

DRAFT SECOND READING SPEECH

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Limitation Amendment Bill 2017

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Mister Speaker,

The time limit within which a common law claim for damages for personal injury must be made is governed by the *Limitation Act 1974*, which was amended in 2004 to provide for the limitation period to commence on the “date of discoverability” and run for three years.

The “date of discoverability” is defined as the date on which the plaintiff knew or ought to have known that the personal injury (which includes a disease) had occurred and that the injury was attributable to the conduct of the defendant.

Limitation periods are set with a view to balancing the interests of both plaintiff and defendant; that is to allow a plaintiff a reasonable time within which to take action against the defendant but also to set a time after which the defendant knows that action can no longer be commenced.

However, this Bill takes the major step of retrospectively abolishing limitation periods in respect of any sexual or serious physical abuse that occurred when the plaintiff was a child.

This change gives effect to the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse that:

“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”.

Because of the intensely intimate nature of the abuse and the breach of trust that it entails, many survivors of child sexual abuse are unable to disclose the abuse until well into adulthood.

Analysis of the Royal Commission’s early private sessions revealed that on average it took survivors 22 years to disclose the abuse and even then their first needs may be counselling and psychological care rather than seeking legal advice.

The Government believes that the special circumstances of child sexual abuse should be recognised by abolishing the limitation period in respect of personal injury claims arising from such abuse.

The abolition of the limitation period in this Bill extends to physical abuse as well, since it may occur in conjunction with sexual abuse and the consequences of physical abuse of a child can be similarly traumatic. Psychological abuse that arises from the sexual abuse or serious physical abuse is also covered.

As explained in the Victorian second reading speech “psychological abuse ... such as when a child is 'groomed', is made to feel erroneously complicit in abuse that has occurred, or is coerced or shamed into covering up abuse...can cause harms that are often inseparable from the harms caused by physical or sexual abuse”.

This Bill extends the abolition of the limitation period to all survivors of childhood sexual or serious physical abuse, not just those who suffered that abuse while in an institutional setting.

The amendment will bring Tasmania into line with Victoria, New South Wales, Queensland and the Northern Territory.

By applying retrospectively, the abolition of the limitation period will allow victims of historical abuse (other than those who have already had final judgment or settled out of court) to bring a case.

There may well be a substantial number of common law claims brought by victims of historic sexual or physical abuse when the amendment comes into effect.

Some of these claims may be made against the State because of abuse that occurred in State care. However, the Government believes that the victims of these egregious crimes should be permitted to seek compensation at common law if they wish to do so, and that Tasmanian victims should not be denied rights that are available elsewhere in Australia.

It is also hoped that when these amendments come into force, an appropriate redress scheme for victims of institutional child sexual abuse will have been established. This will provide victims with a choice of whether to apply for redress or take common law action.

As was recommended by the Royal Commission, the Bill expressly preserves the court's existing jurisdictions and powers so that any jurisdiction to stay proceedings is not affected by the removal of the limitation period.

The Government is aware that in another jurisdiction a provision has been introduced that allows, in some cases where it is just and reasonable to do so, previously settled claims that were the subject of agreement or deed of release to be reopened if the agreement was made “in circumstances of unfairness”.

The Government has decided not to introduce such a provision at this stage as it is a major change to common law principles and will require further consideration and consultation.

The Government has also decided not to introduce in the current Bill a provision that would allow the bringing of a claim where the action had previously been brought and defeated on the basis that time had expired. Again, this is another fundamental change to the law that requires in-depth consideration before any decision is made.

The Bill also abolishes the need to seek leave of the court to proceed with a personal injury action where the date of discoverability occurs more than 12 years after the events on which the claim was based.

The “long-stop period” was recommended by the Final Report of the Review of the Law of Negligence (the Ipp Report) to guard against potential unfairness to the defendant. However, since 2004 most other Australian jurisdictions have now either abolished limitation periods for asbestos related diseases (or more broadly dust diseases) or have no “long-stop” period.

Abolishing the “long-stop period” completely has the advantage of treating all latent diseases or conditions, whether dust-related or not, in the same way.

It also removes the need for a plaintiff, who may have recently been diagnosed with a serious illness, from having to overcome the additional hurdle of seeking leave from the court to bring an action.

The amendment has been actively sought by Asbestos Free Tasmania on behalf of its members and the Government believes that it is appropriate to remove this potential barrier to a legitimate claim.

The limitation period is just one of many factors that will impact on the success or otherwise of a personal injury claim. A claimant will also need to be able to identify a defendant that still exists, prove that the defendant was negligent, and that the negligence caused the latent disease.

Removal of the long-stop period is no guarantee that a common law claim will be successful but simply removes an initial hurdle. It is unlikely that any “floodgates” will be opened as a result of this amendment.

The Bill also amends the Limitation Act to allow an application to a Court to extend time for a further three years beyond the initial period of three years from the date of discoverability. This amendment will apply generally to all actions for personal injuries, not just those which have latent onset.

There will always be a small proportion of potential plaintiffs who, through ignorance rather than deliberate delay, fail to take action in the initial three-year period. Frequently it will be those who are more disadvantaged who fail to take appropriate action within the time allowed.

To prevent an unfair impact on defendants, the transitional provisions contained in the Bill provide that an application for an extension of time to six years from the date of discoverability will apply only to matters that are still within the initial three-year period from the date of discoverability.

This will prevent the extension of time provisions impacting on court cases where a defendant has relied on a statutory limitation defence. It will also prevent insurance claims being revived in circumstances where a reserve is no longer held against a potential claim, thereby preventing any impact on future insurance availability or premiums.

The Bill also makes general amendments to clarify the operation of the Limitation Act.

One such amendment is the repeal of section 5, the pre-2004 limitation period for personal injuries, which no longer has application as no claim could now be brought within the time limit imposed by that section.

The repeal of section 5 emphasises that for personal injury actions in Tasmania the relevant date for the start of the limitation period is the date of discoverability, not the date an injury occurred.

The Bill also makes necessary amendments to provisions that allow for an extension of time in respect of claims arising from personal injury where the prospective plaintiff is under a disability.

These amendments take into account the fact that limitation periods for personal injury actions based on sexual and serious physical abuse suffered when the plaintiff was a child are now abolished.

The amendments also take into account the fact that the relevant date for the commencement of the limitation period is now the date of discoverability and that any significant period of disability within the limitation period should be taken into account.

The Bill inserts a new section 26A which provides that time will be suspended during the period that a plaintiff is under a disability. However, if a child plaintiff is in the care of a capable parent (which is defined) there is no suspension of time.

Similarly, an adult plaintiff under a disability who has a legal representative (which is also defined) who is not in a close relationship with the intended defendant also does not have time suspended.

Importantly, the provision provides that in determining the date of discoverability in respect of a person under a disability, it is the facts known by the parent or legal representative that are taken to be the knowledge of the plaintiff.

In other words, if, for example, the legal representative of an adult under a disability does not know that an injury has occurred, or that the defendant is responsible for that injury, or that the injury is sufficiently significant to warrant bringing proceedings then the date of discoverability has not yet occurred.

Mister Speaker, I commend the Bill to the House.