

# MASSACHUSETTS CATHOLIC CONFERENCE

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### LEGISLATIVE TESTIMONY

To: Joint Committee on the Judiciary  
From: Edward F. Saunders, Jr., Esq., Executive Director  
Re: House 1523, An Act Relating to Comprehensive Protection for Childhood Sexual Abuse  
Date: June 30, 2009

The Massachusetts Catholic Conference (“Conference”) respectfully submits this testimony in opposition to House 1523, “An Act Relating to Comprehensive Protection for Childhood Sexual Abuse.” This bill includes objectionable provisions that will have a negative and unjustifiable impact on charitable institutions, churches and religious organizations.

#### Description of House 1523

Section 1 provides the legislative title, “Comprehensive Protection from Childhood Sexual Abuse Act of 2009.”

Section 2 would amend M.G.L. c. 119, § 51A, governing mandated reporting of suspected child abuse, by adding a new paragraph requiring “all corporations and other institutions” that employ non-licensed individuals who are mandated reporters to 1) create written protocols to be followed in reporting suspected child abuse, 2) institute an education program on compliance with the mandated reporting requirements, and 3) post the mandated reporting requirements and penalties in a prominent location.

Section 3 would amend § 51A(c) by making it a criminal offense for anyone who is a mandated reporter to willfully refuse to report that he or she knows that a child has been sexually assaulted, including in circumstances where the sexual assault did not result in serious bodily injury to the child. The current law penalizes the failure to report only in circumstances involving serious bodily injury.

Section 4 would further amend § 51A(c) by levying a fine of up to \$100,000 against the corporate or institutional employer of any mandated reporter who fails to make a child abuse report as required.

Section 5 would amend § 51A(a) by expanding the scope of the reporting duty to include instances where the mandated reporter believes that an individual alleged to have sexually abused a child in the past currently represents a credible threat to a child in any organization serving children or youth.

Sections 6 and 7 would amend M.G.L. c. 258C, the State Compensation of Victims of Violent Crimes Act, by giving victims of childhood sexual abuse the opportunity to qualify for compensation despite failing to report the abuse to law enforcement within five days of the abuse, or failing to apply for compensation within three years from the time of the abuse if, as demonstrated by a mental health professional's report, the delays were caused by the victim's inability to associate the abuse with harm and were consistent with typical responses by victims of childhood sexual abuse.

Section 8 would amend M.G.L. c. 277, § 63 by removing the requirement that criminal indictments or complaints brought more than 27 years after the time of the alleged offense be accompanied by independent evidence corroborating the victim's allegation, when the offense involves the indecent assault, indecent battery, or rape of a child under 18 years of age.

Sections 9, 10, and 11 would amend M.G.L. c. 260, § 4C, concerning time limitations on the filing of civil actions alleging child sexual abuse. A two-year window of retroactivity and revival would be created for civil actions involving child sexual abuse that occurred before House 1523's effective date, within which all actions filed and pending at the time of that date and those filed up to two years thereafter would not be barred by any otherwise applicable statute of limitations. Prospectively, civil actions would be allowed to be brought at any time for instances of child sexual abuse occurring after the legislation's effective date. Civil actions filed after the two-year window closes, and involving child sexual abuse alleged to have occurred before the effective date, would be subject to § 4C's original three year statutory limitation.

Sections 12, 13, 14, and 15 would amend M.G.L. c. 231, §§ 85K & 85W by eliminating the protection of charitable immunity where a civil claim is for intentional or negligent conduct which caused or contributed to the sexual abuse of a minor. This elimination would apply to all claims pending or accrued on House 1523's effective date, and apply retroactively "to the fullest extent permitted under the Constitution of the United States and the Declaration of Rights of the Commonwealth of Massachusetts."

Sections 16 and 17 provide that House 1523 would become effective upon passage (except Section 9, which would become effective six months after passage), and that each section is separable and shall remain in effect even if other provisions are struck down as unconstitutional or otherwise rendered inoperable.

#### Removing Statutory Limitations on Timing of Civil Claims

By creating a two-year window of retroactivity and revival (Sections 9-11) within which otherwise time-barred civil claims could be brought, and by eliminating charitable immunity in the specified circumstances (Sections 12-15), House 1523 would immediately subject all private institutions, including charities and churches, to the threat of retroactive civil litigation involving what could in many cases be decades old allegations of child abuse.<sup>1</sup>

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<sup>1</sup> Under the Massachusetts Tort Claims Act, civil actions against governmental institutions such as public schools would remain subject to a two-year limitation within which a claim for damages must be presented to the public institution, and then a three-year limitation on filing a lawsuit that runs from the time of the institution's final claim denial. M.G.L. c. 258, § 4.

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). Limiting the time within which a claim may be brought increases the public’s confidence in the ability of the courts to adjudge factual disputes by guaranteeing that testimony and other evidence “is relatively fresh.” *Id.*

The Massachusetts Supreme Judicial Court (SJC) 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.<sup>2</sup>

The SJC has further commented, “We sympathize with the victims of abuse. However, ‘the United States Supreme Court has long recognized . . . [that statutes of limitation are] vital to the welfare of society. . . . They provide repose by giving security and stability to human affairs.’”<sup>3</sup>

In 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.<sup>4</sup>

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

<sup>3</sup> *Koe v. Mercer*, 450 Mass. 97, 106, 876 N.E.2d 831, 840 (2007) (citations omitted).

<sup>4</sup> *Ryan v. Roman Catholic Bishop of Providence*, 941 A.2d 174, 180-81 (R.I. 2008) (citations omitted).

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 1523 would, if enacted, expose potential defendants and society itself to an open-ended threat of litigation based on presumably unreliable evidence and consequent uncertainty.

As noted by the SJC in its Harbor Schools 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 have been and continue to be accommodated in Massachusetts through the institution of the “discovery rule.”<sup>5</sup>

Under the “discovery 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. 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 alleged 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 SJC 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, 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).

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<sup>5</sup> 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.

Thus, there remain real and important practical differences between the allowances permitted under the “discovery rule” and the effect of the changes contained in House 1523. The bill would, in the words of the Harbor Schools 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 1523 dealing with statutory civil filing limitations would destroy the careful balance currently struck by the legislature and the courts.

#### Abolishing Charitable Immunity

Sections 12-15 of House 1523 would expand the degree of potential civil liability to which a charitable organization and its officers and directors would be subject by removing altogether the existing damages cap in Massachusetts for a range of tortious conduct, and making the expanded liability retroactive. At the same time, the bill would leave intact the existing cap on civil damages applicable to governmental institutions,<sup>6</sup> and retain the total governmental immunity from liability for “any claim arising out of an intentional tort”<sup>7</sup> afforded under the Massachusetts Tort Claims Act. The Conference opposes this change and resulting differential treatment 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.”<sup>8</sup>

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<sup>6</sup> M.G.L. c. 258, § 2 (barring all punitive damages and any compensatory damages in excess of \$100,000).

<sup>7</sup> M.G.L. c. 258, § 10(c).

<sup>8</sup> Kenneth R. Hohlberg, *Modern Reflections on Charitable Immunity*, *Mass. L. Rev.*, Winter 2006, at 163, 164.

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. House 1523 fails 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 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.

The bill focuses narrowly on charitable organizations as if these were the only arenas of concern. Unfortunately, the sexual abuse of children is a widespread tragedy. History shows that such abuse occurs in the home, in community organizations, and within governmental institutions such as public schools.

In October 2007, the Associated Press released its findings from a seven-month long investigation in all fifty states of public school administrative disciplinary records between 2001 and 2005, concluding that a “widespread problem” continues to exist in the public schools involving the sexual abuse of minors by educators.<sup>9</sup> Through its investigation, “[t]he AP discovered efforts to stop individual offenders, but overall, [found] a deeply entrenched resistance toward recognizing and fighting abuse,” and observed that “in state capitols and Congress, lawmakers shy from tough state punishments or any cohesive national policy for fear of disparaging a vital profession.”<sup>10</sup>

The AP report follows up on a 2004 study by the U.S. Department of Education entitled “Educator Sexual Misconduct: A Synthesis of Existing Literature.”<sup>11</sup> In a preface to the federal study, the Department’s Deputy Secretary, Eugene W. Hickock, wrote “we believe that sexual misconduct in whatever form it takes is a serious problem in our nation’s [public] schools and one about which parents and taxpayers have a right to be informed.”<sup>12</sup>

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<sup>9</sup> Martha Irvine & Robert Tanner, *Sexual Misconduct Plagues US Schools: AP Counts 2,500 Teachers Punished in 5 Years*, Boston Globe, Oct. 20, 2007, available online at [http://www.boston.com/news/nation/articles/2007/10/20/sexual\\_misconduct\\_plagues\\_us\\_schools\\_ap\\_counts\\_2500\\_teachers\\_punished\\_in\\_5\\_years/](http://www.boston.com/news/nation/articles/2007/10/20/sexual_misconduct_plagues_us_schools_ap_counts_2500_teachers_punished_in_5_years/).

<sup>10</sup> Id.

<sup>11</sup> Authored by Prof. Charol Shakeshaft of Hofstra University, the report is available online at <http://www.ed.gov/rschstat/research/pubs/misconductreview/index.html>.

<sup>12</sup> Id. at 1.

The report surveyed existing studies and demonstrated, among other findings, that a) sexual abuse of children by teachers and other adults is a significant problem in public schools,<sup>13</sup> b) research to date has “document[ed] the ways in which schools and districts fail to remove abusers from the classroom,”<sup>14</sup> c) even among those perpetrators whose employment may be discontinued and teaching license pulled, few are prosecuted or monitored once they have left the school system,<sup>15</sup> and d) school administrations resist media inquiries and other public scrutiny.<sup>16</sup>

In the face of a tragedy that confronts private and public institutions alike, indeed all of society, the bill’s skewed attempt to reach the assets of charities by altering the charitable immunity laws, without a comprehensive consideration of the problem in public institutions, lacks a cogent rationale.

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

Section 4 of House 1523 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 responsibilities under the child abuse reporting statute, M.G.L. c. 110, § 51A. Given that criminal sanctions should have as their purpose the punishment of wrongdoing, a criminal provision that inflicts punishment in the absence of wrongdoing by the institution, as Section 4 of House 1523 would do, cannot satisfy the demands of justice.

#### Conference Position

In conclusion, while House 1523 seeks to address the 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 exist for legitimate reasons based on the social contributions provided by non-profit, religious, and other charitable organizations;
- 3) impose inequitable burdens on private institutions while at the same time ignoring the role of public institutions in the societal tragedy involving the sexual abuse of children;
- 4) inflict “no-fault” punishment contrary to reason and justice.

For these reasons, the Conference urges the Committee to give 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.*

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<sup>13</sup> Id. at 18 (in a national survey commissioned by the American Association of University Women, deemed to be the most extensive and accurate study to date, 9.6 percent experienced unwanted educator sexual misconduct).

<sup>14</sup> Id. at 44

<sup>15</sup> Id. at 44-45.

<sup>16</sup> Id. at 10-11. 44-46.