

New York State Legislative Action Addressing Sexual Abuse of Children

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New York State Catholic Conference Policy Group

Sexual abuse of children is a human tragedy and a major social problem. It is found in every community, racial, ethnic, religious, and socio-economic group. It appears to occur with shocking frequency and seemingly wherever children and adults interact.

In 2002, when the national news media shined a spotlight on clergy sexual abuse dating back to the 1960s and 1970s, the Catholic Church in the United States responded by becoming a leader in the protection of children. Across the United States, Catholic Dioceses have instituted reforms to investigate allegations, remove offending clergy, provide meaningful assistance to victims, and prevent future abuse.

Advocates for victims have complained that because in many cases the abuse took place decades ago and was not reported until recently, criminal prosecutions and civil lawsuits against perpetrators are no longer viable. They have lobbied legislators in New York and other states to take the extraordinary step of waiving the statute of limitations to allow criminal prosecutions and civil lawsuits to proceed, no matter how old the claims may be and even if the accused perpetrator is long dead.

Thus far, though Legislatures in several states have considered the matter, only California and Delaware have waived the statute of limitations on civil lawsuits for sexual abuse of a minor. The result was predictable: The courts were immediately overrun with hundreds of lawsuits demanding millions of dollars from the Catholic Church for claims dating back decades.

In 2006, the New York State Legislature took significant steps to improve the legal protections for individuals who were sexually abused as minors. Historic amendments were made to the Criminal Procedure Law. It is now the law in New York that the crimes of first-degree rape, first-degree criminal sexual act, first-degree aggravated sexual abuse, and first-degree sexual conduct against a child are exempted all together from the statute of limitations for prosecution. In New York State, these crimes are now treated, and appropriately so, with the same gravity as murder.

The state Assembly continues to consider measures that would go much further: A bill that would waive the statute of limitations and create a one-year “window” or invitation to lawsuits claiming abuse and dating from any time in the past.

This proposal raises fundamental legal and fairness issues: First, it runs directly counter to the longstanding legal doctrine that lawsuits must be brought within a reasonable period of time to ensure a fair and just outcome for both plaintiff and defendant based on the facts; second, the proposed law applies exclusively to private organizations -- including small businesses, youth clubs, not-for-profit groups and religious organizations. Public schools, where children spend most of their time and which have become a national focus of sexual abuse allegations, are not affected in any way by this bill.

While the bill would permit old lawsuits to proceed against youth camps, sports clubs, scouting organizations, and businesses that employ young people, supporters of the bill and victims’ advocates have made it clear that there is one intended target: The Catholic Church. Virtually defenseless against fraudulent claims and aged claims about which no information is available, the Church would be forced to settle for many millions of dollars – the very money that now provides essential health care, educational and spiritual services to millions of New Yorkers today.

The Current Law

New York State’s Criminal Procedure Law (CPL) and Civil Practice Law and Rules (CPLR) establish statutes of limitations, setting certain reasonable periods of time in which a case can be prosecuted or a civil claim brought.

Currently, the statute of limitations on civil lawsuits claiming sexual abuse of a minor does not begin to run until a child reaches age 18. It provides five years (until age 23) to file a claim.

Assemblywoman Margaret M. Markey, D-Queens, and Senator Stephen M. Saland, R-Poughkeepsie, have proposed amendments. The companion bills are numbered S4614A (Saland) / A4560B (Markey).

They would:

- Amend the CPL and CPLR by adding five years to the time in which a criminal prosecution and/or civil lawsuit could be filed claiming sexual abuse of a minor. The statutes of limitations then would begin to run at

age 23. This would allow a victim to seek prosecution or sue until age 28.
[The Catholic Conference does not oppose/supports this proposal.]

- Amend the CPLR to create a “window” period of one year during which civil claims -- now barred because they are so old -- could proceed to court anyway to claim past sexual abuse and to recover damages. For one year from the date of enactment of legislation, persons, regardless of their age, could revive any civil claim that was barred because the statute of limitation had expired, no matter how long ago. The only prerequisite would be that the person bringing the claim would first have to obtain a certificate of merit by a mental health expert providing in reasonable detail the facts and opinions relied upon for concluding that the individual was the victim of sexual abuse.

The Assembly bill has passed in the Assembly. The Senate has not acted on it.

Statutes of Limitation Protect Justice

The proposal to waive the statute of limitations retroactively – resuscitating claims now long dead – is a radical departure from established legal doctrine. The proposal would cast aside a fundamental element of jurisprudence respected for decades by judges, litigants and legal scholars and in force in one form or another in every state in the nation.

Statutes of limitations protect justice. They were created to encourage timely and fair resolution of lawsuits, requiring that claims be brought in a reasonable period of time after an incident so that evidence is still available and can be evaluated, witnesses can still be interviewed, and the relevant information can still be assembled. Over time, memories fade, witnesses die, evidence disappears and fraudulent claims increase. It is virtually impossible for any individual or any organization to defend itself against a claim arising from events said to have occurred 50, 60, 70 years ago – claims that may involve people who are long dead.

The New York State Bar Association’s Committee on Civil Practice Law and Rules concluded in a legislative report on the issue of amending the statute of limitations:

Permission to commence litigation after the passage of a substantial period of time should be discouraged unless there is a compelling societal and jurisprudential rationale for the late commencement of an action. Over time, evidence is lost or destroyed and witnesses die or become unavailable or, when they are available, their

memories are less reliable. These circumstances make proof and defense of such actions extremely difficult, if not impossible, for all of the parties involved.¹

There is no such compelling societal or jurisprudential rationale. Waiving the statute of limitations represents the state's official encouragement and permission for the pursuit of old claims. The public interest is served by the law requiring the timely commencement of claims both because these can be fairly adjudicated and because action to protect children from potential sexual abuse can be taken immediately.

Unequal and Unfair Result

The proposal has an unequal and unfair impact on both victims and institutions, is unfair as matter of public policy and provides no deterrent to sexual abuse.

The proposed one-year period to revive old cases would not apply equally to all. It would permit alleged victims to bring lawsuits against *only* private organizations – including small businesses and not-for-profit and religious groups. Under this measure, a person who claims he was sexually abused, for example, in 1950 in a *private* school would be provided with another chance to sue, while a person who claims he was abused in 1950 in a *public* school would get no additional time. This approach creates two classes of victims. The public interest, however, is served by ensuring equal treatment of similarly situated victims. The proposed legislation systematically establishes unjust and unequal treatment.

Moreover, the legislation would not apply equally to all similarly situated institutions that deal with children. Because the waiver proposal is framed as an amendment to the CPLR only, it affects only businesses and not-for-profit organizations like the Boy Scouts, summer camps, and religious organizations like the Catholic Church. It does not contain an amendment to the Education Law or the General Municipal Law as would be necessary to apply to the institution that deals with more children than any other – public schools.

Logic and fairness require a consistent approach in New York civil law that provides all victims with the same remedies at law regardless of where the abuse occurred or who employed the abuser.

Villanova Law School Dean Mark A. Sargent has observed:

¹ Legislative Report #8, Feb. 25, 2003.

The law's careful balancing of rights and interests, its goal of evenhandedness, and its insistence on due process seem to be pettifoggery, mere "technicalities," and an obstacle to achieving the justice we know in our hearts. This impatience with the law, however, can lead to injustice.²

Calls to waive a civil statute of limitation are not new. Over the years, advocates for various victims' groups have pleaded that their particular cases deserve to be exempt from the law barring stale claims. The state Legislature has resisted these calls for the most part. It has waived the statute of limitations only for claims for certain chemical exposures, the consequences of which could not have been known by the injured parties in time to sue during the prescribed period.

The public interest is not served by making a similar exception for claims of sexual abuse. While today there is a far better social understanding of the nature and extent of the problem, abuse of a child has long been a crime and actionable civilly in New York. There was no legal bar to any individual who sought to pursue a civil or criminal remedy or both – only perhaps a personal reticence, as unfortunate as it now seems, to seek punishment of the abuser.

Though there is understandable and appropriate public empathy for victims of abuse and a natural impulse to help them seek a measure of justice, this is not a sufficient basis for the Legislature to upend established legal doctrine and grant to some alleged victims a sweeping and extraordinary exemption from the rules that have applied to other potential litigants for decades. While empathizing with victims of any kind of abuse, the Legislature should not grant special advantages to individuals who were never barred from suing but chose of their own volition to remain silent until now.

Mental Health Certification

The bills provide that, before a time-barred claim can proceed within the one-year window, a mental health expert must present a certificate of merit concluding that a plaintiff has been subject to sexual abuse. Richard J. Bartlett, former Chairman of the Assembly Penal Law Revision Commission and former state Chief Administrative Judge, has publicly criticized this proposal: "That is a fact-finding role that should be performed by a judge or jury, not by a health care provider hired by the plaintiff."³

² "Vengeance Time: When Abuse Victims Squander Their Moral Authority," *Commonweal* (April 20, 2007).

³ "No Need to Alter Sex Abuse Laws," *Albany Times Union* (Dec. 30, 2007).

Catastrophic Impact on Human Services

When the California Legislature waived the statute of limitations on sex abuse lawsuits for one year, hundreds of lawsuits were filed against the Catholic Church, with claimed damages exceeding \$1 billion. In the last few years, several dioceses around the nation have declared bankruptcy, their assets insufficient to satisfy enormous sexual abuse damage claims. It appears that the Church thus far has paid nearly \$2 billion to victims, with attorneys in some cases claiming as much as 40 percent of this in legal fees.

It is reasonable to expect that waiving the statute of limitations on civil lawsuits would produce a similar flood of litigation in New York with the same catastrophic effects on Catholic parishes, schools and social services. The Catholic Church is a major provider of health care, education and human services. More than 1.3 million New Yorkers are helped annually through the social services programs of the Church, including food pantries and kitchens, shelter and housing, counseling, foster care and adoption. The Church educates more than 300,000 Catholic school students, pre-kindergarten through high school, regardless of income, race, ethnicity and religious beliefs. The Church operates 40 hospitals and 60 nursing homes. Every year Catholic hospitals across the state handle 1 million emergency room visits, 4.4 million outpatient visits, and 400,000 in-patient admissions.

Dean Sargent of Villanova has noted that the financial damage inflicted on the Church by the resuscitation of old lawsuits may not be a matter of particular concern for victims and their advocates. "For them, the church is just getting what it deserves, and even these amounts are insufficient to compensate the victims fully for their pain and suffering," he wrote recently.⁴ However, the financial stress is likely to a matter of grave and immediate concern to those who depend on the Church's hospitals, nursing homes, schools and social and spiritual services (and their elected representatives).

Sargent further noted:

The plaintiffs' lawyers have also taken the position in negotiations and in the press that the dioceses have plenty of insurance and under- or unused real estate that can be sold without impeding their religious and charitable missions, and that the bishops are

⁴ Ibid. "Vengeance Time, Commonweal. (April 20, 2007)

crying crocodile tears about how badly the church and its faithful are being hurt.

This last argument is self-serving cant from heavily biased plaintiffs' lawyers. To be sure, some of the larger, older urban parishes have abandoned or underused facilities that can be sold. Some can unload a few grand buildings such as the cardinal's residence in Boston. Most dioceses do have some insurance available to help meet the settlements. ...

Who, then, will pay? Not the molesters, not the long-dead or retired bishops and chancery officials who enabled them, and not even the superiors who are still in office. The bill will be paid by closing and selling off older, marginal parishes that can barely support themselves in the inner cities and poor rural areas. It will be paid by closing Catholic schools already stressed by the increasing cost of providing private education, particularly to the poor. As usual, the poor will pay ...⁵

The Unaddressed Critical Task: Preventing Abuse Now

A far more just and effective public response to the societal tragedy of child sexual abuse is to ensure that comprehensive and rigorous prevention and reporting programs are in place now in every institution that deals with children. Unfortunately, the bills are utterly silent on this issue.

Child sexual abuse is a major social problem affecting families, schools, churches and every other institution in which children and adults interact. It is clearly not a Catholic problem, nor a Church problem, nor a religion problem. It is a societal problem requiring societal solutions.

In an analysis of research for the U.S. Department of Education, Hofstra University Professor Charol Shakeshaft estimated that 4.5 million students were subject to sexual misconduct by an employee of a school sometime between kindergarten and 12th grade.⁶ Among 329 New York State school superintendents Professor Shakeshaft interviewed in the mid-1990s, 58 percent said they had dealt with sexual abuse of a student by a professional employee.⁷ "The physical sexual abuse of students in schools is likely more than 100 times the abuse by priests," she was quoted in *Education Week*, estimating that 290,000

⁵ Ibid. "Vengeance Time" *Commonweal* (April 20, 2007)

⁶ *Educator Sexual Misconduct: A Synthesis of Existing Literature* (2004).

⁷ "Sexual Abuse of Students by School Personnel," *Phi Delta Kappan* (March 1995).

students experienced some form of physical sexual abuse by a public school employee between 1991 and 2000.⁸

In 2007, the Associated Press revealed moral conduct accusations against 485 New York State teachers – most for sexual misconduct and inappropriate relationships with students -- between 2001 and 2005. In 2005, the AP reported that 77 New York educators lost their licenses in the five prior years for sexual misconduct involving students.⁹ The *New York Post* reported that, between 1995 and 2000, New York City public schools paid more than \$18.7 million to students for sex abuse claims and 110 cases remained to be resolved.¹⁰

A study by the New York State Education Department found "tremendous growth" in the number of alleged cases involving sexual abuse of a student by a school employee. The study reported a steady increase over five years, resulting in almost a doubling of the number of cases brought for consideration of whether the accused teacher had the requisite moral character to possess a teacher or administrator certificate in New York State.¹¹ Further, the Education Department reported that "the vast majority" of cases reviewed involved inappropriate relationships and sex-related incidents and drug and alcohol problems. Sex with a child victim was the most frequent type of criminal matters at more than 24 percent; of the most frequent non-criminal cases, 55 percent involved inappropriate relationships.¹²

Underscoring the pervasiveness of this problem, the following reports of alleged child sexual abuse in New York State public schools were among those published in New York State media in the Spring of 2007¹³:

⁸ "Sexual Abuse by Educators Is Scrutinized," *Education Week* (March 10, 2004).

⁹ "Sex Cases Trigger Most Teacher License Revocations," *The Daily Gazette* (Aug. 7, 2005).

¹⁰ "You Pay for School Assaults," *New York Post* (Aug. 6, 2001).

¹¹ Annual Report, New York State Education Department Office of Teaching Initiatives, Professional Standards and Practices Board Professional Practices Subcommittee (2007). Cases increased from 70 to 134 from 2001 to 2005.

¹² Ibid. In 162 non-criminal matters, 90 dealt with inappropriate relationships, far outpacing the next most frequent of the 10 categories - 15 cases of sexual harassment and 12, pornography. In the 321 criminal cases in 17 categories, 78 involved sex-child victim; followed by 66, drugs; 30, larceny; 27, endangering; and 25, child pornography.

¹³ "Blasdel Teacher Is Denied Bail in Child-Sex Arrest," *Buffalo News*, (Feb. 7, 2007); "Coach Is Charged With Endangerment," *Times Union* (Feb. 9, 2007); "Teacher Faces Sex Charge," *Times Union* (Feb. 13, 2007); "Sex Teach Faces Music," *New York Post* (March 7, 2007); "Brooklyn: Teacher Charged With Rape," *The New York Times* (March 8, 2007); "Teacher Accused of Repeated Sex Acts With Student," *Times Union* (May 22, 2007); "Teacher in Lip-Lock Shock," *New York Post* (June 8, 2007); "City Teacher Accused of Abusing Boy Will Face Trial," *Democrat and Chronicle*

- Frontier School District (Erie County) elementary teacher arrested for allegedly trying to arrange sexual liaison with 14-year-old boy (2/7/07)
- Fort Ann (Washington County) coach charged with endangerment; allegedly allowed boys to perform sexual acts in his presence (2/9/07)
- Shenendehowa School District (Saratoga County) elementary teacher charged with alleged sexual abuse with first-grade boys (2/13/07)
- Bronx teacher arrested for alleged affair with underage special needs student (3/7/07)
- Brooklyn junior high teacher charged with rape (3/8/07)
- Columbia High School (Rensselaer County) teacher accused of repeated sex acts with student in classroom (5/22/07)
- Harlem special education teacher arraigned on sexual abuse, endangering charges involving student (6/8/07)
- Rochester (Monroe County) elementary school teacher to go on trial for sexual abuse of 10-year-old (6/22/07)
- Manhattan school aide accused of raping student (6/26/07)

In a span of a single week, one Westchester County public school teacher was charged with possession of child pornography, another with having sex with an underage student, and a counselor at a Tonawanda group home was accused of raping a former resident.

The problem, of course, is hardly confined to New York. Sexual assault or abuse was most often the cause for revocation of teaching licenses in West Virginia - in 35 percent of the cases in a five-year period, according to an Associated Press report.¹⁴ In Michigan, a news organization reported that 39 percent of 641 teachers in the state whose licenses have been reviewed for revocation since 1986 were accused of sexual misconduct -- more than any other reason.¹⁵

As *The New York Times* observed recently, "These cases and scores of others reflect a growing public consciousness of improper sexual relations between teachers and students ... A recent State Education Department study said that the

(June 22, 2007); "School Aide Is Accused of Raping Student," *The New York Times* (June 26, 2007).

¹⁴ "Abuse Is No. 1 Reason Teachers Lose Licenses in W. Va.," *The Herald-Mail* (Oct. 27, 2005).

¹⁵ "State Fails to Stop Teacher Sex Abuse," *Detroit News* (April 24, 2005).

number of (moral-fitness) cases has almost tripled in recent years, and that the clear majority of complaints were sex-related."¹⁶

Yet the bill is utterly silent on this matter. It neither provides individuals who were sexually abused in public schools more time to sue nor does it require reforms that would protect children today.

The Church Responds

For its part, the Catholic Church has responded aggressively to this problem. The Church has been a leader in adopting and promoting comprehensive reforms to protect children, prevent abuse, restore trust among all the people it serves, and especially to provide justice for those who have been victimized. Allegations of sexual abuse are investigated. Priests who were found to have sexually abused a minor have been removed from ministry. Mandatory background checks of clergy, religious and lay employees and volunteers who interact with children have been instituted. Thousands of children and adults have been provided with "safe environment training" in the best ways to prevent abuse.

The Church is systematically reaching out to those who suffered abuse in the past and seek help now. Every Diocese in this state provides a comprehensive program of psychological and spiritual assistance and financial support programs for victims of clergy sexual abuse. Each Diocese has appointed a victims' and survivors' assistance coordinator to oversee these programs and advocate for the interests of victims. Each Diocese is reaching out publicly on a continuing basis to encourage reporting of all incidents of abuse to law enforcement authorities and to encourage victims to avail themselves and their families of the assistance and support offered by the Church.

But the efforts of a single religious denomination, even one as large as the Catholic Church, are not a substitute for a broad societal response. The opportunity to take meaningful action to prevent abuse is missed in this proposed legislation. Despite heightened public concern and media attention, the bills do not apply to public school teachers or districts in New York State. Nor do they address in any way the demonstrated need for a comprehensive approach to training, prevention and reporting -- the need for statewide prevention and education programs, a statewide disciplinary protocol for school employees

¹⁶ "Between Teacher and Student: The Suspicions Are Growing," *The New York Times* (June 20, 2007).

convicted of sexual abuse, and an annual public accounting of sexual abuse complaints in every school.

The sponsors' decision to exclude public schools from the statute of limitations waiver may well be an tacit acknowledgement of the enormous legal exposure and potentially crippling liability for public schools, and therefore, local property taxpayers. There is no known rationale for the proposed legislation's silence on prevention strategies. As a starting point, the Legislature should consider commissioning a comprehensive study by the state Education Department of the numbers of credible allegations of sexual abuse of public school students over the last 30 years.

The Legislature has a historic opportunity to enact a comprehensive approach that becomes a national model for ensuring effective prevention and equal justice for all. Such measures should include:

- *Recognizing child sexual abuse as a broad social problem*, rather than treating it as though it were confined to religious or not-for-profit organizations or businesses. All victims and all New York institutions, public and private, should be treated equally.
- *Ensuring the same legal rights to all victims*, rather than providing an extraordinary legal advantage to one subset of victims while denying the same advantages to others, based on the largely irrelevant consideration of who employed the perpetrator at the time of the abuse -- a distinction that has no justification or basis in fairness for treating similarly situated people differently.
- *Establishing a victim-centered approach* based on compassion, rather than requiring victims who finally and bravely come forward to report decades-old abuse to endure the pain and humiliation of adversarial legal proceedings in which defendants are duty bound to seek to avoid liability for incidents for which they sincerely believe they had no responsibility.
- *Establishing clear, consistent and rigorous education, prevention and reporting programs statewide*, including mandatory annual public reporting of complaints involving the sexual abuse of minors against any public or private school or agency; explicit standards over and above civil and criminal liability for disciplining licensed professionals convicted of abusing children; penalties for institutions that employ persons convicted of abusing a child in positions of trust involving contact with children; universal background checks and mandatory training for all adults who interact with children in any setting; and mandatory age-appropriate education for children to sense and avoid dangerous situations.

