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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**THE JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT
BILL 2016 (No 2)**

EXPLANATORY STATEMENT

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THE JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2016 (No 2)

Introduction

This explanatory statement relates to the Justice and Community Services Legislation Amendment Bill 2016 (No 2) (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Overview of the Reforms

This Bill removes limitation periods from the *Civil Law (Wrongs) Act 2002* and the *Limitation Act 1985* that apply to claims for damages brought by survivors of child sexual abuse in an institutional context.

The Bill amends the *Supreme Court Act 1933* to clarify that section 68N and 68O apply on the day the section commenced.

This Bill also amends the *Victims of Crime Act 1994* to increase the victims services levy from \$40 to \$50 on commencement, and from \$50 to \$60 from 1 July 2017.

Limitation Act Amendments

The Bill implements the recommendations of the *Royal Commission into Institutional Responses to Child Sexual Abuse* ('The Royal Commission') on statutory limitation periods that provide for time limits within which civil litigation can be initiated by survivors of child sexual abuse by amending the Limitation Act.

The Royal Commission's recommendations which are implemented by this Bill are 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 (Recommendation 85);
- 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 86);
- 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 87); and
- 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 the Royal Commission's recommendations in relation to the duty of

institutions and identifying a proper defendant are implemented (Recommendation 88).

Through extensive consultation, the Royal Commission has concluded that “limitation periods are a significant, sometimes insurmountable, barrier to survivors [of child sexual abuse] pursuing civil litigation” for damages for their injury and loss.¹

The current provisions of the Limitation Act mean that if a child in the ACT has been sexually abused in an institutional context, the limitation period currently applicable under the Limitation Act is six years after that child has reached 18 years of age. This limitation period is a significant barrier for survivors of child sexual abuse in institutional context to seek redress for the harm they have suffered. This limitation period has the practical effect of denying survivors reasonable opportunity to seek justice and compensation from these institutions through the law.

Removing the limitation periods for victims of institutional child sex abuse is a reasonable and necessary change.

This Bill removes all limitation periods for claims for damages with respect to personal injury caused by child sexual abuse in an institutional context, and this Bill will apply retrospectively.

The Bill will allow more victims to seek redress and justice through civil proceedings and the resulting litigation will promote greater understanding of the circumstances and conditions that have led to abuse and greater community awareness of this as a societal issue, helping to remove the stigma and encouraging other victims to come forward.

Human Rights Implications

Right to fair trial

As the Bill removes limitation periods for survivors of child sexual abuse, there is an engagement of the individual’s right to a fair trial before a competent, independent and impartial court or tribunal under s 21 of the *Human Rights Act 2004* (HRA).

Under s 28 of the HRA, human rights may be subject to reasonable limits that can be demonstrably justified in a free and democratic society. In deciding whether a limit is reasonable, s 28 provides relevant factors to be considered including the importance of the purpose of the limitation and the nature and extent of the limitation.

Nature of the right

The right to a fair trial is a basic human right. Article 10 of the *Universal Declaration of Human Rights* states:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

¹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, 2015, p 434, accessed at <https://childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/redress/final-report-redress-and-civil-litigation>.

This right is also captured in the *International Covenant on Civil and Political Rights* which states at Article 14.1:

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.

One principle underpinning the right to a fair trial is the principle of equality under the law. This requires that parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to proceedings.

Another central principle is that of independence and impartiality. This requirement means that proceedings must be free from both bias and the objective perception of bias.

Importance of the purpose of the limitation

The purpose of the removal of limitation periods is extremely important in that it improves access to justice for survivors of child sexual abuse in institutional contexts. Limitation periods are often an insurmountable barrier to survivors of child sexual abuse in pursuing civil litigation. This is especially given the findings of the Royal Commission that it takes on average 22 years to disclose the abuse,² and the risk of prolonged litigation and substantial legal costs to determine, without even examining the merits of the case, whether the claim can even be brought.³

It is also important that the law is seen to be able to provide redress and justice, even though circumstances mean that a person is not able or willing to enforce their rights initially. The law must recognise and be able to respond to the nature of the impacts of child sexual abuse in an institutional context, in order to maintain public confidence in the equal application of rights and obligations to all members of society, and especially that the law does not favour powerful institutions or limit the access of ordinary citizens to claim compensation to which they are rightfully entitled.

Nature and extent of the limitation

The removal of limitation periods may engage the right to a fair trial due to the burdensome effect that a long lapse of time before the proceedings are started, may have on the defendant. Furthermore, loss of records and the unavailability of relevant witnesses may result in prejudice to the defendant which in turn may affect the ability to have a fair trial.

However, the defendant will be protected from unfair proceedings by two factors. Firstly, the claimant will still need to prove their case through admissible evidence. Secondly, as per Recommendation 87 by the Royal Commission, the courts’ relevant existing jurisdictions and powers to stay proceedings, for example where the defendant is unable to obtain a fair trial, are expressly preserved by this Bill.

² Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, 2015, p 444, accessed at <https://childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/redress/final-report-redress-and-civil-litigation>

³ *Ibid*, p 434.

Relationship between the limitation and its purpose

This Bill will improve access to justice for survivors of child sexual abuse in institutional contexts by removing limitation periods with respect to this specific context. For example, in the matter of *Hopkins v Queensland*, McGill DCJ found that “any understandable reluctance of the plaintiff to pursue this matter earlier” was not a factor that the extension of time provisions were intended to overcome.⁴ This is a clear example of how the current limitation periods in Australia, and the even the judicial power to apply extension of time provisions, do not take into account the particular long-lasting trauma experienced by survivors of child sex abuse in institutions. This Bill will remove the requirement of survivors having to seek extension of time, which may not be afforded by the court or may be contested by the respondent as part of a delaying litigation strategy, and will allow claims to be heard on their merits.

Other less restrictive means

As identified by the Royal Commission the amendment to the limitations period is a recommended priority reform that will significantly reduce one of the main barriers to redress and justice for victims of child sex abuse in institutions. It is not considered that there are other avenues to achieve the purpose which are less restrictive.

It is considered that these amendments represent a reasonable and justifiable limitation on the right to a fair trial, which is outweighed by the importance of improving access to civil litigation by survivors of child sexual abuse in institutions and which is still largely protected by the express preservation of courts’ jurisdictions and powers to stay proceedings.

Supreme Court Act 1933

The Bill makes a minor and technical amendment to the *Supreme Court Act 1933* to make it clear sections 68N and 68O apply on the day those sections commenced.

Human Rights Implications

This amendment does not engage with human rights.

Victims Services Levy Amendments

This Bill will amend the Victims of Crime Act to increase the victims services levy from \$40 to \$50 upon commencement, and from \$50 to \$60 from 1 July 2017. The increase to the victims services levy is designed to support reforms to enhance services for victims of crime.

Human Rights Implications

Right to recognition and equality before the law

As the Bill increases the victims services levy payable by an adult person who is convicted of an offence and ordered by a court to pay a fine, the right to recognition and equality before the law under s 8 of the Human Rights Act may be engaged. An increase in the levy amount may have a disproportionate impact on vulnerable groups and individuals who may not have the capacity to pay these increased amounts, and who may therefore be at risk of accumulating debt or even incarceration.

⁴ *Ibid*, p 441.

These amendments are not considered to represent a limitation on the right to recognition and equality before the law as there are currently two safeguards in place that protect vulnerable individuals and groups against undue hardship that may be caused by increasing the victims services levy.

The first safeguard is at the court level. Under s 26(2) of the Victims of Crime Act, the court may exonerate the person from liability to pay the levy if satisfied in the circumstances that paying the levy is likely to cause undue hardship.

The second safeguard is contained within the *Crimes (Sentence Administration) Act 2005*, which details the process by which the levy and other court fines can be collected. Section 116K allows the director-general to approve in writing either further time for all or part of an outstanding fine to be paid, or payment of all or part of an outstanding fine by instalments.

If a person defaults by not paying a fine, including the victims services levy, the director-general may conduct an examination of the circumstances of the default to determine the financial position of the defaulter and whether fine enforcement action should be taken.

Any enforcement action can only be taken with a fine enforcement order made under s 116X which can only be made if the court is satisfied that the order would not be unfair or cause undue hardship on the defaulter or another person and that it is in the interests of justice to make the order.

The existing safeguards contained within the legislative fine impositions and enforcement scheme are sufficient to protect against any disproportionate impact the increased levy may have on vulnerable groups and individuals, by providing a mechanism for an individual's circumstances to be taken into account on a case by case basis.

CLAUSE NOTES

Part 1 Preliminary

Clause 1 Name of Act

This clause provides that the name of the Act is the Justice and Community Safety Legislation Amendment Bill 2016 (No 2)

Clause 2 Commencement

This clause provides for the commencement of the Act. The Act (other than sections 11, 12 and 14) will commence on the day after its notification day.

Section 11 and 12 are taken to have commenced on the commencement of section 3 of the *Supreme Court Amendment Act 2016*.

Section 14 commences on 1 July 2017.

Clause 3 Legislation Amended

This clause specifies that the Act amends the following legislation:

- *Civil Law (Wrongs) Act 2002*
- *Limitations Act 1985*
- *Supreme Court Act 1933*
- *Victims of Crime Act 1994*.

Part 2 Civil Law (Wrongs) Act 2002

Clause 4 Notice of Claim Section 51 (1), note 1

Clause 4 amends Note 1 under s 51(1) to reflect that there may not be a relevant limitation period for a particular kind of proceeding and inserts a new Note 1A to specify that there are now personal injuries in certain circumstances, namely child sexual abuse in institutional contexts, where there is no limitation period. This amendment relates to the changes in Part 3 of the Bill.

Clause 5 New section 51(3)

Clause 5 Omits ‘The notice must be given’ and substitutes “For a proceeding based on an institutional child abuse claim, the notice must be given.” This amendment relates to the changes in Part 3 of the Bill.

Clause 6 New section 51(3A)

Clause 6 inserts a new section that establishes that, if a proceeding is based on an institutional child abuse claim, reasonable notice must be given before a claimant brings the proceeding against the respondent. This amendment relates to the changes in Part 3 of the Bill.

Clause 7 New section 51(9)

Clause 7 inserts a new subsection that defines *institutional child abuse claim*, and refers the reader to the *Limitation Act 1985* for definitions of *institutional context*, *sexual abuse* and *subjected to*. This amendment relates to the changes in Part 3 of the Bill.

Part 3 Limitation Act 1985

Clause 8 New Division 2.2A

Clause 8 creates a new Division 2.2A and includes a new section 21C *Personal injury resulting from institutional sexual abuse of child*. This clause exempts causes of action for personal injury resulting from institutional sexual abuse of a child from all limitation periods under the Limitation Act and enables such causes of action to be brought at any time. This clause specifically does not limit any existing jurisdiction of a court. The example given is modelled on the *Limitation of Actions Act 1958 (Vic)* and the *Limitation Act 1969 (NSW)*. This clause also introduces definitions for the following terms:

- *institution*
- *institutional context*
- *official*
- *sexual abuse*
- *subjected to*

Sexual abuse would include behaviour that could be described as grooming.

Clause 9 Special provision for injuries to children - Section 30A(1)(c)

Clause 9 establishes that section 30A only applies if a limitation period applies to a claim under this Act. Section 30A does not apply to actions that substantially arise from sexual abuse to which the person was subjected when the person was a child in an institutional context.

Clause 10 Special provisions in relation to children – claims relating to health services – Section 30B(1)(b)

Clause 10 establishes that section 30B does not apply when the new section 21C (Personal injury resulting from institutional sexual abuse of child) applies the claim.

Part 4 Supreme Court Act 1933

Clause 11 – Court may order retrial – category B offence – 68N(6)

Clause 11 inserts the word “on” to make it clear that Section 68N(6) applies on the day the provision commenced.

Clause 12 – Court may order trial – administration of justice offence – 68O(4)

Clause 12 inserts the word “on” to make it clear that Section 68O(4) applies on the day the provision commenced.

Part 5 Victims of Crime Act 1994

Clause 13 Imposition of victims services levy Section 24(2)

Clause 13 substitutes the current value of the victims services levy of \$40 to \$50.

Clause 14 Section 24(2)

Clause 14 substitutes the value of the victim services levy of \$50 to the value of \$60 commencing 1 July 2017.