CIVIL LIABILITY LEGISLATION AMENDMENT (CHILD SEXUAL ABUSE ACTIONS) BILL 2017

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Sue Ellery (Leader of the House)**, read a first time.

Second Reading

HON SUE ELLERY (South Metropolitan — Leader of the House) [10.23 pm]: I move —

> That the bill be now read a second time.

On behalf of the McGowan state Labor government and the people of Western Australia, it gives me great pleasure to introduce this bill that fulfils an election commitment to remove the limitation periods in respect of civil actions for child sexual abuse. As members will be aware, this is a historic bill. In some respects, the government's legislation will go further than any similar legislation in any other Australian jurisdiction to date.

Statutory limitation periods determine the time within which a claim for damages must be commenced. The Royal Commission into Institutional Responses to Child Sexual Abuse found that the average time for a victim to disclose child sexual abuse was 22 years. At present, under the Limitation Act 2005 of Western Australia, a claim must be brought within three years of the cause of action arising or, in the case of a child, by their twenty-first birthday.

Limitation periods under the previous Limitation Act 1935 of Western Australia will apply to many historical child sexual abuse cases—when sexual abuse was suffered before 15 November 2005, a person had six years to commence a claim for personal injuries damages. Given these limitation periods, it is obvious that most victims of abuse in Western Australia are unable to sue for damages when they finally disclose their abuse. The royal commission recommended that state and territory governments legislate to retrospectively remove any limitation periods that apply to a claim for damages resulting from child sexual abuse.

The sexual abuse of children is one of the most abhorrent crimes imaginable and the fact that these crimes may have happened many years ago should not be a barrier to being able to seek justice and compensation in our civil courts. The Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017 of Western Australia seeks to remedy this. The bill removes limitation periods for all child sexual abuse actions, both retrospectively and going forward. The amendments will define a child as a person under 18 years of age. The phrase "sexual abuse" has not been defined in the bill and the court will have latitude to determine it in accordance with the ordinary meaning and common understanding of the term. A court will not be confined to acts or omissions that are criminal offences.

A cause of action for child sexual abuse could lie against the actual perpetrator of the abuse or against an institution, when an institution was legally responsible for the actions of the perpetrator such as when the institution was negligent and that negligence resulted in the child not being protected from sexual abuse. The removal of limitation periods for child sexual abuse actions applies to all such claims.

Claims by a third party arising from the child sexual abuse are specifically excluded in historic claims—that is, claims that would have been statute barred but for the amendments introduced—so there is no change to the limitation periods that apply to these kinds of claims. Lifting the limitation periods for claims arising from child sexual abuse will not affect the limitation periods that apply to dependants' claims arising under the Fatal Accidents Act 1959 of Western Australia or deceased estate claims.

The bill seeks to strike a balance between the principle that once a court has finally determined a case, it ought not to be re-litigated and the policy to allow victims to sue when they were impeded in doing so by limitation periods. The bill includes transitional provisions to allow a court to set aside previous settlement agreements or court orders in limited circumstances—that is, when a judgement was given on the basis that the action was statute barred or a matter was previously settled after the limitation period had expired.

The bill provides that prior compensation payments related to child sexual abuse must be deducted by a court when determining the damages payable. These would include payments made under the various ex gratia and redress schemes administered by the state, commonwealth or other states and territories; criminal injuries compensation awards; and ex gratia payments and compensation payments made by non-government institutions. In order to ensure that all parties receive a fair trial, the bill maintains the authority of a court to stay civil proceedings for historical child sexual abuse when the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.

The bill also goes further than removing the limitation periods for child sexual abuse. In a first for Australia, the bill provides a legal basis for suing institutions in the name of their current office holders for historical child sexual abuse. At present, there are legal difficulties in suing an unincorporated institution. Many of the churches and other institutions involved are not, or were not at the time, incorporated. These provisions are required to overcome the difficulties that a victim may face in identifying a proper defendant, particularly those arising out of the lack of

perpetual succession in unincorporated institutions as identified in the New South Wales Court of Appeal decision of Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis and Another (2007) 70 NSWLR 565.

The bill sets out detailed provisions to be able to link a historical institution to its current form. Liability will still need to be established against the historical office holder in accordance with ordinary legal principles. However, when the current institution and office are substantially the same as they were, the current office holder may be sued and can be liable in place of the historical office holder. Further provisions provide that a current institution can be taken to be the relevant successor of an earlier institution in specified circumstances. Notwithstanding these provisions, it is possible that a particular set of circumstances arise that was not contemplated by the legislation, or an institution may request to be identified as the proper defendant. For this reason, the bill includes a regulation-making power whereby the Governor may, on the recommendation of the minister, provide in regulations that for the purposes of the act a current institution is the relevant successor of the earlier institution that existed at the time of the accrual of the cause of action. The regulation-making power is not unfettered. The minister cannot make a recommendation for the purposes of such regulations unless satisfied that the current institution has some relevant connection to the earlier institution, or the individual or body with overall responsibility for the current institution has agreed to the current institution being taken to be the relevant successor of the earlier institution.

The bill also contains provisions at proposed sections 15C and 15E that provide a legal basis for institutions, trustees and office holders to use assets that are held by or for liable institutions or office holders to discharge any child sexual abuse liability. These provisions are declared to be corporations legislation displacement provisions under section 5G of the Corporations Act 2001 of the commonwealth, for the purposes of enabling directors or other officers of corporations to exercise their powers without contravening the corporations legislation.

In line with the McGowan government's commitment to ensure that victims are treated fairly, the bill introduces a cap on legal fees that may be charged in child sexual abuse cases. This is in line with similar legislation that is in place for motor vehicle and workers' compensation claims. I anticipate that claims will be commenced for historical child sexual abuse against the state of Western Australia following the passing of this bill. I confirm that the government will deal with these matters sensitively and with respect. The state and its agencies at all stages of the process will be mindful that litigation can be a traumatic experience for persons who have suffered sexual abuse as children. I also take this opportunity to say to those institutions that have been in any way responsible for child sexual abuse under their watch, that these legislative reforms are balanced and rely on a measure of cooperation on the part of institutions. The legislation provides a legal basis for institutions to participate in the litigation and settlement of child sexual abuse claims. However, the government will not hesitate to introduce further legislation should institutions choose to rely on their structures and asset holdings to prevent sexual abuse victims from obtaining adequate compensation.

The commonwealth government recently introduced legislation in the federal Parliament to support its redress scheme. Although no states have yet committed to opt-in to this scheme, which still has features that are far from fully developed—I note that as I am aware, in fact, two jurisdictions have—the state government will continue its discussions with the commonwealth in that regard. The bill contains the first set of amendments in this state that focus on historical child sexual abuse. The royal commission has made many other recommendations in areas of both civil and criminal law and the McGowan government will continue to consider all these recommendations and when required, further tranches of legislation will be introduced.

Justice has been a long time coming for the survivors and their families who have been kept waiting too many years for this legislation. I commend them for their courage and personally thank them for the patience and grace that they have shown while the government has been preparing this bill. I would like to thank the many people across government who have devoted time and energy to this bill, particularly Dom Fernandes at the Department of Justice and the excellent drafters at the Parliamentary Counsel's Office, led by Geoff Lawn and his deputy, Lee Harvey.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and I table the explanatory memorandum.

[See paper 1117.]

Debate adjourned, pursuant to standing orders.