LAFS figures amply illustrate the overwhelming priority given to criminal law.

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30 The most comprehensive study of these phenomena to date is that by the Oxford Socio-Legal Studies Centre. See also Gibson, "Identifying Bias in Personal Injury Compensation" in Brockman and Chunn (eds), *Investigating Gender Bias: Law, Courts and the Legal Profession* (Toronto, Thompson Educational Publishing Inc 1993); Luntz, *Assessment of Damages for Personal Injury and Death* (Sydney, Butterworths, 3rd ed 1990)

31 Harris, Maclean, Genn, Lloyd-Bostock, Fenn, Corfield & Brittan, *Compensation and Support for Illness and Injury* (Oxford, Clarendon Press 1984) p 63, Figure 2.3 "The Path to Damages in Relation to Sex of Victim".

32 Harris et al, *Compensation and Support for Illness and Injury*, tables 2.3; 2.4; 2.5; 2.6 and 2.7. See also the discussion at 49-58. See also Richard Abel, "Torts" in Kairys (ed) *The Politics of Law* (Pantheon, NY, 2nd ed 1990) at 335 and Gibson, "Identifying Bias in Personal Injury Compensation" in Brockman and Chunn (eds), *Investigating Gender Bias: Law, Courts and the Legal Profession* (Toronto, Thompson Educational Publishing Inc 1993) at 91.

33 See Luntz, *Assessment of Damages*.

Family Law

Family law is the only area where women predominate in the legal aid figures: "Not only do they make many more applications than men, but they receive a disproportionately high level of approvals."[34] LAFS explains this 'bias' by reference to that fact that women are generally poorer than men, and therefore can more easily pass the means test. In this regard, LAFS points out that in June 93, 94% of sole parent pensioners were women. And it is important to note that most sole parents acquire that status through the breakdown of marriage, rather than choosing to have children alone. Notwithstanding this 'over representation' of women in family law legal aid, it is worth repeating the point that family law matters accounted for only 21% of legal aid approvals in 1992/93 and for 32% of legal aid expenditure. Furthermore, in both the family and civil areas, LAFS charts demonstrate that over the last 3 years there has been a steady decline both in the number of these applications approved and in expenditure in these two areas.[35]

In family law matters, there may also be additional barriers in access to legal aid. For example, one requirement, increasingly being adopted by legal aid commissions is for parties to be required to attempt mediation and other forms of non-litigious dispute resolution prior to being granted legal aid.[36] In light of the prevalence of violence within the population of separating spouses[37] and the inappropriateness of mediation in cases involving violence, concerns have been raised about this trend.[38]

There are also other limits that effectively restrict the availability of legal aid in family law cases. In NSW, for example, in custody and access matters women are subject to the 'normal' means and merits test (and,

34 Aust, Attorney General's Dept, *Gender Bias in Litigation Legal Aid, Issues Paper* (1994) at 40.

35 At 34-35, charts 11 and 12.

36 For example, "primary dispute resolution", as it is described in the Family Law Reform Bill 1994.

37 Astor reports that one US estimate puts the rate at 36-60% of divorcing couples; while an English sample, notes 28 out of 60 cases: Astor, "Domestic Violence: The Facts" paper presented at Kooralbyn, Family Court of Australia, Gender Awareness Seminar, April 1994. See also Astor, "Violence and Family Mediation: Policy" (1994) 8 *Australian Journal of Family Law* 3 at 9. This issue was raised in a number of submissions to the Australian Law Reform Commission: see, for example, Victorian Women's Legal Resource Group, submission no 249.

38 See Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (Report No 69, Pt 1 1994) at 4.23-4.24.

given the high proportion of women in part-time work, they may well be excluded on the means test, whilst still unable to afford private legal representation),[39] and the parties must have been separated for at least 6 weeks before an application is considered.[40] As the Women's Legal Resources Centre notes, this can be waived in special circumstances,[41] but the centre argues that "there appears to be no recognition of the possibility of the need for an urgent custody order immediately upon separation where there has been a *threat* of abduction which is considered to be a real threat".[42]

A number of submissions also drew attention to limits on the availability of legal aid in family property cases. For example, the Illawarra Legal Centre's submission noted problems caused by the reduction in the availability of legal aid for family law matters and what it perceived as the reluctance of the Court to make use and occupation orders.[43]

The NSW WLRC submitted that the LAC no longer funds applications for contested property settlements or for the preparation and filing of consent orders in relation to property matters. They note that many private practitioners will now act in property matters on a deferred payment basis - that is, fees are paid when the matter is completed and there is money available. However, they suggest this may not assist very many women. Women usually retain custody of the children after separation, need to retain the former matrimonial home in order to do this, and try to buy out their husband's share. This means that when the property settlement is completed, they have no funds available to them to meet legal fees.[44] The Queensland Government submission described a similar cut in funding for property applications and noted "women are now sometimes forced to sell

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39 See WLRC submission to Australian Law Reform Commission (submission no 256).

40 At 14.

41 For example, where children have been abducted.

42 WLRC submission to Australian Law Reform Commission (submission no 256) at 14 (emphasis added).

43 Stubbs, *A Human Right to Justice: Experiences of Women and the Law in the Illawarra Region* (Illawarra Legal Centre 1993) (a summary is reproduced as an appendix to Australian Law Reform Commission, Report No 67, *Equality Before the Law: Women's Access to the Legal System* (1994).

44 WLRC submission no 256, at 15. Since that submission was made, legal aid has been reintroduced for property cases (in the Local Court) where the value of the property is between $5000 and $60,000, and the dispute is not about liquid assets and the property in dispute is not likely to be sold. In addition, aid may be granted where there are "exceptional circumstances": see NSW Legal Aid Commission Policy Bulletin No 94/10, 8 September 1994.

the matrimonial home to raise the funds for a private solicitor to carry out the work at market and not legal aid rates".[45]

It is obvious that the issue of priorities in the allocation of legal aid funds, an apparently gender-neutral phenomenon, is very much a gendered issue. Mossman argues that the priority given to legal aid funding for serious criminal matters (endorsed by the Australian High Court) while manifestly gender neutral, has clear gendered consequences.[46]

In his dissenting judgment in *Dietrich*, Brennan J recognised that in order to give effect to the decision

> public funds must be appropriated to pay for representation or counsel must be required to appear without fee. The courts do not control the public purse strings; nor can they conscript the legal profession to compel the rendering of professional services without reward. The provision of adequate legal representation for persons charged with the commission of serious offences is a function which only the legislature and the executive can perform.[47]

While Brennan J (and Dawson J) recognised that legal aid funding is a political issue to be decided by the government of the day because of competing claims on limited resources, noticeably absent was an acknowledgment that the priority given to criminal law has a gendered impact. As noted above, only the Commonwealth and South Australia intervened and no non-government organisations were represented. The situation may well have been different had an organisation similar to Canada's Women's Legal Education and Action Fund intervened to apprise the court of the gendered consequences of its decision.[48] While giving

45 Queensland Government Submission, at 5.

46 Mossman, "Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change" (1993) 15 *Sydney Law Review* 30. See also van Moorst and Deverall for Women's Legal Resource Group Inc, "Justice for All: Women's Access to Legal Aid and Justice in Victoria" (1993) 1 *Australian Feminist Law Journal* 147.

47 *Dietrich v R* (1992) 177 CLR 292 at 323 per Brennan J.

48 See Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (Report No 69, Pt 1 1994) para 4.14. See also, on the issue of intervention in litigation by women's groups:*Equality Before the Law: Women's Equality* (Report No 69, Pt 2 1994) ch7. For a discussion of the role of LEAF see Sherene Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Second Story Press, Toronto 1991).

priority to criminal cases may not readily appear to be a gendered issue, when the fact that men commit far more crimes than do women is taken into account,[49] together with the diminution of funds available for civil and family law matters, it will be clear that legal aid spending is disproportionately going to men. If it were the case that legal aid went to people solely on the basis of their relative poverty, then we would expect more women to be in receipt of it given their well documented lower financial status.

The High Court in *Dietrich* extensively discussed the rationales for considering representation in serious criminal matters as essential for a fair trial. Yet this discussion occurred without any reference to other areas of law where legal aid may also be essential.

Mossman has pointed to two main reasons usually proffered for the priority to criminal defendants:

> [O]ne is the disparity of resources involved when the state is a party to the adversary proceedings against an accused person. The other is the seriousness of the possible consequences of the proceedings for the accused, including imprisonment.[50]

However, it is not only criminal trials where the state is the other party to a legal proceeding: for example, a social security dispute or a refugee claim involves the state as the opponent. It is unclear whether the High Court would consider that a person unrepresented in such proceedings is deprived of a fair trial. Mossman has urged "legal aid programs to take more seriously the disparity of resources of many women, by contrast with their male partners, in family law disputes" and asks:

> Why do legal aid programs readily accept the arguments about the disparity of resources (between an accused person and the state) as the basis for defining entitlement for criminal legal aid services, but systematically deny the

49 National Committee on Violence, *Violence: Directions for Australia* (Australian Institute of Criminology, 1990) reports (at 67) that in Australia, "men are at least ten times more likely than women to be charged with violent offences."

50 Mossman, "Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change" (1993) 15 *Sydney Law Review* 30 at 47.

> significance of such disparities in the context of legal aid services in family law?[51]

Turning to the second of the stated rationales for the view that in a serious criminal matter, legal representation is essential to a fair trial, considerable emphasis was placed by the High Court on the potential for imprisonment in serious criminal offences, but there are other ways that the state can deprive a person of her or his liberty, for example, by detaining illegal entrants or by committing people to psychiatric institutions against their will. The High Court was also concerned to confine its decision to serious criminal matters, yet there is evidence that women are disproportionately imprisoned for social security offences, often after pleading guilty without legal representation.[52] Not only is such a woman deprived of her liberty, but she may also lose her children in such a process. The distinction between serious and other criminal offences may not be so clear to a woman threatened with the loss of her child. And what of a sole parent pensioner who loses her pension because the Department of Social Security has decided that she is living in a marriage like relationship? She, while not losing her 'liberty', will lose the means of feeding herself and her children, yet in most jurisdictions legal aid is not available for social security matters.[53]

As Mossman put it:

> What are the unstated values in a scheme which always regards the consequences of possible imprisonment as more significant than the loss of custody of one's children, a distinction which could result in an accused person receiving legal aid in criminal proceedings while a mother is denied legal aid in a custody action?[54]

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51 Mossman, "Gender Equality, Family Law and Access to Justice" (1994) 8 *International Journal of Law and the Family* 357 at 366.

52 Wilkie, *Women Social Security Offenders: Experiences of the Criminal Justice System in Western Australia* (UWA Crime Research Centre, Research Report No8, 1993).

53 See *Legal Aid Funding in the '90s: A Submission by the Law Council of Australia* (March 1994) at Appendix C.

54 Mossman, "Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change" (1993) 15 *Sydney Law Review* 30 at 48. See also van Moorst and Deverall for Women's Legal Resource Group Inc, "Justice for All: Women's Access to Legal Aid and Justice in Victoria" (1993) 1 *Australian Feminist Law Journal* 147 at 150.

Or, as the Family Court recently said in a case where the woman applicant had been denied legal aid:

> Issues concerning the welfare of children are no less important in a civilised legal system than issues concerning liberty of the subject. Provision of proper legal representation in matters concerning liberty of the subject has been seen by the High Court of Australia to be essential to the administration of justice (*Dietrich v R*). The provision of appropriate legal assistance in children's custody cases is equally as vital.[55]

Gender neutrality in action

By highlighting the way the legal aid dollar is spent, we are not meaning to suggest that legal representation in serious criminal matters is not important. However, it is important to emphasise that giving priority to these matters means that, as the budgets of Legal Aid Commissions are currently constructed, areas of law that are of more relevance to women are comparatively under-funded. For example, discrimination actions are "civil actions" as are claims for criminal injuries compensation and applications for restraining orders. While it is clearly important that people (disproportionately men) who are accused of serious criminal offences are properly represented, it is also of importance that women are able to seek remedies when they are harmed. And it must be remembered that a considerable portion of legal aid expenditure goes to defend men who are accused of committing violent crimes against women, such as rape and homicide.[56] One might also speculate that if legal aid had been more readily available for, for example, restraining orders for women

55 *McOwan v McOwan* (1994) FLC 92-451 at 80,691.

56 For example, in the Victorian Law Reform Commission's study of rape prosecutions occurring in 1989, 95% of accused were men: see Law Reform Commission of Victoria, *Appendices to Interim Report No 42 Rape: Reform of Law and Procedure* (July 1991). Alison Wallace in her study *Homicide: The Social Reality* (Research Study No 5, Bureau of Crime Statistics and Research, NSW, 1986) has shown that 42.5% of all homicides committed in NSW between 1968 and 1981 occurred within the family. Spouse killings, of which 73% were committed by men of their wives or de facto wives, account for nearly one quarter of all killings in the state. The report also notes that in nearly half of the spouse homicide cases, there was a documented history of prior domestic violence (see Chapter 7). See also, for similar data, Law Reform Commission of Victoria, *Homicide* (Report No 40, July 1991).

against their violent partners, some of these homicides might have been preventable.[57]

As the Queensland Government submitted:

> [E]ither legislation or agreement between the State and Commonwealth Government to earmark funds for civil and family matters, together with increased funding, will be necessary to fund adequately those areas of the law which are women's greatest need in terms of access to justice.[58]

As part of its reference on *Equality Before the Law*, the ALRC recommended the establishment of a National Women's Justice Program that would include increased funding for legal aid in family and civil matters, and the establishment of more women's legal centres.[59] In 1995, the Government proposes to make an Access to Justice statement, expected to implement some of these recommendations.

LIMITATION OF ACTIONS

The next section considers limitation periods, the time limits imposed by law in which a civil claim for damages may be brought.[60] Again, for lawyers, these limitation periods are issues that are encountered in day-to-day legal practice, and are apparently prosaic and also apparently gender

57 In 1993, a specialist domestic violence legal service was established in Darwin (Domestic Violence Legal Help). In a submission to the Law Reform Commission, the centre reported an evaluation of its first three months of operation which showed that there had been an increase in the number of applicants obtaining restraining orders from 43% to 72%. They concluded that the specialist representation provided was responsible for this increase: see submission no 306 at 4. And, the SA Legal Services Commission provided a table which indicated that for the cost of one complex criminal trial and appeal, they could instead fund 14 one week custody cases; or 67 AAT hearings, or 360 negotiations or guilty pleas in the magistrates court or 4000 advice or duty solicitor services: submission no 236. See also Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (Report No 69, Part 1 1993) at 99 note 52.

58 Womens Policy Unit and Women's Advisor to the Premier, Office of the Cabinet, *Queensland: Submission No 286*, at 5.

59 See Australian Law Reform Commission, *Equality Before the Law: Women's Access to the Legal System* (Interim Report, no 67). See also Report No 69, Part 1, chapter 4.

60 We would particularly like to thank Dr Michael Bryan for his assistance in our work on limitation periods. See also, Bryan, "Sexual Abuse: Some Common Law and Equitable Responses" (1993) 5 *Journal of Child Law* 38.

neutral. By briefly examining the issue of limitation periods and childhood sexual abuse, we demonstrate the particular significance of these procedural issues for women who have been sexually abused as children.[61]

Limitation of Actions and Child Sexual Abuse: The Problem of Legal Redress

In the 1970s and 1980s, much attention was focussed on reforming the criminal law concerning rape and sexual assault as a way of enhancing women's access to justice. However, it soon became apparent that the

61 This is not meant to suggest that men are not also sexually abused as children, as evidenced by the recent publicity about criminal and civil actions being brought against Catholic priests. (See, for example, Nick Papadopoulos, "Brothers Ignored Abuse, Court Told", *The Age*, 6 December, 1994). The Canadian Committee on Sexual Offences Against Children and Youths (the Badgley Committee, 1984) undertook a national population survey which found that one in three men and more than one in two women "reported that they had been the victim of at least one unwanted sexual act, with four-fifths of these occurring before adulthood": Mosher, "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 *University of Toronto Law Journal* 169 at 174. Unwanted sexual acts included "exposures, threat, touching and attacks". Of the most serious category, sexual attack, one in five females and one in ten males described themselves as the target of such an attack: Mosher, "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 *University of Toronto Law Journal* 169 at 174. There is also evidence that girls are more likely to be sexually abused by a family member, and boys by a trusted non-family member: Mosher, "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 *University of Toronto Law Journal* 169 at 175. Other studies suggest that males make up between 5-20% of victims: see Lowenstein, "Incest, Child Sexual Abuse and the Law: Representation on Behalf of Adult Survivors" (1990-91) 29 *Journal of Family Law* 791 at 794, n14, citing Vander Mey and Neff, *Incest as Child Abuse: Research and Applications* 48-49 (1986. A survey by Ronald and Juliette Goldman of some one thousand Australian students in their first year of university found that 28% of women and 9% of men reported some kind of sexual exploitation by an older person: Goldman & Goldman, *Show Me Yours! Understanding Children's Sexuality* (Penguin Books, Ringwood 1988) p164). The same study showed that girls were twice as likely as boys to be victimised by relatives (at 169 and 183). All the evidence suggests that men are overwhelmingly the perpetrators of sexual abuse of children: see Mosher, "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 *University of Toronto Law Journal* 169 at 175; Goldman & Goldman, *Show Me Yours! Understanding Children's Sexuality* p164.

civil law was also an important avenue for seeking justice.[62] As Mosher has said:

> There is a world of difference between the victim demanding accountability to her, and the state demanding accountability to it through its criminal law processes.[63]

Many women are sexually abused as children.[64] However, many women do not realise that they have been abused as children and that they continue to suffer the effects of that abuse. This was described most graphically by the Women Incest Survivors' Network in their submission to the Australian Law Reform Commission:

> A number of years may elapse before a woman remembers the abuse she suffered in childhood. Following remembering the woman needs to break through the fear to be able to speak, firstly among trusted supporters and later possibly to the abuser and other family members. She must struggle against years of low self-worth and an inflated

62 However, it should be recognised that regardless of the problems with limitation periods, there are other barriers to women pursuing civil remedies for child sexual abuse. For example, a civil suit against an individual who has no money is a pointless exercise, particularly given the costs of bringing such an action. And it has been noted, at least in the United States, that many household insurance policies expressly or by implication exclude recovery for this sort of harm: see Graycar & Morgan, *The Hidden Gender of Law* (Federation Press, Sydney 1990) at 286, fn54. Other civil remedies are available in some jurisdictions, for example crimes compensation where compensation for criminal injuries is awarded and paid for by the state. Note that these have their own limitation problems, as *Arnold v Crimes Compensation Tribunal* (AAT Decision: 4 December 1991) made all too clear. This was a case involving a claim under the Victorian Criminal Injuries Compensation Act 1983. Arnold made a claim for crimes compensation for sexual abuse by a neighbour. Her application was refused by the Crimes Compensation Tribunal, in part because her application was out of time. On appeal to the AAT, the tribunal refused to exercise a discretion (see s20(3)) to extend the time in which an application is lodged (4 December 1991). The Supreme Court affirmed the AAT decision (10 December 1992). She was granted special leave to appeal to the High Court in June 1993. The Victorian Government conceded the case and the High Court made consent orders on 9 September 1993 that an extension of time be allowed. For a detailed discussion of this case, see Cabassi & George, "Remembering Childhood" (1993) 18 *Alternative Law Journal* 286.

63 Mosher, "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 *University of Toronto Law Journal* 169 at 183.

64 See note 61 above.

> sense of the power of the abuser. The dynamics of abuse, each woman's coping mechanisms - and the resultant delay in reporting - challenge basic assumptions within the legal system that people know their rights, know immediately when those rights have been abused and know the extent of their injuries.[65]

The dynamics of abuse that delay knowledge raise particular legal difficulties in relation to the time limits within which a civil action for compensation may be brought against the person responsible.

All jurisdictions impose time limits within which actions for legal remedies must be brought.[66] For example, for tort actions in Victoria, an action must be brought within six years of the cause of action accruing.[67] This raises the question of when a cause of action 'accrues'. It may be clear when a pedestrian is hit by a car - the time limitation runs from the time of the accident; one's cause of action accrues at that time. However, it may be much less clear if a person contracts a lung disease from exposure to a dusty environment when symptoms do not manifest themselves until many years later. Does the cause of action accrue when the dust does the damage, long before the person knows of the damage? Or, does the action accrue when they eventually know that they have suffered an injury or disease? And, bearing in mind what the Women's Incest Survivors Network said about the delay in recognising the harm caused by child sexual assault, when does a cause of action accrue for such a harm?

The lung disease problem came before the English courts in the 1950s and 1960s and in *Cartledge v Jopling*[68] the House of Lords held that a cause of action accrues when the damage occurs, when the lungs are affected. This is the case even when an individual had no way of knowing that he or she had suffered that damage and could not have known until long after the

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65 Women Incest Survivors Network, Submission 319 to the Australian Law Reform Commission Inquiry into Equality Before the Law, at 43.

66 *Limitation of Actions Act* 1958 (Vic); *Limitation of Actions Act* 1936 (SA); *Limitation Act* 1935-1983 (WA); *Limitations Act* 1974 (Tas); *Limitation Act* 1985 (ACT); *Limitation of Actions Act* 1974 (Qld); *Limitation Act* 1969 (NSW); *Limitation Act* 1981 (NT).

67 *Limitation of Actions Act* 1958 (Vic) s5. Note that most statutory claims, eg, for discrimination or crimes compensation, have their own limitation period which are usually included in the statute creating the remedy.

68 [1963] AC 758.

limitation period had expired. This approach has been followed in Australia.[69]

The issue of when a cause of action accrues was raised in the recent Canadian case of *M(K) v M(H)*[70] (hereafter referred to as *M v M*). The appellant, who was a victim of incest, brought an action for damages against her father for abuse perpetrated by him against her from the time she was 8 until she left home at 17. The trial judge had dismissed the action on the basis that it was out of time and this decision was affirmed on appeal by the Ontario Court of Appeal. With the intervention of the Women's Legal Education and Action Fund (LEAF), she successfully appealed to the Supreme Court of Canada.

The Supreme Court, by contrast with the Australian and English approach, decided that a cause of action accrues "at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history".[71] As La Forest J put it, "the issue properly turns on the question of when the victim becomes fully cognizant of who bears the responsibility of her childhood abuse, for it is then that she realises the nature of the wrong done to her".[72] "The tort claim, although subject to limitations legislation, does not accrue until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and the plaintiff's injuries".[73]

In other words, the Supreme Court of Canada decided that knowledge of the injury and its cause was an essential part of the cause of action accruing.

Statutory amendments: An Alternative Approach

The Anglo-Australian approach,[74] in contrast to the Canadian approach in *Mv M*, has been simply to assume that a cause of action accrues when damage occurs even if there is no way a person could know of the damage at the relevant time. In order to respond to the obvious problem that follows from this approach, parliaments in most jurisdictions in England and Australia have amended limitations legislation in a limited set of

69 See *Do Carmo v Ford* (1984) 154 CLR 234; *Hawkins v Clayton* (1988) 164 CLR 539.
70 [1992] 3 SCR 3.
71 At 35 per La Forest J.
72 At 45.
73 At 7.
74 See *Cartledge v Jopling* [1963] AC 758.

circumstances. For some types of actions, generally personal injury arising from "negligence, nuisance or breach of duty", statutory amendments provide that a cause of action accrues only when the person knew (or sometimes, ought to have known) that they had been injured by the defendant. In Victoria, for a person in this situation, the time limit is, in the first instance, six years from when they first know that they have been injured.[75] And, a further provision gives the court a broad discretion to extend the period, having regard to a specified set of matters listed in the Act.[76]

Do These Amendments Solve the Problem for Victims of Child Sexual Assault?

There are a number of problems with the approach taken in these amendments. First, they do not even question the traditional approach to the issue of when a cause of action accrues in that they unproblematically assume that the person's own knowledge of the injury is not relevant to the basic question. This is so even if it is quite clear that the injured woman did not remember the abuse, the connection between the abuse and her current problems, or indeed may have consciously or unconsciously worked very hard at not remembering for many years. In such a case, time has commenced to run and an action has become out of time before the woman could have even started to contemplate legal proceedings.

This approach underpinned the recent decision of the House of Lords in *Stubbings v Webb.*[77] The case concerned a claim by a woman against her step-father and step-brother for damages flowing from sexual abuse in childhood. The issue before the court was whether she had brought her action too late. The House of Lords said that she was out of time because she had not pursued her action within 6 years of the original injury, (or, in her case as a minor, from her majority). She was then forced to try (unsuccessfully) to bring herself within the amendments.[78] The approach in *M v M*, which focussed on the basic limitation question of when a cause of action accrued, was not even mentioned by the House of Lords.

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75 *Limitation of Actions Act* 1958 (Vic), s5(1A).

76 s23A.

77 [1993] AC 498.

78 The statutory provisions relating to "negligence, nuisance or breach of duty", allowed a plaintiff 3 years from the critical date of knowledge to bring her action.

Why did the statutory changes not assist Ms Stubbings? The statutory extension provisions generally use the phrase "negligence, nuisance or breach of duty", as these did.[79] The House of Lords said these did not apply to child sexual assault. They said her action was a "trespass to the person" (legally, a tort or civil wrong) but that that was not personal injury caused by "negligence, nuisance or breach of duty". Therefore she could not take advantage of the provision that said time ran from when she knew of the injury. Rape was not a "breach of duty" within the terms of the statute because, as Lord Griffiths said: "If I invite a lady to my house one would naturally think of a duty to take care that the house is safe but would one really be thinking of a duty not to rape her?"[80] This was important because the limitation periods for all other types of action were subject to the rule that the cause of action accrues when the assault takes place, irrespective of whether or not the person knows at that time that they have been harmed. Her action, a trespass to the person, could therefore only be brought within six years of the actual abuse, whether or not she had made the critical connections between the harms she suffered and the conduct of her father and step brother, or remembered the abuse she had experienced.

As we noted above, these extension provisions were specifically addressed at the types of injuries suffered by men at work, particularly those working in hazardous environments. It may not be so easy to fit into them the harm of child sexual assault. Our courts, like the House of Lords, may decide that child sexual assault is "trespass to the person" and that this in turn is not "negligence, nuisance or breach of duty".[81]

This then raises the question of how childhood sexual abuse is most appropriately categorised as a legal harm. In *Stubbings* the House of Lords characterised the injuries to her as "trespass to the person". As we noted above, the Supreme Court of Canada of Canada said that incest is assault and battery (a trespass to the person), but went further in

79 See, for example, the *Limitation Act* 1969 (NSW) s60G; but compare the *Limitation of Actions Act* 1974 (Qld) ss11, 31 which include trespass with negligence, nuisance or breach of duty.

80 *Stubbings v Webb* [1993] AC 498 at 508. However, contrast this with the Court of Appeal decision in the same case where all three judges readily accepted that there had been a "breach of duty": *Stubbings v Webb* [1991] 3 All ER 949.

81 They may also consider that persons suffering the effects of childhood sexual abuse are not suffering from "personal injuries consisting of a disease or disorder" within the meaning of s5(1A) of the *Limitation of Actions Act* 1958 (Vic).

suggesting that it could also be characterised as a "breach of fiduciary duty". We explore this cause of action and its implications further below.

Perhaps most problematically, if the woman's knowledge was considered relevant how would Anglo-Australian courts respond?[82] How do judges "know" the things they know about women? Since the House of Lords took the narrow approach to when a cause of action arises, and characterised rape as a "trespass which is not a 'negligence, nuisance or breach of duty'" and therefore not subject to the statutory modification, it was not necessary to consider Stubbings' knowledge of her abuse. However, Lord Griffiths said:

> In the present case the principal argument in the Court of Appeal focused upon whether or not the plaintiff [Ms Stubbings] knew she had suffered significant injury over three years before she commenced her action ... The plaintiff's case was that although she knew she had been raped by one defendant and had been persistently sexually abused by the other she did not realise she had suffered sufficiently serious injury to justify starting proceedings for damages until she realised that there might be a causal link between psychiatric problems she had suffered in adult life and her sexual abuse as a child. The Court of Appeal accepted this argument ... If it was necessary to decide the point I should not have found it easy to agree with the Court of Appeal. Personal injury is defined [under the Act] as including "any impairment of a person's physical or mental condition" and I have the greatest difficulty in accepting that a woman who knows that she has been raped does not know that she has suffered a significant injury.[83]

In other words, he could not understand her experience. By contrast, the Supreme Court of Canada did appear to understand the complex nature of a woman's discovery of the connection between harm she suffered in adulthood and her childhood experience of abuse. That court had the benefit of intervention from the Women's Legal Education and Action Fund (LEAF) (a feminist litigation organisation) and considered an extensive body of expert evidence about the phenomenon of child sexual

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82 Cf Graycar, "The Gender of Judgments: An Introduction" in Thornton (ed), *Public and Private: Feminist Legal Debates* (OUP, Melbourne 1995) (forthcoming).

83 *Stubbings v Webb* [1993] AC 498 at 505-506.

assault in making its decision. Lord Griffiths, whose judgment does not refer to any such evidence, instead resorted to his own sense of the world in expressing his difficulty in understanding the plaintiff's situation.

The difficulties that the House of Lords had in *Stubbings* demonstrate the uneasy fit between child sexual abuse and the amendments made. These amendments were designed to respond to lung disease, largely suffered by men at work. An injury sustained in the workplace is a very different injury from one suffered in the home and perpetrated by a family member. A person who knows that he has suffered, say, mesothelioma and that that has been caused by his exposure to hazardous substances at work, does not face the additional burden of coming to terms with the dynamics of abuse by a trusted family member. While inequalities of power characterise work relationships, the similarities may well stop there. The abuse of power by a family member in the so-called private sphere is both more complicated and may be clouded by "a veil of secrecy" that does not apply to work injuries. This is not to minimise the harm caused by those injuries but rather to highlight that abuse in the home and abuse in the workplace are qualitatively different and may well require different legal responses.

At the most obvious level, it may take longer than the times provided for in these various amendments for a woman to confront the situation in a way that enables her to issue proceedings. This is the case even if she knows that she has been abused and by whom.[84]

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84 For example, in NSW for causes of action that accrued prior to 1 September 1990, the knowledge extension provisions gave a mere one year from the date of knowledge to bring an action: s58(2). See now, in NSW, Part 3 of the Act dealing with personal injury cases, and see, in particular, subdivision 3. In Victoria, there is a "standard" 6 years, though an unlimited extension can occur in some circumstances: s23A. See O'Halloran, "Sexual Abuse Claims and the Limitation of Actions Act" (1994) 68 *Law Institute Journal* 503. Mosher has argued that although the Supreme Court of Canada understood well the difficulties of incest survivors recognising the harm they were suffering as adults as connected to the harm of sexual abuse they suffered as children, it failed to encompass adequately the situation of victim-survivors who, though making these connections, are still "unable" to pursue a civil action in a timely way. This inability, she argues, "may be related to a number of factors: while the survivor may know that the acts were wrong and that they resulted in harm, she may feel ashamed and thus reluctant to recount publicly the events of her past; she may share the all too pervasive belief that these are 'private' matters that must be dealt with through private channels; she may continue to be concerned about the implications for her family of making a disclosure; and she may not yet be prepared to relive the terrorizing memories of the incest": Mosher,

Breach of Fiduciary Duty

It was suggested above that child sexual assault might best be characterised as a breach of fiduciary duty. The underlying concept behind breach of fiduciary duty is an abuse of power: since many women experience injuries by virtue of their lack of power in a gendered society, this category seems to capture that experience more readily than, for example, the more traditional categories of negligence or intentional torts.[85]

The Supreme Court of Canada described the parent-child relationship in the following way:

> It is intuitively apparent that the relationship between parent and child is fiduciary in nature, and that the sexual assault of one's child is a grievous breach of the obligations arising from that relationship. Indeed, I can think of few cases that are clearer than this. For obvious reasons society has imposed upon parents the obligation to care for, protect and rear their children. The act of incest is a heinous violation of that obligation. Equity has imposed fiduciary obligations on parents in contexts other than incest, and I see no barrier to the extension of a father's fiduciary obligation to include a duty to refrain from incestuous assaults on his daughter.[86]

The notion of a fiduciary is someone who is in a position of trust. Whilst traditionally this has been used in relation to financial relationships, the notion of breach of fiduciary duty is also an apt description of the sort of abuse perpetrated by someone who uses their power (and breaches their position of trust) to abuse someone sexually.[87]

"Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 *University of Toronto Law Journal* 169 at 203.

85 Recently there has been a growing awareness that breach of fiduciary duty, traditionally used in the context of abuse of financial power, might be usefully relied upon for other sorts of non-financial abuses of power, including sexual abuse. Until recently, breach of fiduciary duty was not used in the context of sexual abuse.

86 *M (K) v M (H)* [1992] 3 SCR 3 at 61-62.

87 The Supreme Court of Canada in *M v M* built upon a judgment by McLachlin J in *Norberg v Wynrib* [1992] 2 SCR 226 at 230 where she described sexual abuse by a doctor of his patient as a breach of trust which constituted a breach of fiduciary duty.

In our view, the experience of women who have been sexually abused as children by those with parenting responsibilities is best described in law as a "breach of fiduciary duty", thereby capturing the essential elements of a relationship of inequality and the abuse of power in that context. Other groups of people may well find this legal category of assistance. For example, Aboriginal people who were removed from their families as children by those responsible for their care (particularly the state), may well experience that dislocation as an abuse of power, as a breach of fiduciary duty.[88]

Limitation Periods and "Breach of Fiduciary Duty"

It is unclear whether the various limitation acts apply to this cause of action.[89] The Supreme Court of Canada held that they did not in Ontario. If this is the case in Australian jurisdictions, then framing the cause of action as a breach of fiduciary duty will help women seek legal redress for these kinds of harm.[90] The Australian courts have not yet been called on to interpret limitation statutes in an action for breach of fiduciary duty and the question of what if any limitation period applies remains unresolved.

However, even if a breach of fiduciary duty has the advantage of freedom from limitation periods, not all child sexual assault can so readily be classified in this way. For example, is assault by a step-brother necessarily an abuse of trust or power?

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88 See also the action by Joy Williams, *Joy Williams v Minister for Aboriginal Land Rights Act 1983*, Supreme Court of NSW, Common Law Division, No 10257, 25 August 1993 and the Court of Appeal's granting of leave to appeal on 29 November 1993.

89 In *Williams v Minister for Aboriginal Land Rights Act 1983* (23 December 1994), the Court of Appeal (Kirby P and Priestly JA, Powell JA dissenting) held that "the equitable claims are not, as such, subject to the direct application of the limitation statute" (typescript at 18).

90 Equitable remedies are subject to the equitable defence of "laches" (delay). La Forest J in *M v M* decided this defence was not applicable in cases of childhood sexual abuse (at 69). Another option for avoiding the harshness of limitation provisions may be via s27 of the *Limitation of Actions Act* 1958 (Vic)which provides that where there is fraud by the defendant, the limitation period shall not begin to run "until the plaintiff has discovered the fraud ... or could with reasonable diligence have discovered it". In *M v M*, La Forest J in considering the equivalent Ontario provisions said: "The fact that the abuser is a trusted family authority figure in and of itself masks the wrongfulness of the conduct in the child's eyes, thus fraudulently concealing her cause of action. On this basis, I am satisfied that fraudulent concealment can be applied in incest cases" (at 56). He also noted: "the courts will not allow a limitation period to operate as an instrument of injustice" (at 58-59).

Why have limitation periods? Limitation periods do of course serve some purpose, and the policies behind limitation periods were discussed extensively by the Supreme Court of Canada in the *M v M* decision. First, it is argued that after a period of time a defendant should not be able to be sued: a defendant should be left "in repose" and should be secure in his reasonable expectation that he will not be held to account for ancient obligations.[91] In response to this concern, the Supreme Court of Canada held that whilst this argument had merit in some circumstances, in the context of childhood sexual abuse:

> 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.[92]

Secondly, the Supreme Court also noted a concern about "stale evidence":

> Once the limitation period has lapsed the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim.[93]

The Supreme Court also found this consideration unpersuasive. It observed that in almost all childhood incest cases there will be delays as a young person cannot sue in her own name until she reaches the age of 18. Further, the Court was not "convinced that in this type of case evidence is automatically made stale by the passage of time".[94] The court went on to say "the loss of corroborative evidence over time will not normally be a concern in incest cases since the typical case will involve direct evidence solely from the parties themselves".[95] That is, there is usually no corroborative evidence to "lose".

The third argument for the existence of limitation periods is that plaintiffs are expected to act diligently and "not sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion".[96] Again, the Supreme Court found this inappropriate to childhood sexual abuse cases for three reasons:

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91 *M (K) v M (H)* [1992] 3 SCR 3 at 29.
92 As above.
93 At 30.
94 As above.
95 As above.
96 As above.

> [M]any if not most of the damages flowing from incestuous abuse remain latent until the victim is well into adulthood. Secondly, ...when the damages begin to become apparent, the causal connection between the incestuous activity and present psychological injuries is often unknown to the victim. ... Needless to say, a statute of limitations provides little incentive for victims of incest to prosecute their actions in a timely fashion if they have been rendered incapable of recognising that a cause of action exists.
>
> Further, one cannot ignore the larger social context that has prevented the problem of incest coming to the fore. Until recently, powerful taboos surrounding sexual abuse have conspired with the perpetrators of incest to silence victims and maintain a veil of secrecy around the activity. The cogency of these social forces would inevitably discourage victims from coming forward and seeking compensation from their abusers.[97]

In our view, these arguments against the application of restrictive limitation periods in childhood sexual abuse are compelling and should be followed.

Some overseas responses

In the Canadian Province of British Columbia the *Limitation Amendment Act* 1992 quite simply abolished all limitation periods for child sexual assault.[98] It provides that an action for damages arising from sexual abuse of a minor can be brought at any time without reference to limitation periods. And in Saskatchewan, a 1993 amendment provides:

> 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:

97 At 31-32.

98 *Statutes of British Columbia* (1992) c44 which commenced on September 1 1992. It is to be noted that such a legislative response can take account of the circumstances of victim-survivors who understand the connection between the harm they suffered as children and the harm they suffer as adults, but are still psychologically incapable of bringing a civil claim within a limited period of this knowledge: see Mosher, "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 *University of Toronto Law Journal* 169 at 203.

> (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.[99]

Australian jurisdictions now increasingly being called upon to deal with such issues, might consider following the Canadian example and abolish limitation periods altogether in relation to child sexual assault, or, as in the Saskatchewan case, in all cases involving abuse of power.[100] A statutory response of this nature would make it unnecessary to depend upon a reinterpretation by Australian courts of the central question of when damage occurs as the Supreme Court of Canada did when it decided that knowledge was essential to a cause of action accruing. Nor, for the reasons explained above, can we be confident that the statutory ameliorating provisions have resolved the problem. And, we cannot assume that all such cases can be characterised as breach of fiduciary duty, assuming as we suggested above, that such a characterisation would overcome limitations problems.

CONCLUSION

Women have played a very limited role in the legal system to date. Public discussion in recent years has drawn attention to the small number of women in senior positions in the judiciary and the profession, and the way women are treated when they appear in courts. But the barriers of the type we have described above operate as a latter day form of civil death in that they prevent women from even invoking the legal system to redress the harms they have suffered. In that sense, they create considerable obstacles to women's full enjoyment of citizenship, an essential aspect of which is access to the justice system.

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99 *Statutes of the Province of Saskatchewan* (1993), Chapter 9, *An Act to amend The Limitation of Actions Act.*

100 Such an amendment might prove valuable to Aboriginal people claiming damages against state government authorities for removal from their families of origin.