

LIMITATION AMENDMENT (CHILD ABUSE) BILL 2016

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Bill introduced on motion by Ms Gabrielle Upton, read a first time and printed.**Second Reading****Ms GABRIELLE UPTON** (Vaucluse—Attorney General) [4.19 p.m.]: I move:

That this bill be now read a second time.

On behalf of the Government I am pleased to introduce the Limitation Amendment (Child Abuse) Bill 2016. This bill acknowledges the abuse suffered by many children and young people in our community—abuse that can forever alter the course of people's lives and continue to cause trauma and hardship for decades. The bill cannot and will not change the past for those survivors. Legislation is not enough to take that pain away, but by removing the limitation periods for damages claims the bill will lift one barrier to justice for survivors of child abuse. This reform is the result of extensive work undertaken by the Government, which includes community consultation by way of the release in January 2015 of a discussion paper on limitation period reform options. It is also a response to recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse.

In September 2015 the royal commission released its final report on redress and civil litigation. One chapter of that report—chapter 14—was devoted to addressing the barrier posed by limitation periods. The report recommended: that State and Territory governments legislate to remove any limitation periods that apply to a claim for damages resulting from child sexual abuse; that such amendments should be retrospective in effect and apply regardless of whether or not a claim was subject to a limitation period in the past; that the amendments should expressly preserve the courts' existing jurisdictions and powers to stay proceedings; and that the amendments should be implemented as soon as possible, even before the royal commission's recommendations in relation to the duty of institutions and identifying a proper defendant are implemented. The bill delivers on all of those recommendations of the royal commission.

Statutory limitation periods determine the time by which a claim for damages must be commenced. The royal commission found "limitation periods are a significant, sometimes insurmountable, barrier to survivors pursuing civil litigation." It is now widely understood that, due to the injuries inflicted on them by their abusers, survivors of sexual and other child abuse often take decades to understand and act on the harm arising from the abuse. The royal commission's research has revealed that the average time to disclose childhood sexual abuse is around 22 years. As the applicable limitation period is currently between three and 12 years, depending on when the abuse occurred, many survivors find the statutory period in which to commence a claim for damages has passed by the time they are able to commence proceedings. For those survivors who may be able to prove one of the exceptions to the standard limitation period, the process of proving an exception can be expensive, lengthy and traumatic. In essence, statutory limitation periods often mean that survivors of child abuse are unable to claim any compensation for the harm done to them.

The New South Wales Government has long been committed to ensuring that survivors of child sexual abuse receive the compassion and care they need and deserve. The Government has already introduced a number of specific interim measures for survivors of child sexual abuse. The Government has offered unlimited counselling for survivors through the Victims Support Scheme; provided extra resources to the Department of Family and Community Services to improve and fast-track access to care records; assisted with establishing a place of recognition at the Parramatta Girls Home; and adopted guiding principles to guide New South Wales government agencies on how to appropriately respond to a civil claim for child sexual abuse.

Those guiding principles complement the New South Wales Government Model Litigant Policy and provide, amongst other things, that New South Wales government agencies will not generally raise the passage of time as a defence to a claim. At the same time, the Department of Family and Community Services determined not to generally rely on limitation period defences in civil claims for the sexual and physical abuse of a child. Following the release of the discussion paper by the Department of Justice in January 2015, 48 submissions were received from a wide range of stakeholders, including the Law Society of New South Wales, the New South Wales Bar Association, Care Leavers Australia Network, Barnardos, the Alliance for Forgotten Australians, plaintiff law firms, community legal centres, academics, the judiciary, the NSW Ombudsman, Indigenous advocacy groups, religious organisations and the Insurance Council of Australia. In addition to the recommendations of the royal commission regarding limitation periods—all of which are adopted in this bill—those community submissions have been carefully considered in the development of the bill.

In my time both as the Attorney General and as the former Minister for Families and Community Services I have personally heard evidence at public hearings, in particular the public hearing on Bethcar Children's Home. As I mentioned earlier today, I have spoken with Bonney Djuric from Parramatta Girls Home and Leonie Sheedy, who proudly leads Care Leavers Australia Network. Listening to their heartbreaking stories and their commitment to helping other survivors has strengthened my resolve to redouble our efforts as a government to open up justice for survivors and better protect our children and young people in the future.

Of course, the voices of those survivors, and the extensive work of the royal commission, tell us the removal of limitation periods is only one step towards delivering justice. The royal commission made 99 recommendations in its final report on redress and civil litigation. Only four of those recommendations related specifically to limitation periods. Since the royal commission delivered its report in September 2015 the Government has been closely considering all of the commission's recommendations. This has allowed the Government to consider the cumulative impact of the mix of reforms to help survivors of child abuse.

I am convinced a holistic approach will ultimately deliver the best justice to survivors and so the Government is taking a number of steps to address the other recommendations of the royal commission. In particular, the Government supports the royal commission's keystone recommendation for the establishment of a single national redress scheme. A redress scheme will provide a less traumatic alternative to civil litigation for survivors. At the Law, Crime and Community Safety Council meeting in November the New South Wales and Victorian governments moved a motion urgently calling on the Commonwealth to give effect to the royal commission's recommendation for a single national redress scheme. Last month the Commonwealth Government announced it would lead the development of a "nationally consistent" approach to redress.

I am of the firm belief that a nationally led and nationally administered scheme is the best way to ensure consistent, accessible justice for survivors regardless of where their abuse occurred. Where abuse occurred and where a survivor may live today should not be an impediment to justice. I look forward to continuing to engage in constructive discussions with my Commonwealth, State and Territory colleagues on this issue in the coming months. In addition to removing limitation periods, the royal commission recommended reforms to remove some of the other obstacles to civil litigation for survivors of child abuse. They include requiring institutions with proper trusts to nominate a "proper defendant" to respond to claims for compensation and expanding the legal responsibility of institutions for child abuse.

Members should make no mistake—these reforms are complex, but the Government will not shy away from them. In the coming months, the New South Wales Government will release a consultation paper seeking the community's input on these additional important reforms. The Government will also update the guiding principles, which I referred to earlier. The guiding principles were considered by the royal commission to be a worthy example of the types of principles that can ensure a more caring and compassionate approach to litigation. Accordingly, to fully comply with the royal commission's recommendations only a minor change needs to require government agencies to assist plaintiffs in identifying the proper defendant. The principles will also be amended to reflect the definition of "child abuse" in the bill before the House today.

I will now address the key provisions of the bill. The Limitation Act 1969 now applies a complex range of limitation periods to actions for damages relating to child abuse depending on when the abuse took place and, in some cases, the identity of the perpetrator and their relationship to the survivor. It is a complex landscape. In comparison, this bill will treat all child abuse claims equally, regardless of when the abuse occurred or who perpetrated the abuse. The bill removes the existing time limitations on commencing a child abuse action, including the "ultimate bar", which is a statutory provision that prevents claims more than 30 years after the abuse occurred.

The amendments will apply equally to any action that relates to death or personal injury resulting from child abuse. This includes actions against the perpetrator of child abuse and actions against a negligent institution with care and custody of the child. This extends to actions which survive on the death of a person and which are continued by their estate under part 2 of the Law Reform (Miscellaneous Provisions) Act 1944. It also includes wrongful death actions brought by the dependants of a deceased survivor under the Compensation to Relatives Act 1897. While these claims rarely arise in relation to child abuse, this provision recognises that the impact of abuse can extend beyond the primary victim to their family and dependents. The bill defines "child abuse" as abuse perpetrated against a person when the person is under 18 years of age; that is, sexual abuse, serious physical abuse, and/or other abuse perpetrated in connection with sexual or serious physical abuse.

The threshold for removal of the limitation period is the sexual or serious physical abuse of a child or young person under the age of 18 years. If this threshold has been met, then other forms of abuse connected to the threshold abuse, such as psychological abuse or minor physical abuse, can be considered in determining the claim. This ensures that the court can consider the whole context of abuse when determining the substance of a claim. "Connected abuse" can be perpetrated by the same person who perpetrated the threshold abuse, or by another person. To avoid doubt, the bill makes it clear that both the "threshold abuse" and "connected abuse" must have occurred when the victim was under the age of 18 years.

The royal commission's recommendations are limited by their terms of reference to child sexual abuse. However, its final report suggests governments could enact reforms covering other types of abuse. This broader approach recognises that many children who have been maltreated experience multiple forms of abuse. For example, a perpetrator of sexual abuse may also use physical violence, grooming and psychological manipulation to prepare a child for sexual activity or to ensure that a child does not report the abuse. The evidence demonstrates that non-sexual forms of abuse, such as serious physical abuse, can be equally as traumatic as child sexual abuse.

The key determinants of worse outcomes for survivors of child abuse are not the kind of abuse but include factors such as the frequency and duration of abuse, the co-occurrence of multiple forms of abuse, the developmental stage of the victim, and whether there was a close emotional relationship with the abuser. The definition in the bill is thus broad enough to cover the kinds of abuse associated with trauma, serious injury, and delayed disclosure, but not so broad as to cover trivial, accidental or other conduct that, on its own, is unlikely to cause trauma. To avoid being overly prescriptive, the bill does not exhaustively define what conduct constitutes "sexual abuse" or "serious physical abuse". Rather, the bill requires courts to determine whether or not abuse has occurred having regard to the circumstances of each individual case and the ordinary meaning of the terms. The term "child abuse" should be interpreted in a beneficial manner.

The following examples are indicative of the type of conduct that may constitute child abuse. "Sexual abuse" of a child has been defined by the royal commission as "any act which exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted community standards". This includes sexual activities that do not involve physical contact with the victim, such as acts of exhibitionism and exposure to pornography. "Serious physical abuse" should capture non-accidental physical contact with a child that could cause injury. It may consist of a series of relatively minor episodes over a period that cause the conduct to become serious, as well as serious, one-off conduct.

The bill is not intended to capture conduct that on its own would not amount to "serious physical abuse", such as a one-off physical altercation between two minors, the reasonable restraint of a violent child, reasonable corporal punishment where a defence of lawful chastisement was available at law at the time of the incident, lawful medical treatments conducted under previous policies, and medical negligence claims. "Connected abuse" could include psychological abuse where a child is manipulated to feel complicit in the abuse, where a child is threatened to prevent them from reporting the abuse, or where a child is coerced into covering up the abuse. It would also include "grooming", which is defined by the royal commission as "actions deliberately undertaken with the aim of befriending and establishing an emotional connection with a child to lower the child's inhibitions in preparation for sexual activity with the child". "Connected abuse" could also include minor physical abuse that does not meet the threshold of serious physical abuse, such as minor physical assaults.

Importantly, the bill applies retrospectively, meaning there will be no limitation period for claims regardless of when the abuse occurred. The transitional provisions balance the retrospective nature of the amendments with the fundamental legal principle of *res judicata*, meaning that a matter may not generally be re-litigated once it has been judged on the merits. The bill does not apply to an action where a court has already determined the substantive issues in dispute, or where a matter has been settled between the parties. These actions cannot be re-litigated. However, the amendments do provide for some cases to be reopened, including cases which have commenced but which have not been determined or settled where the limitation period has already expired; where judgment has been given on the basis that the action is statute barred, meaning the limitation period has expired and the statutory exemptions do not apply; and where a survivor has already commenced proceedings against a former solicitor for professional negligence arising from a failure to provide accurate advice in relation to the limitation period that applies to the abuse claim.

It is a fundamental tenet of the rule of law that all parties receive a fair trial. These amendments preserve the existing powers of a court to safeguard the right to a fair trial. They do not restrict a court from dismissing or staying proceedings where it determines that a fair trial is not possible; for example, where the passage of time has led to a loss of evidence capable of establishing a case to be tried. This bill is broadly consistent with similar reforms in other jurisdictions, including the Limitation of Actions Amendment (Child Abuse) Bill 2015 passed by the Victorian Government last year, which removes limitation periods for claims relating to the sexual or physical abuse of a child, and psychological abuse that is connected to the sexual or physical abuse.

This bill is only a part of the Government's response to the recommendations of the royal commission. This Parliament and the community of New South Wales will continue to see this Government deliver on the royal commission's recommendations, in consultation with the community as it does so. These are vital, watershed reforms that come at the end of a long journey. They are part of a human, compassionate, caring and generous response to often untold suffering. We cannot remove the past for those who suffered, but we can try, as we are doing in this bill, to provide some justice and some recognition of what has been unspoken for too long. I commend the bill to the House.

Debate adjourned on motion by Mr Paul Lynch and set down as an order of the day for a future day.