

Issues Paper

The civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse: *Redress and Civil Litigation Report* - understanding the Queensland context

August 2016



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Contents

Attorney-General’s Foreword	4
Background.....	5
Purpose	5
Making a Submission	5
Privacy Statement.....	5
Introduction	7
Limitation Periods	7
What the Commission considered.....	8
Current position in Queensland.....	8
Scope of the amendments	8
Questions.....	9
Duty of institutions (non-delegable duty and ‘reverse onus’).....	10
Non-delegable duty	11
What the Commission considered.....	11
Questions.....	12
Reverse onus of proof	12
What the Commission considered.....	12
Questions.....	13
Identifying a ‘proper defendant’	14
What the Commission considered.....	14
Questions.....	15

Attorney-General's Foreword

In late 2015, the Royal Commission into Institutional Responses to Child Sexual Abuse (the Commission), established by the Australian Government, delivered the *Redress and Civil Litigation Report* (the Report)

The Report highlighted the significant effects that child sexual abuse has on the lives of survivors and their families. The Commission has made recommendations about reparation and compensation measures and the Commonwealth Government is leading discussions with the States and Territories about redress arrangements.



The Commission also examined the difficulties experienced by survivors of child sexual abuse in commencing or pursuing civil litigation against institutions and has made recommendations with the aim of creating a more accessible justice system for survivors and moderating the power imbalance that often exists between survivors and institutions in civil litigation proceedings.

The Queensland Government understands the lasting and often devastating impact that child sexual abuse has on survivors. Central to the Commission's proposals for reform is the recommendation that State and Territories introduce legislation to remove the limitation periods applying to civil actions against institutions brought by survivors of child sexual abuse. This is why the Palaszczuk Government is removing the statutory limitation period for child sexual abuse claims to ensure that we are taking steps to ensure survivors have the ability to pursue justice.

This issues paper will consider a range of civil litigation reforms, including to inform whether the removal of limitation periods should be widened to apply to all forms of child abuse rather than only child sexual abuse, and whether it should apply more broadly than just to abuse suffered in institutions. Furthermore, this issues paper will also provide an opportunity for public comment to assist the Government in its consideration of the other civil litigation reform recommendations contained in the Report.

Whole-of-Government Guidelines for Queensland Government agencies responding to civil litigation in relation to child sexual abuse have now been released. The Guidelines provide that a defence that a limitation period has expired, or a release or discharge from liability under a deed of release pursuant to the redress scheme following the Forde inquiry, should ordinarily not be relied on, either in formal proceedings or in the course of settlement negotiations.

I would encourage all interested persons to consider this issues paper and to provide feedback to inform the Government's consideration of these important issues.

Signature

A handwritten signature in black ink, appearing to read 'Judith D'Almeida'. The signature is fluid and cursive, with a large loop at the end of the first name.

Background

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Commission) was established by the Commonwealth Government in 2013 to inquire into institutional responses to allegations and incidents of child sexual abuse and related matters. The Commission was directed to focus on systemic issues, informed by individual cases, and make findings and recommendations to better protect children against sexual abuse, and alleviate the impact of abuse on children when it occurs.

On 14 September 2015, the Commission released its *Redress and Civil Litigation Report* (the Report). The Report contains the Commission's final recommendations about how best to provide effective justice to survivors of institutional child sexual abuse, through reasonable access to redress and reforms to the frameworks governing civil litigation actions by child sexual abuse survivors.

A full copy of the Report can be found at: <http://www.childabuseroyalcommission.gov.au/policy-and-research/redress/final-report-redress-and-civil-litigation>.

Purpose

While the Queensland Government is considering all relevant Commission recommendations, the main purpose of this paper is to seek feedback on the scope of the recently announced removal of the statutory limitation period in relation to claims for child sexual abuse, and more broadly, how the Commission's civil litigation reform recommendations, relating to claims for damages for harm arising from child sexual abuse in an institutional context, might operate in Queensland.

The outcomes of this consultation process will assist in the Government's consideration of these matters.

Making a Submission

All comments and submissions must be made in writing. In providing comments or a submission, please refer to the relevant question number and provide reasons and supporting details for your response. Please feel free to comment on other issues which are not raised in the paper that relate to limitation period, the duty of institutions and the proper defendant issues.

Please provide any comment or submission by **25 October 2016**

By email: civil_litigation_review@justice.qld.gov.au

By post: Child sexual abuse - civil litigation issues review
Strategic Policy
Department of Justice and Attorney-General
GPO Box 149
Brisbane QLD 4001

Privacy Statement

For the purpose of the *Information Privacy Act 2009*, by making a submission you are consenting to the use and disclosure of any personal information you provide as outlined in this privacy statement.

Any personal information in your comments or submissions will be collected by the Department of Justice and Attorney-General (DJAG) for the purpose of the consultation. DJAG may contact you for further consultation on the issues you raise, and your submissions and/or comments may be provided to others with an interest in the matter. Your submissions may also be released to other Government agencies as part of the consultation process.

Submissions provided to DJAG in relation to this issues paper will be treated as public documents. This means that, in all but exceptional cases, they may be published on the DJAG website, together with the name and suburb of each person making a submission and section 28 of the *Information Privacy Act 2009* applies to this personal information. If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly. Please note however that all submissions may be subject to disclosure under the *Right to Information Act 2009*, and access to applications for submissions, including those marked confidential, will be determined in accordance with that Act.

Submissions (or information about their content) may also be provided in due course to a parliamentary committee that considers matters relating to the review.

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Introduction

The Commission has considered the current civil litigation landscape in Australia and whether reforms are required to ensure victims of child sexual abuse are afforded access to justice and recommended:

- removing limitation periods for damages claims founded on the personal injury of a person resulting from child sexual abuse in an institutional context, with retrospective effect;
- imposing a statutory, non-delegable duty on certain types of institutions for acts of child sexual abuse by persons associated with the institution;
- reversing the onus of proof to hold institutions liable for child sexual abuse committed by persons associated with the institution, unless the institution can prove it took reasonable steps to prevent the abuse; and
- overcoming difficulties in identifying a proper defendant in civil claims.

The Report also made recommendations in respect of adopting model litigant guidelines for Government and non-government institutions for responding to claims for compensation concerning allegations of child sexual abuse and the establishment of a national redress scheme. However, this paper only considers issues relating to civil litigation reform recommended by the Commission.

The Queensland Government is seeking feedback from survivors, institutions, including existing and prospective operators of children's services, legal stakeholders, and interested members of the public about the direct and indirect impact of adopting the Commission's recommendations for legislative change.

Limitation Periods

The Commission made the following recommendations:

Recommendation 85

State and territory governments should introduce legislation to remove any limitation period that applies to a claim for damages brought by a person where that claim is founded on the personal injury of the person resulting from sexual abuse of the person in an institutional context when the person is or was a child.

Recommendation 86

State and territory governments should ensure that the limitation period is removed with retrospective effect and regardless of whether or not a claim was subject to a limitation period in the past.

Recommendation 87

State and territory governments should expressly preserve the relevant courts' existing jurisdictions and powers so that any jurisdiction or power to stay proceedings is not affected by the removal of the limitation period.

Recommendation 88

State and territory governments should implement these recommendations to remove limitation periods as soon as possible, even if that requires that they be implemented before our

recommendations in relation to the duty of institutions and identifying a proper defendant are implemented.

What the Commission considered

The Commission considered a number of factors in recommending the removal of limitation of action periods for claims of damages for personal injury resulting from child sexual abuse in an institutional context.

Central to the argument that the limitation periods for bringing actions should not apply in the case of child sexual abuse, was the fact that the average length of time for a survivor to disclose the abuse is 22 years. The Commission noted that, as a consequence of this delay, proceedings are often commenced a considerable time after the abuse has occurred and that defendant institutions commonly object to an extension of statutory limitation periods, resulting in the withdrawal/dismissal of the matter.

Although limitation periods can be extended by a court, preliminary consideration of whether to extend the limitation period may take considerable time and involve substantial legal costs to the survivor. The Commission found that this can be significantly traumatic for a victim and creates a perceived and often real barrier for many survivors wishing to pursue a civil claim.

While the Commission recognised that institutions may face additional claims as a result of the retrospective nature of the recommended removal of limitation periods, it considered that the interests of the institutions would be adequately protected by evidentiary requirements and the preservation of the power of the court to stay proceedings in the event that a fair trial is not possible (recommendation 87). The Commission further noted that the removal of limitation periods would only create an opportunity to argue the merits of a claim, not guarantee the success of an action.

Current position in Queensland

Under the *Limitation of Actions Act 1974*, the limitation period for an action for damages for personal injury for damages for negligence, trespass, nuisance or breach of duty, is three years from the time the action accrued. If the person was under 18 years of age when the action accrued, the limitation period is extended so that it ends three years from when the person turns 18 years of age. This period can be extended, in certain circumstances, under Part 3 of the Act.

The Queensland Government has announced that the statutory limitation period for actions relating to child sexual abuse in institutions will be removed. However, the Queensland Government is seeking to determine whether the scope of these reforms should be broadened in the future. Issues to consider include the type of abuse covered (i.e. non-sexual), and whether it should be broadened to include abuse that occurred outside an institutional setting.

Additionally, recently released Whole-of-Government Guidelines for Queensland Government agencies already provide: that in responding to civil litigation in relation to child sexual abuse that a defence that a limitation period has expired; or a release or discharge from liability under a deed of release pursuant to the Redress scheme following the Forde inquiry, should ordinarily not be relied on, either in formal proceedings or in the course of settlement negotiations.

Scope of the amendments

The recommendations of the Commission reflect its Terms of Reference and are confined to child sexual abuse in an institutional context.

New South Wales (NSW) and Victoria have recently removed the limitation periods applying to actions relating to child abuse, including sexual abuse. In the NSW legislation, the removal of the limitation period applies to child abuse, which is sexual abuse, serious physical abuse and

other abuse that is connected to the sexual or serious physical abuse. In Victoria, the limitation period does not apply to actions relating to child physical abuse or sexual abuse, and related psychological abuse. Actions in NSW and Victoria are also not limited to abuse that has occurred in an institutional context and applies to harm that has occurred in family, foster care, and out-of-home care settings.

In NSW, the amendments followed consultation on the discussion paper – *Limitation periods in civil claims for child sexual abuse*, released in January 2015. The Victorian amendments implemented recommendations of the Victorian Parliamentary Committee report – *Betrayal of Trust: Inquiry into the handling of child abuse by religious and other non-government organisations* (November 2013).

In Western Australia there is a Private Members Bill before Parliament that considers an alternative option. The Bill proposes to remove the limitation period for child sexual abuse as recommended by the Commission but extends the removal to include, child sexual abuse committed outside of an institutional context.

In Queensland, previous inquiries into the child protection system and abuse of children in institutions, namely the Forde Inquiry – *Commission of Inquiry into Abuse of Children in Queensland Institutions* (May 1999) and the *Crime and Misconduct Commission Inquiry into Abuse of Children in Foster Care* (January 2004) did not make any recommendations in respect of limitation periods for civil claims.

In its 1998 report, 'Review of the *Limitation of Actions Act 1974* (Qld)', the Queensland Law Reform Commission (QLRC), after considering the application of the Act to claims related to child sexual abuse, recommended that those claims should not be specifically excluded from the Act, and that they should be dealt with by the exercise of judicial discretion. The QLRC also recommended a more general expansion of the judicial discretion to extend the limitation period in the interests of justice, if the prejudice to the defendant in having to defend an action after the expiration of the limitation period and the general public interest in the finality of litigation are outweighed by other factors.

Other issues

The *Personal Injuries Proceedings Act 2002* (PIP Act) applies to personal injury arising out of an incident whether happening before, on or after 18 June 2002. Currently, the PIP Act sets out a number of procedural requirements in relation to giving notice of a claim and responding to a claim, exchanging information, preparing expert reports, attending compulsory conferences and exchanging final offers. In submissions to the Commission, stakeholders raised concerns about the application of the PIP Act to child sexual abuse claims, indicating that the procedural requirements impact on victims in terms of causing unnecessary costs and delays.

Questions

1. Recommendation 85 is limited to child sexual abuse. Should other forms of abuse, for example, physical abuse and related psychological abuse be considered? If so, should there be a threshold of seriousness of abuse and how might that be defined?
2. Recommendation 85 is limited to child sexual abuse that has occurred in an institutional context. Should child abuse in other or all settings, including the family setting, foster care and out of home care, also be included?

3. Should the removal of limitation periods be limited to child sexual abuse (and not physical or psychological abuse), but include abuse that occurred outside the institutional setting?
4. For child sexual abuse not in an institutional context and for abuse, other than child sexual abuse, should the limitation period be removed, or should there be expanded judicial discretion to extend the limitation period in either of these circumstances?
5. Does the *Personal Injuries Proceedings Act 2002*, create additional or unnecessary obstacles for parties? Should alternative procedures be adopted?
6. What processes and procedures could be adopted for dealing expeditiously (to avoid unnecessary costs) with matters where a stay of proceedings may eventuate?

Duty of institutions (non-delegable duty and ‘reverse onus’)

The Commission made the following recommendations:

Recommendation 89

State and Territory governments should introduce legislation to impose a non-delegable duty on certain institutions for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution.

Recommendation 90

The non-delegable duty should apply to institutions that operate the following facilities or provide the following services and be owed to children who are in the care, supervision or control of the institution in relation to the relevant facility or service:

- a. residential facilities for children, including residential out-of-home care facilities and juvenile detention centres but not including foster care or kinship care;
- b. day and boarding schools and early childhood education and care services, including long day care, family day care, outside school hours services and preschool programs;
- c. disability services for children;
- d. health services for children;
- e. any other facility operated for profit which provides services for children that involve the facility having the care, supervision or control of children for a period of time but not including foster care or kinship care; and
- f. any facilities or services operated or provided by religious organisations, including activities or services provided by religious leaders, officers or personnel of religious organisations but not including foster care or kinship care.

Recommendation 91

Irrespective of whether State and Territory parliaments legislate to impose a non-delegable duty upon institutions, State and Territory governments should introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse. The ‘reverse onus’ should be imposed on all institutions, including those institutions in respect of which we do not recommend a non-delegable duty be imposed.

Recommendation 92

For the purposes of both the non-delegable duty and the imposition of liability with a reverse onus of proof, the persons associated with the institution should include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institution also include religious leaders, officers and personnel of the religious organisation.

Recommendation 93

State and Territory governments should ensure that the non-delegable duty and the imposition of liability with a reverse onus of proof apply prospectively and not retrospectively.

Non-delegable duty

What the Commission considered

Recommendation 89 seeks to create greater certainty about the circumstances in which an institution may be liable for institutional child sexual abuse. The proposed legislative changes respond to difficulties faced by claimants seeking to prove that an institution is liable for the intentional criminal act of a person. In addition, the recommended changes propose that the duty of the institution should cover the acts of people 'associated with the institution', so that the acts of people who do not fall within the traditional meaning of 'employee' are covered.

In considering this issue, the Commission reviewed the leading case law in Australia and overseas, noting the less restrictive approach taken to vicarious liability in both the United Kingdom and Canada, where an institution may be vicariously liable for the criminal acts of its members or employees, and the nature of the relationship between the institution and the person who commits the abuse, is not restricted to the conventional employer/employee relationship.

In discussing the Australian context, the Commission closely examined the High Court decision in *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* [2003] HCA 4 (6 February 2003); (2003) 212 CLR 511, and its consideration of the law on vicarious liability and non-delegable duty. The Commission noted that the law in this area is still unclear.

The Commission decided not to recommend extending the scope of vicarious liability. Rather, it considered that, given the level of care, supervision and control that institutions may have over children and the vulnerability of children. The Commission considered it was more appropriate to impose a non-delegable duty on institutions for the prevention of child sexual abuse in an institutional context, and to expand the scope of the duty to ensure that the duty operates despite the abuse being the deliberate criminal act of a person associated with the institution. By doing so, the Commission sought to ensure that not only do institutions owe a duty to ensure reasonable care is taken to prevent child sexual abuse in the institutional context, but also that institutions ensure reasonable care is exercised by others in the performance of the institution's duty.

The Commission considered that the imposition of a specific non-delegable duty should not extend to all institutions that operate facilities or provide services to children, proposing that foster or kinship care services and community based not-for-profit or volunteer institutions that provide children with cultural, sporting and social activities, should be excluded. The former, on the basis of the level of supervision or control typically exercisable in these contexts, and the latter on the basis that the services were not considered high risk and the viability of requiring such services to obtain suitable insurance. If the Commission's recommendations are adopted, these institutions would still be required, under their existing common law duty, to take reasonable care to prevent child sexual abuse.

The Commission recommended the prospective application of the duty noting the potential impact of imposing a new statutory duty in respect of the affordability of insurance premiums and that 'no institution could now improve its practices or take steps to prevent abuse that has already occurred'.

Questions

7. Is the imposition of a non-delegable duty the best way to ensure that institutions take reasonable steps to prevent harm caused by child sexual abuse?
8. Should legislation define 'non-delegable duty' and the extent of the duty or, should defining the nature and extent of a non-delegable duty be left to the courts? Please explain which approach you favour and why.
9. Recommendation 90 of the Commission identifies which institutions should be in scope for the purpose of imposing a non-delegable duty. Are there any institutions or types of institutions that should be in or out of scope? Please explain why you think an institution should be included or excluded?
10. Recommendation 92 of the Commission identifies the types of 'relationships' (e.g. employees, members, officer holders, volunteers) that should be captured under the proposed statutory non-delegable duty. Are there any relationships that should be in or out of scope? Please explain why you think the relationship should be included or excluded?
11. If implemented should the legislation include a test for what constitutes reasonable care to prevent child sexual abuse in an institutional context? What would the test include?
12. Should a complementary code of practice or standards be developed to provide guidance to institutions in respect of discharging the duty? What should the code or standards cover?
13. Should the implementation of recommendation 89 be broadened to include other forms of abuse, for example, to impose a non-delegable duty on institutions to prevent serious physical and related psychological abuse in an institutional context?
14. What are the financial and other associated impacts for institutions in implementing recommendations 89, 90, and 92 as regards to non-delegable duty? What are the implications for the cost and availability of insurance?

Reverse onus of proof

What the Commission considered

In most civil matters the burden of proof, or the bringing of evidence on a specific issue, rests with the person commencing the proceedings, however, there are statutory exceptions to this general principle. For example, the *Anti-Discrimination Act 1991 (Qld)*, which deals with vicariously liability of workers and agents for a person, provides that it is a defence to a contravention of the Act if the respondent can prove, on the balance of probabilities, that the respondent took reasonable steps to prevent the worker or agent contravening the Act (section 133(2)).

The Commission considered that it was appropriate to ‘reverse the onus’ of proof in regard to an action regarding a claim for damages for personal injury arising out of child sexual abuse in an institutional context (recommendation 91). Specifically, the Commission proposed that institutions be made liable for child sexual abuse committed by their members or employees, defined broadly to include contractors and people associated with the institution, unless the institution can prove that reasonable steps have been taken to prevent the abuse.

While the Commission acknowledged the potential impact of the recommendation, it was satisfied that, with the proposed prospective application of the liability, institutions should be well positioned to provide evidence, by way of access to records and witnesses, regarding the steps that the institution took to prevent the abuse.

Central to the Commission’s reasoning is the argument that the proposed reform sends a clear message as to the level of governance and risk prevention that the community expects in regard to the care and supervision of children, and provides a powerful incentive to ensure these standards are adhered to, therefore minimising the potential for abuse.

Unlike recommendation 90, the Commission recommended that *all* institutions, including community based not-for-profit or volunteer organisations delivering services and activities to children, as well as institutions that administer foster care and kinship care, should be captured by the proposed reverse onus requirement, and that the definition of members and employees of an institution should be broad enough to include the types of relationships set out in recommendation 92.

Questions

15. Recommendation 91 of the Commission provides that all institutions should be liable for child sexual abuse, unless the institution can prove that it took reasonable steps to prevent the abuse. Do you agree that the reverse onus should apply to *all* institutions? Please explain why you agree or disagree with the Commission’s recommendation and which institutions should be included or excluded?
16. Recommendation 92 of the Commission identifies the types of ‘relationships’ (e.g. employees, members, officer holders, volunteers) which should be captured by the proposed reverse onus requirement. Are there any relationships that should be included or excluded from the types of relationships captured? Please explain why you think a relationship should be included or excluded?
17. Should the scope of recommendation 91 be broadened to include liability for other forms of abuse, for example, serious physical and related psychological abuse in an institutional context?
18. What are the financial and other associated impacts for institutions in implementing recommendations 91 and 92 as regards to the reversal of the onus of proof? What are the potential implications for the cost and availability of insurance?

Identifying a ‘proper defendant’

The Commission made the following recommendations:

Recommendation 94

State and Territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:

- a. the property trust is a proper defendant to the litigation; and
- b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.

Recommendation 95

The Australian Government and State and Territory governments should consider whether there are any unincorporated bodies that they fund directly or indirectly to provide children’s services. If there are, they should consider requiring them to maintain insurance that covers their liability in respect of institutional child sexual abuse claims.

What the Commission considered

Recommendation 94 of the Report attempts to resolve the issue that arises where an institution is named as the defendant to an action, and does not have sufficient funds to pay damages, but is connected to another entity, or property trust, that is able to meet any liability arising from the proceedings.

The Commission considered that the difficulties for survivors in identifying a correct defendant when commencing litigation against entities where assets are held separately, in a trust, should be addressed. The recommendation for this legislative amendment does not address other issues identified in the Report, for example, difficulties in ascertaining the defendant where the institution is an unincorporated association, or no longer exists, or is impecunious and is not associated with another entity with sufficient funds to discharge liability under an award of damages.

The Commission envisaged that faith-based institutions that expressed concern about the court having the power to nominate the proper defendant and identify property trusts, because of the conflict with the purposes for which many of these trusts were established, could avoid the application of the provisions by choosing to accept being named as defendant, or nominating an alternative legal entity as the defendant.

Recommendation 95, proposes a non-legislative response to ensure that unincorporated bodies that are funded through the Government are adequately insured to cover any liability in respect of child sexual abuse claims. The Commission was not satisfied that it was appropriate to recommend that all institutions providing children’s services should be incorporated and insured because of the potential impact on the delivery of services by small, temporary and informal associations that provide sporting, cultural and other activities in the community.

Questions

19. Should the claimant/plaintiff be required to enquire as to the correct defendant, or the nature of entities related to the defendant in order to identify any related property trusts, before commencing proceedings? Should the defendant have a responsibility to nominate an additional related entity with capacity to meet any award of damages or costs?
20. Should the court have the power to appoint an expert to investigate and identify the appropriate entity to be joined in proceedings, upon application by the claimant/plaintiff? (Note the current powers contained in the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR), in particular, rule 429G Appointment of experts and rules 429J to 429M dealing with powers to facilitate the preparation of the report.)
21. Should the court have the power to direct the related entity to make a payment in satisfaction of any award of damages or costs, notwithstanding the terms of any deed of trust, or statutory instrument establishing the trust?
22. Are the existing powers of the court contained in the UCPR sufficient for these purposes?
23. For example, the UCPR provide for the court to include a person as a party at any stage of a proceeding (rule 69). If the recommendation is adopted, would it be desirable to have an additional provision that specifies that, in exercising its discretion to join an entity as a party to proceedings, the court should give consideration to the following factors:
 - whether the entity has sufficient connection with the institution named as the defendant;
 - whether the entity has sufficient resources to meet the potential liability; and
 - whether it is fair and reasonable in all the circumstances for the entity to be joined in the proceedings.
24. With respect to recommendation 95, would the imposition of a requirement for government funded organisations providing children's services to have insurance to cover liability for child sexual abuse, have any operational consequences for those organisations? What are the implications for the cost and availability of insurance?