Date of Hearing: May 3, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 2777 (Wicks) – As Amended April 27, 2022

As Proposed to be Amended

SUBJECT: SEXUAL ASSAULT: STATUTE OF LIMITATIONS

KEY ISSUES:

1) SHOULD CLAIMS ALLEGING ADULT SEXUAL ASSAULT BASED UPON CONDUCT THAT OCCURRED ON OR AFTER JANUARY 1, 2009 AND COMMENCED ON OR AFTER JANUARY 1, 2019 THAT WOULD HAVE BEEN TIME-BARRED SOLELY BECAUSE OF APPLICABLE STATUTE OF LIMITATIONS, BE EXPLICITLY REVIVED AND ALLOWED TO BE COMMENCED BY DECEMBER 31, 2026?

2) SHOULD CLAIMS ALLEGING A COVER UP OF A SEXUAL ASSAULT OR OTHER INAPPROPRIATE CONDUCT, COMMUNICATION, OR ACTIVITY OF A SEXUAL NATURE THAT OTHERWISE WOULD BE TIME BARRED AS OF JANUARY 1, 2023, BE REVIVED FOR A ONE-YEAR PERIOD, ENDING ON DECEMBER 31, 2023, EXCEPT IN SPECIFIED CASES?

SYNOPSIS

Sexual assault is a widespread and serious problem in our society. According to an ongoing, nationally representative survey that assesses sexual violence, stalking, and intimate partner violence victimization among adult women and men in the United States, 43.6% of women (nearly 52.2 million) experienced some form of sexual violence in their lifetime, with 4.7% of women experiencing this violence in the 12 months preceding the survey. (S. G. Smith., et al., The National Intimate Partner and Sexual Violence Survey: 2015 data brief – updated release, *(2018) Centers for Disease Control and Prevention, at p. 2.) Those who choose to report sexual assaults and go through the trial process in either the criminal or civil justice system frequently experience the criminal justice system as a place that re-traumatizes and even harms them. It is essential that the justice system understand the neurobiology of trauma, the brain's defense circuitry, and the types of habits and reflex behaviors that victims of sexual assault often exhibit. (Lori Haskell and Melanie Randall,* The Impact of Trauma on Adult Sexual Assault Victims *(2019), Department of Justice Canada, at p. 27.) Policy makers should also be mindful of the long-term trauma of sexual assault, delaying the ability of survivors to face their assailants and seek justice.*

This bill seeks to account for the natural delay in some civil claims based upon acts of sexual assault and harassment reaching the courts by reviving some time-lapsed claims. As introduced, the bill only revived claims of sexual assault (or other inappropriate conduct, communication, or activity of a sexual nature) where there had been a cover up, and imposed a number of challenging pleading requirements on plaintiffs who wished to bring forward such claims, including a certification requirement. As recently amended, the bill no longer includes a certification requirement. The bill also now includes a provision to revive adult sexual assault

claims that were not revived when the limitations period was extended in 2019. The bill as proposed to be amended revives two types of sexual assault claims that otherwise would be barred solely because of the expiration of the applicable statute of limitations: (1) any claim seeking the recovery of damages suffered as a result of sexual assault alleged to have occurred on or after January 1, 2009 and commenced on or after January 1, 2019 that would have been barred solely because the statute of limitations has or had expired, allowing such claims to be commenced until December 31, 2026; and (2) any claim seeking to recover damages suffered as a result of a cover up of a sexual assault or other inappropriate conduct, communication, or activity of a sexual nature, including a claim that was time-barred prior to January 1, 2023, and allowing such claims to be commenced during a one-year period from January 1, 2023 until December 31, 2023.

The analysis discusses, among other things, that (1) the Legislature has the power to create, extend, and alter statutes of limitation as it deems appropriate, but it must expressly revive lapsed claims if they are time-barred; (2) the Legislature has, in fact, revived lapsed civil claims related to sexual assault of adults and minors; (3) the bill's proposed revival is similar to precedents in both statutory and common law; (4) how and why the balance of competing interests favor reviving lapsed claims for adult sexual assault (and could even justify abolishing the statute of limitations altogether); and (5) how the bill does not apply to claims against either the state or local government agencies. The bill also discusses author's amendments that clarify several issues in the bill, including (1) the relevant dates governing lapsed claims that were omitted from recent legislation that extended the statute of limitations and therefore this bill seeks to include; and (2) a revised definition of "cover up" that omits unnecessary examples of what cover ups could entail. The author's proposed amendments are incorporated into the Summary, below, and discussed in the analysis. The bill is opposed by a coalition of business interests who believe that it will open the floodgates of litigation against employers. It is supported by a number of advocates for victims of sexual assault who believe that it will provide justice and closure to victims who were too traumatized to pursue their cases during the relevant statutory period allowed by current law.

SUMMARY: Allows specified claims for recovery of damages suffered as a result of sexual assault or other inappropriate conduct, communication, or activity of a sexual nature, including those which are time-barred solely due to the expiration of the applicable statute of limitations, to be revived. Specifically, **this bill**:

1) Declares that the bill shall be known and may be cited as the Sexual Abuse and Cover Up Accountability Act.

2) Finds and declares the following on behalf of the Legislature:

    a) Every 68 seconds, an American is sexually assaulted.

    b) One out of every six American women has been the victim of an attempted or completed rape in their lifetime.

    c) According to the Rape, Abuse and Incest National Network, only about 300 out of every 1,000 sexual assaults are reported to police. That means more than two out of three go unreported.

d) Thirty-three percent of women who are raped contemplate suicide; thirteen percent attempt it.

e) A 2016 analysis of 28 studies of nearly 6,000 women and girls 14 years of age or older who had experienced sexual violence found that 60 percent of survivors did not label their experience as "rape."

f) Women may not define a victimization as a rape or sexual assault for many reasons such as self-blame, embarrassment, not clearly understanding the legal definition of the terms, or not wanting to define someone they know who victimized them as a rapist or because others blame them for their sexual assault.

g) When the perpetrator is someone a victim trusts, it can take years for the victim even to identify what happened to them as a sexual assault.

h) For these reasons, it is self-evident that the unique nature of the emotional and psychological consequences of sexual assault, especially on women, can paradoxically permit wrongdoers to escape civil accountability unless statutes of limitation are crafted to prevent this injustice from occurring.

i) Moreover, when these data are combined with widespread news reports of major companies being accused of covering up sexual assaults by their employees it is self-evident that statutes of limitation for sexual assault need to be crafted in a way that does not cause the covering-up company to enjoy the fruits of their cover-up solely because our statutes of limitation permit, and thus motivate, such behavior.

3) Revives claims for sexual assault of an adult that are based upon conduct that occurred on or after January 1, 2009 and commenced on or after January 1, 2019 that would have been barred solely because the applicable statute of limitations has or had expired. Specifies that such claims are hereby revived and may be commenced until December 31, 2026. Specifies that the bill does not revive either of the following claims:

   a) A claim that has been litigated to finality in a court of competent jurisdiction before January 1, 2023.

   b) A claim that has been compromised by a written settlement agreement between the parties entered into before January 1, 2023.

4) Provides that notwithstanding any other law, any claim seeking to recover damages suffered as a result of a sexual assault or other inappropriate conduct, communication, or activity of a sexual nature that would otherwise be barred before January 1, 2023, solely because the applicable statute of limitations has or had expired, is hereby revived, and a cause of action may proceed if already pending in court on January 1, 2023, or, if not filed by that date, may be commenced between January 1, 2023, and December 31, 2023. Specifies that the bill revives claims brought by a plaintiff who alleges all of the following:

   a) The plaintiff was sexually assaulted or was subjected to other inappropriate conduct, communication, or activity of a sexual nature.

b) One or more entities are legally responsible for damages arising out of the sexual assault or other inappropriate conduct, communication, or activity of a sexual nature.

c) The entity or entities, including, but not limited to, their officers, directors, representatives, employees, or agents, engaged in a cover up or attempted a cover up of a previous instance or allegation of sexual assault or other inappropriate conduct, communication, or activity of a sexual nature by an alleged perpetrator of such abuse.

d) Failure to allege a cover up as required as to one entity does not affect revival of the plaintiff's claim or claims against any other entity.

5) Defines the following for purposes of 4):

a) "Cover up" means a concerted effort to hide evidence relating to a sexual assault or other inappropriate conduct, communication, or activity of a sexual nature that incentivizes individuals to remain silent or prevents information relating to a sexual assault or other inappropriate conduct, communication, or activity of a sexual nature from becoming public or being disclosed to the plaintiff, including, but not limited to, the use of nondisclosure agreements or confidentiality agreements.

b) "Entity" means a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity.

c) "Legally responsible" means that the entity or entities are liable under any theory of liability established by statute or common law, including, but not limited to, negligence, intentional torts, and vicarious liability.

6) Specifies that 4), above, revives any related claims, including, but not limited to, wrongful termination and sexual harassment, arising out of the sexual assault or other inappropriate conduct, communication, or activity of a sexual nature that is the basis for a claim.

7) Specifies that 4) does not revive either of the following claims:

a) A claim that has been litigated to finality in a court of competent jurisdiction before January 1, 2023.

b) A claim that has been compromised by a written settlement agreement between the parties entered into before January 1, 2023.

8) Clarifies that 4) shall not be construed to alter the otherwise applicable burden of proof, as defined in Section 115 of the Evidence Code, that a plaintiff has in a civil action subject to this section.

9) Clarifies that 4) does not preclude a plaintiff from bringing an action for sexual assault pursuant to 3).

10) Provides that the provisions of the bill are severable. If any provision of this bill or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

EXISTING LAW:

1) Requires all civil actions be commenced within applicable statutes of limitations. (Code of Civil Procedure (CCP) Section 312.)

2) Makes the general statute of limitations in California to bring an action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another, two years. (CCP Section 335.1.)

3) Provides that in any civil action for recovery of damages suffered as a result of sexual assault of an adult, the time of commencement of the action shall be the later of the following:

   a) Within ten years from the date of the last act, attempted act, or assault with intent to commit an act, of sexual assault against the plaintiff.

   b) Within three years from the date the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from an act, attempted act, or assault with intent to commit an act, of sexual assault against the plaintiff. (CCP Section 340.16 (a).)

4) Defines, for purposes of 3), "sexual assault" to mean any of the crimes described in Section 243.4, 261, 262, 264.1, 286, 287, or 289, or former Section 288a, of the Penal Code, assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes. (CCP Section 340.16 (b)(1).)

5) Clarifies that for the purpose of 3), it is not necessary that a criminal prosecution or other proceeding have been brought as a result of the sexual assault or, if a criminal prosecution or other proceeding was brought, that the prosecution or proceeding resulted in a conviction or adjudication. This subdivision does not limit the availability of causes of action permitted under 3), including causes of action against persons or entities other than the alleged person who committed the crime. Specifies that the time period for bringing an action pursuant to 3) applies to any action commenced on or after January 1, 2019. (CCP Section 340.16 (b)(2).)

6) Revives any claim seeking to recover more than $250,000 dollars in damages arising out of a sexual assault or other misconduct of a sexual nature by a physician occurring at a student health center between January 1, 1988, and January 1, 2017, that would otherwise be barred before January 1, 2020, solely because the applicable statute of limitations has expired. Provides that an otherwise time-barred cause of action may proceed if already pending in court on October 2, 2019, or, if not filed by that date, may be commenced between January 1, 2020, and December 31, 2020. Specifies however, that this provision does not revive any claim that was litigated to finality, or settled between the parties, before January 1, 2020. Provides, however, that these provisions do not apply to a claim brought against a public entity. (CCP Section 340.16 (c).)

7) Revives any claim seeking to recover damages arising out of a sexual assault or other inappropriate contact, communication, or activity of a sexual nature by a physician while employed by a medical clinic owned and operated by the University of California, Los Angeles, or a physician who held active privileges at a hospital owned and operated by the University of California, Los Angeles, at the time that the sexual assault or other inappropriate contact, communication, or activity of a sexual nature occurred, between January 1, 1983, and January 1, 2019, that would otherwise be barred before January 1, 2021,

solely because the applicable statute of limitations has or had expired. Provides that an otherwise time-barred cause of action may proceed if already pending in court on January 1, 2021, or, if not filed by that date, may be commenced between January 1, 2021, and December 31, 2021. Specifies, however, that this provision does not revive any claim that was litigated to finality, or settled between the parties, before January 1, 2021. (CCP Section 340.16 (d).)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: This bill, sponsored by Victim Policy Institute, allows specified claims for recovery of damages suffered as a result of sexual assault or other inappropriate conduct, communication, or activity of a sexual nature, including those which are time-barred solely due to the expiration of the applicable statute of limitations, to be revived. According to the author:

> At a moment of reckoning in the United States about sexual harassment, abuse and sexual assault, California has made landmark decisions that recognize for many survivors it takes years before being able to come forward.
>
> With this bill, California takes another step to protect survivors of sexual abuse when there is evidence of cover up by a defendant entity.

Sexual assault and its long-term psychological impact on survivors. Sexual assault is a widespread and serious problem in our society. According to an ongoing, nationally representative survey that assesses sexual violence, stalking, and intimate partner violence victimization among adult women and men in the United States, 43.6% of women (nearly 52.2 million) experienced some form of contact sexual violence in their lifetime, with 4.7% of women experiencing this violence in the 12 months preceding the survey. (S. G. Smith, *et al., The National Intimate Partner and Sexual Violence Survey: 2015 data brief – updated release*, (2018) Centers for Disease Control and Prevention, at p. 2.) Approximately one in five (21.3% or an estimated 25.5 million) women in the U.S. reported completed or attempted rape at some point in their lifetime. (*Ibid.*) More than a third of women (37.0% or approximately 44.3 million women) reported unwanted sexual contact (e.g., groping) in their lifetime. (*Ibid.*)

Yet instead of delivering justice the criminal justice system is often a source of further distress for victims of sexual assault. Many victims choose not to report the crimes of sexual violence committed against them. In 2018, it is estimated that less than 25% of all incidents of rape and sexual assault were reported to law enforcement. (Rachel E. Morgan and Barbara A. Ouderkerk, *Criminal Victimization, 2018* (2019) U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, at p. 8, available at https://www.nsvrc.org/sites/default/files/2021-04/cv18.pdf.) Those who choose to report sexual assaults and go through the trial process in either the criminal or civil justice system frequently experience the criminal justice system as a place that re-traumatizes and even harms them. Trauma associated with a sexual assault has a neurobiological impact – it affects our brains and our nervous systems. (Lori Haskell and Melanie Randall. *The Impact of Trauma on Adult Sexual Assault Victims* (2019) Department of Justice Canada, at p. 22, available at https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf.) It is essential that the justice system understand the neurobiology of trauma, the brain's defense circuitry, and the types of habits and reflex behaviors that victims of sexual assault often exhibit. (*Id.* at p. 17.) Policy makers should also be mindful of the long-term trauma of sexual assault, delaying the ability of survivors to face their assailants and seek justice.

The Legislature has the power to create, extend, and change statutes of limitation, as it deems appropriate. The policy behind statutes of limitations provides that they "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. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and the right to be free of stale claims in time comes to prevail over the right to prosecute them." (3 Witkin, California Procedure Section 433, 4th Ed.)

Nonetheless, courts have acknowledged that, "the need for repose is not so overarching that the Legislature cannot by express legislative provision allow certain actions to be brought at any time, and it has occasionally done so." (*Duty v. Abex Corp* (1989) 214 Cal.App.3rd 742, 749 [citations omitted].) The United States Supreme Court has long held that:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. . . . They are by definition arbitrary, and their operation does not discriminate against the just and the unjust claim, or the avoidable or unavoidable delay . . . . Their shelter has never been regarded as what now is called a "fundamental right" . . . . [T]he history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control. (*Chase Securities Corp. v. Donaldson* (1945) 325 U.S. 304, 314.)

With regard to reviving cases previously barred by a statute of limitations, in *Liebig v. Superior Court* (1989) 209 Cal.App.3d 828 and *Lent v. Doe* (1995) 40 Cal.App.4th 1177, the courts cited *Chase Securities* and affirmed the Legislature's power to *revive* civil causes of action, even if the actions were otherwise barred by the running of the statute of limitations. In both cases, the court upheld against constitutional attack the retroactive application of prior legislation amending CCP Section 340.1 to revive childhood abuse actions that had lapsed or technically expired under prior law. Similarly, in *Hellinger v. Farmers Group, Inc.* (2001) 91 Cal.App.4th 1049, the court upheld the Legislature's revival of certain insurance claims arising out of the Northridge Earthquake that were not brought previously and otherwise were time-barred, allowing the claimants a one-year window to file the revived actions. (SB 1899 (Burton), Chap. 1090, Stats. 2000, enacting CCP Section 340.9.)

Perhaps most importantly for purposes of this bill, the California Supreme Court in *Quarry v. Doe I* (2009) 53 Cal.4th 945, held that the provision of CCP 340.1, allowing a plaintiff over 26 years of age to file suit against specified third parties in specified circumstances, did not apply to claims that had lapsed under prior law; the court did not say that the Legislature could not revive the claims by express terms, but rather (the majority) held that the Legislature had *not* expressly done so.

> The Legislature has authority to establish—and to enlarge—limitations periods. . . . [H]owever, legislative enlargement of a limitations period does not revive lapsed claims in the absence of **express language of revival**. This rule of construction grows out of an understanding of the difference between prospective and retroactive application of statutes. . . . As long as the former limitations period has not expired, an enlarged limitations period ordinarily applies and is said to apply prospectively to govern cases that are pending when, or instituted after, the enactment took effect. This is true even though the underlying conduct that is the subject of the litigation occurred prior to the new enactment. . . . However, when it

> comes to applying amendments that enlarge the limitations period to claims as to which the limitations period has expired before the amendment became law—that is, claims that have lapsed—the analysis is different. Once a claim has lapsed (under the formerly applicable statute of limitations), revival of the claim is seen as a retroactive application of the law under an enlarged statute of limitations. **Lapsed claims will not be considered revived without express language of revival**. (*Quarry v. Doe I* (*Quarry*) (2012) 53 Cal.4th 945, 955-957 [emphasis added, internal citations omitted].)

Quarry is relevant to this bill because (1) the statute it seeks to amend—CCP 340.16—does not expressly revive lapsed claims for adult sexual assault, even though it was amended in 2018 to extend the statute of limitations governing claims that are filed *after* January 1, 2019; and (2) this bill, as it was recently amended, now seeks to do just that.

Recent legislation extending the statute of limitations for bringing civil claims based on adult sexual assault, but not expressly reviving claims that were time-lapsed. Prior to 2019, the statute of limitations for bringing a cause of action alleging sexual assault of an adult was two years, the same as any other tort action. The enactment of AB 1619 (Berman), Chap. 939, Stats. 2018, which coincided with the "Me Too" and "Time's Up" movements, reflected a widespread consensus among professionals and women's advocates that survivors of sexual assault often need more than two years to process and engage with the legal system to seek a legal remedy. As a result, AB 1619 created Code of Civil Procedure Section 340.16, which extended the time for bringing an action seeking damages for sexual assault of an adult to ten years after the date of the assault, or three years after the plaintiff discovered that an injury or illness was the result of the assault, whichever date is later. While the concept of "discovery" is an important equitable principle in civil procedure, it is especially important in sexual assault cases, where memories might be repressed or the connection between an assault and later psychological or physical manifestations may not be apparent for some time.

However, as mentioned above, AB 1619 did not expressly *revive* civil claims for sexual assault that were time-barred because of lapsed statutes of limitations by including the explicit revival language which the California Supreme Court held in *Quarry* to be required. Therefore, despite the new ten-year period to file claims provided by AB 1619, a claim based upon a sexual assault more than two years prior to the date when that bill went into effect (January 1, 2019) remained time-barred, while claims based upon sexual assault less than two years prior, and at any point after, that effective date, still *could* be filed, which seems somewhat arbitrary and unfair. To address that apparent oversight and the disparate treatment it created, this bill now seeks to revive the claims that occurred in the ten years prior to AB 1619 taking effect, most of which were time-barred under the two-year statute of limitations by January 1, 2019, when the bill took effect.

Recent legislation expressly reviving adult sexual assault (and related) claims against specific defendants that were time-lapsed. Disclosures of sexual assaults at student health centers at both USC and UCLA, over an extended period of time, provides examples of cases in which even the extended time frame for bringing civil claims under AB 1619 proved to be inadequate.

Adult sexual assaults at USC. A gynecologist at USC who treated patients at the university's student health center committed multiple and egregious assaults on college-aged women over a period of nearly thirty years, from 1988 until 2017. The rationale for extending statutes of limitation for victims of sexual assault were especially appropriate for college students, many of

whom were experiencing their first gynecological exam and therefore did not know that the procedures the doctor subjected them to were medically unnecessary or inappropriate. For many women, it was only when the sexual assaults were widely reported that they realized they had been assaulted or abused. In 2019, therefore, the Legislature enacted AB 1510 (Reyes), Chap. 462, Stats. 2019, which revived otherwise time-barred causes of action arising out of a sexual assault, or related sexual misconduct, committed by a physician at a college or university student health center, between 1988 and 2017.

Specifically, AB 1510 provided that an otherwise time-barred cause of action may proceed if already pending in court on October 2, 2019, or, if not filed by that date, could be commenced between January 1, 2020 and December 31, 2020. In short, it created a one-year window in which a plaintiff could revive or newly file a claim that would otherwise be dismissed because of a failure to bring the case in a timely manner under the applicable statute of limitation. Because the author of AB 1510 wanted to limit that revival to the unique situation at USC, the bill exempted assaults that occurred at a student health center at any public college or university. In addition, AB 1510 only applied to causes of actions seeking more than $250,000 in damages. This monetary limitation reflected the fact that many victims had become part of a settlement agreement with USC that limited damages to $250,000. AB 1510 allowed survivors who sought more than that limited amount to not join (or opt out of) the settlement without having their individual action barred by the statute of limitation.

Adult sexual assaults at UCLA. Dr. James Heaps, a physician employed by UCLA, in both its student health centers and its medical center, allegedly committed sexual assaults against over 100 women over the course of his career that lasted from 1983 to 2018. To the extent that the existing statute of limitation would bar any of these women's legal claims against the doctor or UCLA, AB 3092 (Wicks), Chap. 246, Stats. 2020, revived those claims, allowing a cause of action to proceed if it were already pending as of January 1, 2021, or any claim to be commenced between January 1, 2021 and December 31, 2021. Like AB 1510, AB 3092 created a one-year window to bring or revive otherwise time-barred claims. Also, like AB 1510, AB 3092 did not revive any claim that had been litigated to finality or was already subject to an approved settlement agreement. Unlike AB 1510, however, AB 3092 did not include the $250,000 limitation, as that limitation was in response to the settlement agreement reached between USC and a specific class of plaintiffs.

Like AB 1510, AB 3092 revived claims based on sexual assault, as well as claims based on "other inappropriate contact, communication, or activity of a sexual nature." It appears that most of the young women assaulted at both USC and UCLA were subject to behavior that would meet the statutory definition of sexual assault, but some claims alleged other kinds of conduct, such as demeaning comments or unnecessary and prurient procedures, that might fall short of sexual assault. In short, like AB 1510 – which passed out of this Committee on a 9-0 vote, and passed in both houses of the Legislature without a negative vote – AB 3092 was a measured and reasonable response to a specific set of circumstances that were not adequately protected by existing law.

Given these repeated incidents of systemic and widespread adult sexual assault (and similar incidents elsewhere in the nation, such as repeated and widespread abuse of college athletes at the University of Michigan, University of Arizona, and University of Texas; and of athletes training with their national teams governed by US Gymnastics and US Swimming) that go undisclosed and undiscovered for years or even decades after the assaults, and the repeated

need to revive lapsed civil claims for sexual assault, the Legislature may wish to consider whether it is wise to enact one-time revivals of limitations periods, or whether it would be preferable as a matter of policy and protection of survivors, to enact a more comprehensive approach to the issue. California has abolished its statutes of limitations for almost all felony level sex offenses as a result of SB 813 (Leyva), Chap. 777, Stats. 2016, despite the constitutional rights of defendants, including the rights to a speedy trial and due process of laws. In light of the precedent of the state abolishing the statute of limitations for criminal prosecutions of sexual assault, it may be appropriate to also abolish the statute of limitations for bringing civil actions based upon sexual assault.

This bill. As introduced, the bill only revived claims of sexual assault (or other inappropriate conduct, communication, or activity of a sexual nature) where there had been a cover up, and imposed a number of challenging pleading requirements on plaintiffs who wished to bring forward such claims. Specifically, it required a plaintiff to do all of the following, among other things:

- Within 60 days of the date of service of the initial complaint on any defendant or cross-defendant, the attorney for the plaintiff shall file and serve a certificate (one certificate per complaint, notwithstanding that multiple defendants have been named in the complaint or may be named at a later time) executed by the attorney declaring *all* of the following:
    - That the attorney has reviewed and researched the facts of the case and reasonably believes that the entity or entities engaged in a cover up or attempted a cover up of a previous instance or allegation of sexual assault or other inappropriate conduct, communication, or activity of a sexual nature by an alleged perpetrator of such abuse.
    - That the attorney has consulted with and received an opinion from at least one mental health practitioner who is licensed to practice in this state and is not a party to the action, who the attorney reasonably believes is knowledgeable regarding the effects of sexual assault or other inappropriate conduct, communication, or activity of a sexual nature, who is not treating and has not treated the plaintiff, and who has interviewed the plaintiff and has concluded that there is a reasonable basis to believe that the plaintiff had been subjected to a sexual assault or other inappropriate conduct, communication, or activity of a sexual nature by an alleged perpetrator.
    - That the attorney has concluded on the basis of the attorney's review of the facts of the case and consultation with the mental health practitioner that there is reasonable and meritorious cause for the filing of the action.

These requirements are very similar to requirements for claims alleging sexual abuse of a child pursuant to CCP Section 340.1 that were put in place as a result of SB 108 (Lockyer), Chap. 1578, Stats. 1990, when the statute of limitations for childhood sexual abuse was first extended beyond three years. SB 108 lengthened the limitations period from three years to eight years past the age of majority, or 26 years of age, or within three years of discovery. (It has since been extended by AB 218 (Gonzalez), Chap. 861, Stats. 2019, to 22 years past the age of majority, or 40 years of age, or five years from the date of discovery.)

Importing SB 108's certification requirements for claims of childhood sexual abuse into a bill addressing adult sexual assault and harassment may not make sense. First, the certification process outlined in SB 108 was written for very specific examples of civil claims filed against

the Catholic Church, which do not appear to be at play in this bill. Second, the requirements established by that bill were costly and nearly impossible to meet in sexual assault cases, making them not very useful or relevant for the overwhelming majority of sexual assault victims. Finally, the certification requirements would invite litigation within litigation in sexual abuse cases, and could discourage the filing of meritorious claims.

As recently amended and now in print, the bill no longer includes a certification requirement. And the bill now includes a provision to revive adult sexual assault claims that did not benefit from an extended statute of limitations when the applicable period was extended to ten years from the date of the assault (or three years from the date of discovery) in 2019. It revives two types of adult sexual assault claims that otherwise would be barred solely because of the expiration of the applicable statute of limitations: regular assault claims, and claims of assault or other inappropriate contact, communication, or activity of a sexual nature where there has been a cover up of the claims.

The bill as proposed to be amended refines these two types of claims so the following claims that otherwise would be barred solely because of the expiration of the applicable statute of limitations would be revived: (1) any claim seeking the recovery of damages suffered as a result of sexual assault alleged to have occurred on or after January 1, 2009 and commenced on or after January 1, 2019 that would have been barred solely because the statute of limitations has or had expired, as long as such claims are commenced no later than December 31, 2026; and (2) any claim seeking to recover damages suffered as a result of a *cover up* of a sexual assault or other inappropriate conduct, communication, or activity of a sexual nature, including a claim that was time-barred prior to January 1, 2023, as long as such claims are commenced during a one-year period from January 1, 2023 until December 31, 2023.

(1) Claims alleging adult sexual assault (CCP 340.16 (a) and (b)).

Under the bill in print, adult sexual assault claims commenced on or after January 1, 2019, "including any action or causes of action that would have been barred solely because the applicable statute of limitations has or had expired prior to January 1, 2019," would be revived. Although it appears that the author's intention was to revive claims that date back to ten years before AB 1619 took effect and revive only those claims so that, as of the effective date of this bill, all plaintiffs in those cases would have had at least ten years to bring their claims, the language may not be as specific as necessary to achieve that goal. Under the language of the bill in print, claims dating back to 2009 would be technically revived, but would then be subject to the ten year statute of limitations, would immediately be time-barred. The same would be true for all claims occurring before 2013 (or more realistically 2014, given than there would be so little time to gather evidence and prepare a complaint). Also, the bill in print does not specify when the ability to file a complaint regarding revived claims would end. In order to address and correct the discrepancy in the rights of survivors of sexual assaults that occurred after January 1, 2009 and were lapsed as of January 1, 2019 (the date when AB 1619 took effect), while also clarifying the end date for claims to be filed, the author proposes the following additional clarifying amendments on Page 4, at lines 6 - 11:

> (3) This section applies to any action described in subdivision (a) that is ***based upon conduct that occurred on or after January 1, 2009 and*** commenced on or after January 1, 2019~~,~~ ~~including any action or causes of action~~ that would have been barred solely because the

applicable statute of limitations has or had expired ~~prior to January 1, 2019~~. Such claims are hereby revived ***and may be commenced until December 31, 2026***.

The proposed amendments would clarify that claims must be commenced by a date certain (December 31, 2026) to make clear that revived claims cannot be filed any time in the future. The date is appropriate because plaintiffs with claims that arose between January 1, 2009 and December 31, 2016 could not bring claims after AB 1619 took effect, despite being within the 10-year statute of limitations provided by AB 1619.

It is important to note that civil actions brought pursuant to CCP Section 340.16 (a) and (b) require a plaintiff to establish that an assault occurred that would meet the definition of at least one of the crimes described in Section 243.4, 261, 264.1, 286, 287, or 289, or former Sections 262 and 288a, of the Penal Code, assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes. Therefore, the universe of claims covered by CCP Section 340.16, and therefore the universe of claims that are covered by the bill's proposed revival language, is relatively small. Claims for sexual assaults that would be misdemeanors, for example, are not revived by the bill's proposed amendments to CCP Section 340.16 (a) and (b).

(2) Cover ups of sexual assaults, or other inappropriate conduct, communication, or activity of a sexual nature.

The second category of claims addressed and revived by the bill are those alleging *cover ups* of sexual assaults, or other inappropriate conduct, communication, or activity of a sexual nature. The bill would revive claims which would otherwise be barred before January 1, 2023. Those claims, once revived, could be filed during a one-year period: between January 1, 2023 and December 31, 2023. Like adult sexual assault claims under CCP 340.16 (a) and (b), some claims would be exempt from revival: (i) a claim that has been litigated to finality in a court of competent jurisdiction before January 1, 2023; or (ii) a claim that has been compromised by a written settlement agreement between the parties entered into before January 1, 2023.

While this provision does not include a time limit on the age of a claim that would be eligible for the one-year revival, it does include a number of pleading requirements that limit the scope of claims that effectively could be revived, limiting the scope of this provision of the bill, including the following:

- One or more entities are legally responsible for damages arising out of the sexual assault or other inappropriate conduct, communication, or activity of a sexual nature.

- The entity or entities, including, but not limited to, their officers, directors, representatives, employees, or agents, engaged in a cover up or attempted a cover up of a previous instance or allegation of sexual assault or other inappropriate conduct, communication, or activity of a sexual nature by an alleged perpetrator of such abuse.

Definition of "cover up" – The bill's revival provision only applies to cases where a "cover up" is alleged. The bill in print defines "cover up" as follows:

> "Cover up" means a deliberate effort to hide or disregard information relating to a sexual assault or other inappropriate conduct, communication, or activity of a sexual nature.
>
> (i) Moving an alleged perpetrator to another position at the entity or a subsidiary entity.

(ii) Assisting an alleged perpetrator in gaining employment at another entity following allegations of sexual assault or other inappropriate conduct, communication, or activity of a sexual nature.

(iii) Incentivizing individuals to remain silent or otherwise taking steps to prevent the information from becoming public or being disclosed to the plaintiff, including, but not limited to, use of nondisclosure agreements or confidentiality agreements.

Some of this language, especially the examples, may not be helpful or necessary. CCP 340.1, which revived claims of childhood sexual abuse where there has been a cover-up, does not give examples of activities that would constitute a cover up. Rather, it uses generic language to describe the behavior. It defines "cover up" as follows:

For purposes of this subdivision, a "cover up" is a concerted effort to hide evidence relating to childhood sexual assault. (CCP Section 340.1 (b)(2).)

Also, some of the examples used by the bill in print do not necessarily correlate with efforts to cover up a sexual assault or other misconduct of a sexual nature, such as, "Moving an alleged perpetrator to another position at the entity or a subsidiary entity." In order to more closely conform this language to CCP 340.1 (b)(2) and eliminate unhelpful and unnecessary examples, the author proposes the following clarifying amendments (on Page 7, at lines 1 – 14):

(A) "Cover up" means a ~~deliberate~~ ***concerted*** effort to hide ~~or disregard information~~ ***evidence*** relating to a sexual assault or other inappropriate conduct, communication, or activity of a sexual nature~~. Examples of a cover up include, but are not limited to, the following:~~

~~(i) Moving an alleged perpetrator to another position at the entity or a subsidiary entity.~~

~~(ii) Assisting an alleged perpetrator in gaining employment at another entity following allegations of sexual assault or other inappropriate conduct, communication, or activity of a sexual nature.~~

~~(iii) Incentivizing~~ ***that incentivizes*** individuals to remain silent or ~~otherwise taking steps to prevent the~~ ***prevents*** information ***relating to a sexual assault or other inappropriate conduct, communication, or activity of a sexual nature*** from becoming public or being disclosed to the plaintiff, including, but not limited to, ***the*** use of nondisclosure agreements or confidentiality agreements.

Similar to statutory and common law – Opponents criticize the vagueness of the language "other inappropriate conduct, communication, or activity of a sexual nature." But that language is not unprecedented. It is codified in subdivisions (c) and (d) of CCP Section 340.16 [dealing with claims arising at the USC and UCLA medical centers], the very section that is being amended by the bill. Committee staff is unaware of any court decision regarding subdivisions (c) and (d) of CCP Section 340.16 holding that the language is void for vagueness, or otherwise invalid or unenforceable.

Also, the concept of pausing an applicable statute of limitations because of obstruction or obfuscation on the part of the defendant is not novel or unprecedented in the law. In fact, it is consistent with the common law doctrine of equitable estoppel. In the statute of limitations context, equitable estoppel may be appropriate where the defendant's act or omission actually

and reasonably induced the plaintiff to refrain from filing a timely suit. (See *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 385.) The requisite act or omission must involve a misrepresentation or nondisclosure of a material fact bearing on the necessity of bringing a timely suit. (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1149–1152.)

Balance of competing interests to determine when time-lapsed claims should be revived. The business coalition opposing the bill criticize it for violating, "fundamental fairness and due process by permitting lawsuits against which it is impossible to provide a defense." They continue:

> AB 2777 flies in the face of these long-established principles underlying statutes of limitation. As a matter of policy, statutes of limitations recognize that when claims reach too far back in time, the legal system is no longer able to find employees, other witnesses, or records from the time period of the claim to evaluate what did or did not occur. This leaves juries with comparatively little evidence, and leaves defendants with no basis for an appropriate response or ability to defend themselves in court.

It is true that courts have recognized these concerns. They have observed, for example, "Individuals, as well as businesses and other enterprises ordinarily rely upon the running of the limitations period: 'The keeping of records, the maintenance of reserves, and the commitment of funds may all be affected by such reliance … To defeat such reliance … deprives [enterprises] of the ability to plan intelligently with respect to stale and apparently abandoned claims." (*Quarry v. Doe I, supra,* 53 Cal.4th at p. 958 [quoting *Douglas Aircraft v. Cranston* (1962) 58 Cal.2d 462, 465–466].)

But revival of time-lapsed claims involves a balancing of interests that requires the Legislature to consider competing interests that favor of revival. (See *Quarry v. Doe I, supra,* 53 Cal.4th at p. 986.) While it may be true that memories fade and evidence diminishes over time (to the detriment of *both* plaintiffs and defendants), it is also true that recent research shows the profound impact of sexual assault on the brains of survivors of sexual assault (see discussion of ***Sexual assault and its long-term psychological impact on survivors***, above) that could impair their ability to come forward. Also, a survivor of sexual assault *or* sexual harassment who is at the early stages of their career may be less willing and able than a more experienced and senior employee to come forward and take action against their employer, especially when the employee knows that the employer has taken efforts to cover up evidence of the incident. This hesitancy to pursue claims could be the result of either immaturity, or (justifiable) fear of retaliation and the long-term impact on the survivor's career. Balancing these interests, the Legislature certainly could conclude that the interests of a survivor of sexual assault or harassment to pursue justice and accountability would outweigh the interests of a potentially complicit employer who wants closure for their potential exposure to liability for such wrongdoing.

In order to clarify that the bill's revival provisions override otherwise applicable statutes of limitations (and to correct a drafting error by restoring language that inadvertently was omitted in the bill's recent amendments), the author proposes to reinsert the following language on Page 5, at the start of line 24:

> ***"Notwithstanding any other law,"***

Potential overlap between the bill's provisions regarding sexual assault claims. As explained in detail above, the bill allows two types of claims to be revived and both types involve claims

based upon sexual assault. There potentially could be overlap between such claims. If a claim were based upon a sexual assault that occurred on or after January 1, 2009, a plaintiff could file a claim under one or both provisions of the bill. The bill takes into account this possibility by providing in subdivision (e)(4): "Nothing in this subdivision precludes a plaintiff from bringing an action for sexual assault pursuant to subdivisions (a) and (b)."

One could therefore ask, what is the reason for two provisions that both address claims for adult sexual assault and revive them to varying degrees? First, an assault may constitute a sexual assault but not meet the rather narrow definition of "sexual assault" under CCP Section 340.16 (b)(1), which requires that the act would constitute "any of the crimes described in Section 243.4, 261, 264.1, 286, 287, or 289, or former Sections 262 and 288a, of the Penal Code, assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes." In such a case, the plaintiff would be able to file their claim under the bill's cover up provision—that does not refer to crimes—in subdivision (e), assuming there were evidence of a cover up. Second, the claim may be based upon conduct that pre-dates January, 1, 2009, in which case the plaintiff would be able to file their claim under subdivision (e)—that does not require that the act post-date January 1, 2009—in subdivision (e), assuming there were evidence of a cover up. Third, the plaintiff may not have evidence of a "cover up," in which case they could file their claim under the CCP Section (a) and (b), assuming that the assault occurred on or after January 1, 2009. In short, these provisions can be harmonized so they work together for the benefit of traumatized survivors of sexual assault.

No feasible application to public entities. The business coalition opposing the bill points out that, "To apply to public sector agencies, AB 2777 would need to eliminate the six-month government claims presentation deadline during 2023, which it does not. (Cal. Gov. Code §911.2.)" This is true. California's Government Claims Act (Act) starts with the broad claim that "a public entity is not liable for an injury" caused by the entity, *except* as otherwise provided by another statute. Government Code Section 815.2 (a) provides that a public entity may be liable for injuries caused by an act or omission of its employees acting within the scope of employment, if the employee's act would subject the employee to liability. However, even where existing law permits an action against a public entity, the Act still includes a "presentation" requirement for most causes of action.

Although there are important exceptions, as a general rule, a person wishing to sue a government entity or government employee must first "present" a claim to the entity and, in many cases, exhaust all administrative remedies before bringing a civil action in court. (Government Code Section 900 *et seq.*) The presentation requirement under the Tort Claims Act applies to both claims against the state (Government Code Section 905.2, 910 *et seq*.) *and* local government entities (Government Code Section 905). The bill does not eliminate the presentation requirement for claims against *either* the state, or local governmental entities.

In order to provide full redress for grievances, including for claims based upon sexual assault perpetrated by public employees or covered up by public employers, the author may wish to consider exempting claims against state and local governments for adult sexual assault from the Act. This would be consistent with the exemption from the presentation requirement for claims of childhood sexual assault against local governments *under existing law (See Gov. Code 935 (f)). An exemption from the presentation requirement for claims of adult sexual abuse against* the *state would be consistent with the exemption for claims of childhood sexual abuse against* the *state provided in this year's pending Committee-authored bill, AB 2959.*

***ARGUMENTS IN SUPPORT**:* The Victim Policy Institute, sponsor of the bill, writes the following in support of the Sexual Abuse Cover Up and Accountability Act:

> With this bill, California takes another small step to protect victims of sexual abuse. This bill opens a one-year window in the statute of limitations but does so only when there is evidence a defendant entity has engaged in a cover-up of a prior incident of sexual abuse or misconduct. Cover ups feed isolation and fear. By knowing there was sexual misconduct that was covered up by the same entity, subsequent victims will feel empowered to say: "Me too." The bill would allow victims of sexual abuse or misconduct to bring a claim under a one-year window only when all of the following are alleged by the victim: the victim was sexually assaulted or subjected to inappropriate conduct of a sexual nature, the victim has suffered damages as a result of the sexual assault or misconduct, a defendant entity is legally responsible for the acts of the perpetrator, and the entity has covered up sexual assault or misconduct in the past.

Valor California (VALOR), formerly the California Coalition Against Sexual Assault), writes that it strongly supports the bill for a number of reasons, including the following:

> Whether a criminal case is filed or not, survivors of sexual assault may also turn to the civil court for recovery of costs related to medical and non-medical needs, which are required for healing. If a survivor awaits the outcome of a criminal case to initiate civil proceedings, they may find their search for justice blocked, if the statute of limitations has expired. Given the potential lifetime costs a survivor may face, both immediate and long-term, the option to recover damages through the civil court is critical. The loss of this option is punitive and possibly injurious to the survivor.

***ARGUMENTS IN OPPOSITION**:* The business coalition opposing the bill predicts that it will bring a deluge of new claims based upon old facts:

> AB 2777 provides a one-year "reviver" window in 2023 to sue for alleged sexual assault or other inappropriate conduct of a sexual nature that can go back in time for half a century or more. As a result, this bill could result in an onslaught of ancient claims against which businesses of all types and sizes across every industry will have no ability to defend themselves due to records and witnesses that are no longer accessible.
>
> . . .
>
> ***AB 2777's scope is so vague and overbroad that it could include a vast number of subjective claims and be subject to abuse.*** AB 2777 applies to both alleged acts of sexual assault as well as "other inappropriate conduct, communication, or activity of a sexual nature," phraseology which is unclear and subject to broad interpretation. For example, does an inappropriate communication of a sexual nature include a risqué joke?
>
> Additionally, "cover up" is defined to include "assisting an alleged perpetrator in gaining employment at another entity following allegations of sexual assault or other inappropriate conduct, communication, or activity of a sexual nature." . . . Is the past employer "assisting" the alleged perpetrator in gaining employment if it only confirms dates of employment and provides no other information? AB 2777 also has such a low pleading burden that there is no way to distinguish meritorious claims from frivolous claims, creating a potential field day for unethical lawyers to bring threatening monetary demands over manufactured allegations.

. . .

AB 2777 creates a questionable disparity between private versus public entities, underscoring why it should not be applied to either. AB 2777 does not appear to provide the same revival of stale claims for victims of sexual assault who visited or worked for a public entity as it does for private entities. To apply to public sector agencies, AB 2777 would need to eliminate the six-month government claims presentation deadline during 2023, which it does not. (Cal. Gov. Code §911.2.) If the intent of the measure is to protect victims and provide them recourse, there is no reason to treat victims who visit or work for one differently than the other.

REGISTERED SUPPORT / OPPOSITION:

Support

Victim Policy Institute (sponsor)
California Partnership to End Domestic Violence
California Sexual Assault Forensic Examiners Association
Family Violence Appellate Project
Rape Trauma Services: A Center for Healing and Violence Prevention
Thompson Law Offices, P.C.
Valor California

Opposition

American Tort Reform Association
California Business Properties Association
California Business Roundtable
California Chamber of Commerce
California Retailers Association
Civil Justice Association of California
National Association of Mutual Insurance Companies
National Federation of Independent Business
Torrance Chamber of Commerce
Western Electrical Contractors Association

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