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LEGISLATIVE TESTIMONY

To: Members of the Joint Committee on the Judiciary
From: Edward F. Saunders, Jr., Esq., Executive Director
Re: H. 1592, “An Act Relating to Comprehensive Protection from Childhood Sexual Abuse”
Date: February 26, 2008

The Massachusetts Catholic Conference (“Conference”) respectfully submits this testimony in opposition to House 1592, “An Act Relating to Comprehensive Protection from Childhood Sexual Abuse.” House 1592 commendably recognizes the issue of childhood sexual abuse to be a serious and widespread societal problem, not limited to any one institution or sector, and thus addresses the issue from a perspective more global in scope. It does not unfairly single out the Catholic Church or other religions, as other bills filed in Massachusetts unfortunately have done in the past. Nonetheless, while House 1592 contains noteworthy elements, it includes objectionable provisions that we cannot support due to their negative impact on charitable institutions, churches and religious agencies.

Description of House 1592

Generally, the bill would: a) impose more substantial penalties for individuals that fail to report child abuse as required under M.G.L. c. 110, § 51A; b) add a provision to § 51A that levies a fine of up to \$100,000 for institutional employers of any individual who fails to report as required; c) expand the scope of required reporting under § 51A to include instances where an individual alleged to have sexually abused a child in the past presently represents a credible threat to a child; d) make available to victims of childhood sexual abuse funds from the State Compensation of Victims of Violent Crimes Act under M.G.L. c. 258C; e) eliminate the criminal statute of limitations on “the entire range of sex offences against children under the age of 18”; f) modify the civil statute of limitations so as to allow actions for assault and battery and negligent supervision (or causing or contributing to the abuse of a minor by a third person) to be brought within three years after the plaintiff first reports the allegations to a police department or other law enforcement agency; g) eliminate the protections of charitable immunity where the claim is for intentional or negligent conduct which caused or contributed to the sexual abuse of a minor; and h) establish a permanent Commission for the Protection of Children from Sexual Abuse to advise and recommend additional legislation.

The bill provides that the new civil statute of limitations as well as the changes in charitable immunity would apply to all claims “which have accrued, and to all actions which are pending” on its effective date and should be deemed retroactively applicable “to the fullest extent permitted” under the federal and state constitutions. The bill also appears to contemplate a narrowly-defined revival window after passage, during which claimants who have reported allegations of sexual abuse before the bill’s effective date could commence an action within three years after that date. Finally the bill includes a savings provision which specifies that each

section shall be treated as severable and shall continue in effect if any other provision is found unconstitutional or otherwise rendered ineffective.

Removing Statutory Limitations on Timing of Civil Claims

House 1592 would immediately subject all institutions including public charities and churches to the threat of retroactive civil litigation involving what could in many cases be very old allegations of child abuse inflicted by employees. According to Section 9 of the bill, would-be plaintiffs would have three years after the bill's effective date within which to file civil actions stemming from reports of alleged child abuse brought to law enforcement authorities at any time before the bill took effect. This would retroactively nullify within a three-year window any statutory limitations on filing civil claims for alleged past abuse.

In addition, Section 8 would prospectively remove current statutory limitations on the reporting and prosecution of future criminal claims, which then could be brought at any time after the alleged abuse took place. Pursuant to Section 9, civil claims would then be time-limited (3 years) not according to when the alleged abuse took place or would be reasonably discoverable, but according to when a criminal report is lodged which, as just noted, could be brought at any time.

The United States Supreme Court has observed that “[s]tatutes of limitation are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system.” *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). That is, limiting the time within which a claim may be brought increases the public's confidence in the ability of the courts to adjudicate factual disputes by guaranteeing that testimony and other evidence “is relatively fresh.” *Id.*

The Massachusetts Supreme Judicial Court has affirmed the “strong public policy” considerations behind statutes of limitations:

While strong public policy favors protecting the beneficiaries of a fiduciary relationship [from sexual misconduct], equally strong public policy favors imposing reasonable limits on liability. Statutes of limitation provide the temporal finality necessary for the orderly conduct of human affairs. They represent society's considered, although often far from perfect, compromise between a plaintiff's need to remediate wrongs and society's need for closure and forward movement. By permitting beneficiaries to bank causes of action until such time as the beneficiary attains a lawyer's knowledge of fiduciary obligations, [Plaintiff's] theory would skew the limitations balance decidedly in favor of plaintiffs. Fiduciaries would become perpetual defendants-in-waiting, and one would expect as a result that fewer individuals would elect to undertake a fiduciary's weighty responsibilities.¹

In addition, just this past fall, the SJC further commented that “We sympathize with the victims of abuse. However, ‘the United States Supreme Court has long recognized . . .

¹ *Doe v. Harbor Schools, Inc.*, 446 Mass. 245, 843 N.E.2d 1058, 1066 (2006).

[that statutes of limitation are] vital to the welfare of society. . . . They provide repose by giving security and stability to human affairs.’’²

Finally, just weeks ago on February 8, 2008, the Rhode Island Supreme Court affirmed the dismissal of a child abuse claim barred by a statute of limitations, stating:

“Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. . . . An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar.” . . . Statutes of limitation “are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” . . . They are the product of a balancing of the individual person’s right to seek redress for past grievances against the need of society and the judicial system for finality—for a closing of the books.’’³

In general, then, statutes of limitation acknowledge the increasing risk over time of inaccurate verdicts based on “stale” evidence, and reflect the reasonable judgment that after a certain period, the risk becomes unacceptable. The time, money and effort required to separate out the truly meritorious claims will expand exponentially while the odds of accurate fact-finding by judges will continue to shrink as the years pass.

Eliminating filing deadlines altogether ignores these critical interests. By proposing such an extreme measure, House 1592 would, if enacted, expose potential defendants and society itself to an open-ended threat of litigation based on presumably unreliable evidence and the consequent uncertainty.

As noted by the SJC in its Doe decision, the interests at stake are not limited, of course, to those asserted by potential defendants. Injured plaintiffs deserve every reasonable opportunity to become aware that there has been an injury, to realize the cause of the injury, and to gather the evidence needed to establish their right to a remedy. The interests of tort victims, however, have been accommodated in Massachusetts through the institution of the “discovery rule.”⁴

Under this rule, the clock does not start to run towards the three-year limit on tort actions as long as an individual is reasonably unaware of being harmed by another’s conduct. *Doe v. Harbor Schools, Inc*, supra; *Riley v. Presnell*, 409 Mass. 239, 243 (1991) (applying rule generally to tort claims against perpetrators); M.G.L. c. 260, § 4C (specifically applying rule to civil actions against perpetrators alleging sexual assault of a minor); *Phinney v. Morgan*, 39 Mass. App. Ct.

² *Koe v. Mercer*, 450 Mass. 97, 106, 876 N.E.2d 831, 840 (2007) (citations omitted).

³ *Ryan v. Roman Catholic Bishop of Providence*, No. 2004-49-Appeal (PC 95-6524), slip op. at 8-9 (R.I. Feb. 8, 2008) (citations omitted).

⁴ The discovery rule augments another provision of Massachusetts law that tolls the statute of limitations until a victim reaches the age of majority. See M.G.L. c. 260, §§ 4, 7.

202, 204 (1995) (finding “no reason in the absence of a statute not to apply the discovery rule to tort actions arising out of incestuous child abuse against the nonperpetrator” who failed to exercise a duty to protect the victim from the abuse). The three-year window opens when the victim discovered or reasonably should have discovered the injury caused by the defendant. *Doe v. Harbor Schools, Inc.*, supra.

Consequently, tort claims may survive for a significant time in Massachusetts. For example, in *Ross v. Garabedian*, 433 Mass. 360 (2001), the Supreme Judicial Court allowed a claim seeking damages for child abuse to be brought more than thirty years after the misconduct occurred. Thus, the discovery rule affords aggrieved individuals ample opportunity to bring suit outside the three year filing limit.

At the same time the Massachusetts courts have created safeguards against unchecked delays. See *Doe v. Harbor Schools, Inc.*, supra (rejecting plaintiff’s argument that the statute of limitations should be tolled until the time she acquired the knowledge of the legal consequences of her injury “(i.e.,[when she learned that she had] a legal claim against the fiduciary)” rather than the time she realized that she was injured); *Doe v. Creighton*, 439 Mass. 281 (2003) (holding that “a plaintiff who brings suit beyond the normal statutory limitations period may not reach a jury simply by presenting evidence that sexual abuse took place” and emphasizing that the delay in discovering the injury must be shown to be objectively reasonable).

Thus, there remain real, and important practical differences between the allowances permitted under the “discovery rule” and the approach taken by House 1592. The bill would, in the words of the *Doe* decision, supra, “skew the limitations balance decidedly in favor of plaintiffs,” to the detriment of all potential “defendants-in-waiting” and society itself.

An additional serious problem of fairness arises when a legislative alteration weighing so “decidedly in favor of plaintiffs” is directed not only prospectively but retroactively, such as to revive lapsed past claims or to extend the time on existing, yet-to-lapse claims. To the issues of staleness and social uncertainty is added the unfairness of imposing a new burden retroactively. Based on existing legal expectations, potential defendants are led to believe that their vulnerability will exist for a certain period of time, but that then it will end: then they will be free to cease gathering and preserving evidence of their innocence and direct their attention and resources to the future.

Present Massachusetts law regarding the limitation period for civil claims already accommodates in a fair manner the competing interests of plaintiffs, defendants, and society as a whole. The scales do not tilt entirely in either direction between plaintiffs and defendants. If passed, the provisions in House 1592 dealing with statutory civil filing limitations would destroy the careful balance currently struck by the legislature and the courts.

Abolishing Charitable Immunity

Sections 10-13 of House 1592 expands the degree of potential civil liability to which a charitable organization and its officers and directors would be subject by removing altogether the existing

cap in Massachusetts for a range of tortious conduct, and making the expanded liability retroactive. We oppose these changes for the following reasons.

Charitable immunity recognizes the importance of preserving the financial capacity of charities to serve the public good. As noted in the Massachusetts Law Review, a publication of the Massachusetts Bar Association, “The primary rationale for charitable immunity is that, without it, the financial strains of liability would reduce the capacity of charitable institutions to provide valuable goods and services to the community. In turn, these ‘public goods’ would be undersupplied when left to the commercial sector, with government having to make up the shortfall. Thus, by furnishing societal benefits, charitable institutions relieve government of the burden and costs it would otherwise confront if responsibility for public goods were left primarily to for-profit businesses.”⁵

Any alteration in the careful balance currently struck by the charitable immunity statutes between the interest of charities in providing services of great public value and the interests of those harmed by sexual abuse should be based on a careful and comprehensive public policy assessment. The bills before this committee fail in this regard for the following reasons.

First, removing all limits on the amount of liability exposes charities to the threat of dissolution as a result of the unlimited awarding of damages in specific cases. Second, no precedent exists for singling out specific torts in order to open the damage award floodgates. Third, retroactive application would interpose an extremely unfair enlargement of potential liability without affording charities the opportunity to sufficiently insure against actual risk of loss from claims already brought. Fourth, stipulating that retroactivity should be as extensive as judicially determined, transgresses constitutional guarantees of fairness while at the same time it hands over to the courts the legislative task of assessing the competing public policy interests. Fifth, the combination of all of these effects, when exacted on individual officers and directors, will create a serious chilling effect on the willingness of dedicated citizens to serve in these socially indispensable capacities.

Subjecting Institutions to the Threat of Criminal Fines Under the Child Abuse Reporting Law

Section 4 of House 1592 would subject charitable and educational entities to the threat of criminal fines for up to \$100,000 based on the failure of an employee to exercise his or her duties under the child abuse reporting statute, M.G.L. c. 110, § 51A. This punishment would pertain regardless of whether the institution’s policies, standards, controls, and responses concerning the potential, alleged and actual wrongdoing of employees were reasonable in light of the circumstances. Even those institutions would be subject to punishment which took every conceivable measure to address the risk that individual employees subject to the duties of § 51A in fact would breach those duties, despite the lack of any institutional fault. Given that criminal sanctions should have as their purpose the punishment of wrongdoing, a criminal provision that inflicts punishment in the absence of wrongdoing cannot satisfy the demands of justice.

⁵ Kenneth R. Hohlberg, *Modern Reflections on Charitable Immunity*, Mass. L. Rev., Winter 2006, at 163, 164.

Conference Position

In conclusion, while House 1592 recognizes the breadth and depth of harm posed by child abuse in our society, key provisions would:

- 1) upset the reasonable balance of rights and interests struck by current legislative and judicial policies governing civil statutes of limitations;
- 2) destroy the protections of charitable immunity which exists for legitimate reasons based on the social contributions generally provided by non-profit, religious, and other charitable organizations;
- 3) inflict “no-fault” punishment contrary to reason and justice.

For these reasons, the Conference urges the Committee to give House 1592 an unfavorable report recommending that the bill ought not pass.

The Massachusetts Catholic Conference is the public policy office of the Roman Catholic Bishops in the Commonwealth, representing the Archdiocese of Boston and the Dioceses of Fall River, Springfield, and Worcester.