

**LIMITATION BILL 2004**  
**LIMITATION LEGISLATION AMENDMENT AND REPEAL BILL 2004**

*Cognate Debate*

On motion by Hon Kim Chance (Leader of the House), resolved -

That orders of the day Nos 448, the Limitation Bill 2004, and 449, the Limitation Legislation Amendment and Repeal Bill 2004, be taken cognately.

*Referral to Standing Committee on Legislation*

**HON PETER FOSS** (East Metropolitan) [10.11 am]: I move without notice -

That the orders of the day for the second reading of the Limitation Bill 2004 and the Limitation Legislation Amendment and Repeal Bill 2004 be discharged and the Bills referred to the Standing Committee on Legislation.

There is a growing concern amongst members of this House about the way in which the Government has tried to deal with a number of extremely important pieces of legislation. I do not for one moment demean the importance of those Bills, but they are of long-lasting, not just short-term, importance. They do not seek only to address short-term problems, although they do address some such problems. However, in general, they are law reform Bills, and I applaud that. In fact, I initiated some of the Bills, although not the two presently under consideration. However, one of the major changes in these Bills came out of a committee on which Hon Nick Griffiths and I sat during the term of the previous Government. I am worried about the nature of this legislation. I will quickly draw the attention of members to the way in which it will operate, and why a recent amendment placed on the supplementary notice paper has sent a chill through my bones. The premonition I had about the lack of wisdom in dealing with this legislation without it having gone to the Standing Committee on Legislation has become quite real.

The current legislation, the Limitation Act 1935, deals with most of the issues that will be covered by the new legislation. The current Act is in many ways a compilation of provisions dealing with limitation. To a large extent the Limitation Bill 2004 seeks to re-enact those provisions with some changes. The problem with re-enacting something with changes is that, if something is left out, it is gone. If the current legislation were merely amended to add things to it, it would be clear what was being added. However, because of the broad terms of some of the provision indicating what the limitation period will be in the absence of any other provision, if something is left out that was intended to be covered, it will not be provided for at all. The initial concern I had, without in any way looking at the provisions of the Bill, was that something might be left out. If that happened, it could very well be quite significant. Then, on 7 November, supplementary notice paper No 344 appeared, with an amendment seeking to insert the following new clause -

**23. Equitable actions (not analogous to other actions)**

- (1) An equitable action cannot be commenced after the only or later of such of the following events as are applicable -

I am not quite sure how it will be known which is the only event. It can certainly be determined which is the later. The new clause continues -

- (a) the elapse of 6 years since the cause of action accrued; or  
(b) the elapse of 3 years since time started running, on equitable principles, for the commencement of the action.

I did not know that “elapse” was a noun. The new clause continues -

- (2) In this section -

**“equitable action”** means an action -

- (a) in which the relief sought is in equity; and  
(b) for which (had a limitation period not been provided for under subsection (1) or section 9) the limitation period would not be determined in equity by analogy to the limitation period for any other kind of action.

The bracket after the words “section 9” does not appear to mean anything.

That proposed new clause illustrates a couple of things. Firstly, for most people in this Parliament, this Bill is gobbledegook. I will not ask members whether they understood that amendment at all, let alone its significance, because I suspect that nobody in this Chamber, except Hon George Cash, Hon Nick Griffiths and the Clerks,

would have the faintest idea what those words mean. What is an equitable action? I do not know what an elapse is, although I know what a lapse is. Members would also not know what “the elapse of 3 years since time started running, on equitable principles, for the commencement of the action” means; nor would they know what the definition in proposed new clause 23(2) means. For most people that is gobbledegook. Even lawyers need to take time to consider what has been put in and what has been left out. It is even more alarming to consider what would happen if this amendment were not passed. I will give members a bit of an idea about what it does.

Equity is an area of the law that is laid on top of what most people know to be the law. Most people deal with what is known as the common law. That is the law as understood by the majority of citizens, but it is not the law as understood by lawyers. Strangely enough, sitting on top of the law is another system altogether, and it is called equity. Strangely enough, it is probably a bigger area of law than the common law. If there is a conflict between equity law and the common law, equity law will prevail. The Parliament passes laws that mainly affect the common law. Although legislation passed by the Parliament can affect equity principles, generally speaking it does not. There is another body of law which will always prevail over the common law and which in many ways is more important than the common law in day-to-day commercial and personal dealings, but it was left out of this legislation. I will provide an example of how equity works. It relates very much to an area that members probably have heard of, which is trusts. Equity has always worked on the conscience of the individual when that person is obliged, by virtue of some trust imposed on him or her, to deal with property in a particular way. For example, if a trust is established under a will, the trustee is obliged to deal with the property covered by the will according to equitable principles. If that person misbehaves, the law will come into play, and all sorts of remedies that would not be available in any other circumstances will be exercised.

In particular, there is a doctrine of tracing. If somebody misapplies equitable or trust assets, under the law of equity those assets will be traced to find out where they have gone, and they will be brought back for the benefit of beneficiaries. There are thousands of rules about when that can and cannot occur. However, it gives members an indication of the power that equity has. More importantly, equity does not normally have a limitation period. If a person is in breach of trust, why should there be a limitation period? Why should a limitation period be imposed on picking up people who have breached a moral obligation which has been placed on them and which they have taken on? Why should there be a limitation period? For instance, a person may be the trustee of an estate, and that might go on for a couple of generations. That person might fiddle the estate now, and later the grandchildren ascertain that that person has fiddled the estate. Generally speaking, even as grandchildren, they can call that person to account, even though the ordinary periods of limitation have expired. Again, I am being simplistic about this, but that is the general sort of idea that I want to get across that equity has totally different rules from every other type of law.

Hon Bill Stretch: So it is a law that goes beyond the grave.

Hon PETER FOSS: It is certainly a law that goes beyond the grave. However, it is not the only source of equitable principle. Equity inserts itself into every bit of daily behaviour and every bit of law. I used the example of trusts because that is the area that is most easily understood by people who are not lawyers. There was another major area in other parts of the English-speaking world, but that has been severely limited in Western Australia and other parts of Australia through what is called the Torrens land registration system, because equity had a rather nasty effect on land title.

What does this Bill say about equity? The Limitation Act 1935 has a few sections that deal with equitable remedies. I will read a few headings to the House: “In cases of fraud no time shall run whilst the fraud remains concealed”; “Saving the jurisdiction of equity on the ground of acquiescence or otherwise”; and “No suit in equity to be brought after the time when the plaintiff might have brought an action at law”. In addition to that Act, there were also the provisions that equity itself had developed. In this legislation, the general limitation period is imposed in clause 9. By imposing that general limitation period in clause 9, this legislation has virtually been turned into a code. Clause 9 of the Bill states -

- (1) An action on any cause of action cannot be commenced if 6 years have elapsed since the cause of action accrued.
- (2) Subsection (1) does not apply to an action if Division 3 provides for a different limitation period for that action.

It is intended to be a code. Therefore, anything that is left out is out. I am not saying that anything more is left out. I do not think I am in a position to do that. It will require quite a bit of research and care to make sure that nothing is left out. Members might have said that that was a hypothetical fear on my part. They might have said that until supplementary notice paper No 344 came along. I am not criticising supplementary notice paper No 344. I believe the amendment contained in it is very good. However, what confidence does it give us in the process when a Bill goes through the other House - I do not know when it was introduced in the other House; somebody might be able to tell me - and comes into this place, and a week after the supplementary notice paper

was issued we are asked to debate this legislation? Members must keep in mind that this is not the only Bill of weighty significance that is before this House; this is the umpteenth Bill of such weighty significance. I have agreed to quite a few of those Bills being allowed to go through. However, frankly, as a member - I am also a qualified lawyer - I believe that all the other members in this place need to have the support of a research paper from the Standing Committee on Legislation. The legal staff, who are very competent, should look at the legislation, make a comparison, see where the changes are and ascertain whether there has been an error. We cannot say that that process has been properly done to date. Members should look at supplementary notice paper No 344. If members needed any evidence that the process may not be thorough, that is it. An argument that I was going to make hypothetically has been made for me by supplementary notice paper No 344. I now understand that the Bill was introduced into the other House on 20 October. It has gone through that place and come to us. It has had a fairly speedy passage, which again does not give me a great deal of confidence that it has had the scrutiny that it should have had.

I support the principle of the Bill. However, it is not so much the principle that concerns me; it is the detail. I do not feel competent to deal with the detail. It would take hours of research. It may be right; and if it is right, that is fine.

Hon Kim Chance: I take your point.

Hon PETER FOSS: However, I am really scared that it is not.

Hon George Cash: This is a House of Review.

Hon PETER FOSS: Yes. Had this legislation arrived earlier, I do not think anybody would have been concerned about sending it to the committee. It would have been an obvious candidate for it. I am reluctant at this late stage to do this. However, I do not see it as a contentious Bill. When this Bill has been looked at, I do not see it being held up because of, say, a change of government or anything like that. This is the sort of legislation that should be passed, but it should be passed in its correct state. I am very concerned about this. Even though I have reluctantly supported many other Bills - I have said on a number of occasions that I thought they should go to the Standing Committee on Legislation - I must baulk on this Bill and say that I am sorry; I am keenly interested in supporting this Bill, but I am very cautious in doing so because I would hate to pass it if we have gotten it wrong. The reason is that if we get it wrong, there will be many complexities of the retrospective legislation that will have to be passed to fix it. It will not be simple. I suspect that members will have a few goes at that retrospective legislation. It is not the sort of legislation that can be fixed later, because the process will be difficult; this will take away rights.

Hon Kim Chance: I think you have made your point, honourable member. I want a chance to test the feeling of the House on this matter. If you would be prepared to take your seat now, I would be happy to move that you be given leave to continue your remarks. The House will then know better where we are.

Hon PETER FOSS: Yes. I think it will be simpler if I just seek leave to continue my remarks at a later stage of this day's sitting.

[Leave granted for speech to be continued at a later stage.]

**HON JIM SCOTT** (South Metropolitan) [10.28 am]: Certainly, I have concerns about these Bills. I have recently taken over this matter from my colleague Hon Giz Watson. I see from the notes she provided to me that she had quite a few concerns about these Bills.

Hon Peter Foss: She was probably suffering from exhaustion, I suspect.

Hon JIM SCOTT: Yes, I imagine so. People who work within the area have brought to us a number of propositions about which they are concerned. In particular, concerns were expressed to us about the issue of children.

The real problem was whether they had any certainty in getting extensions. I will give an example of a real-life matter that was brought to my attention. A person who was pushing 80 years of age came to see me. He was sexually abused as a child at a Christian Brothers establishment. This man also has attachments to Doodlakine.

Hon Paddy Embry: It keeps coming up, doesn't it?

Hon JIM SCOTT: Yes. He was put in the college as a child after his parents died. He became a ward. It was only at the age of 80 that he was really able to talk about the terrible experience, which still had a huge and deep impact on this man. It was only through the revelations of other people who came forward and spoke about these matters that he was able to come forward. I am very concerned that a lot of people will be put into that position with this sort of limitation period. They may initially feel ashamed or frightened of coming forward. Some people receive threats, such as that their family will be killed and things like that if they come forward. I would hate to think that we would put together legislation that would have an undesirable impact on those

people. Although these Bills attempt to clarify matters and to take pressure off doctors and so on, which may be a good thing, in some ways it may mean that people will be unable to take action. Some people may commit suicide if they find that they cannot take action. This is always a problem with the law when limitation periods are set. An awful lot of people are totally ignorant about the law. They may find out very late in the piece that they are able to take action. When there are limitation periods, people sometimes find out too late. In cases such as the one that I described it would be an aberration of justice to allow that to happen. I will probably seek amendments to cover particular cases.

The consideration of legislation by the House is very rushed at this time of the year. I understand why the Government is in a hurry to get things through. I particularly sympathise with the Leader of the House and the pressure that he is under. However, this legislation will impact on people who, in many cases, really need a proper resolution of their issues. It behoves us as a House to properly examine the legislation. I may not be the one who does that for the Greens (WA), as I will not be here when the Bills are examined. Hon Peter Foss is correct: these Bills should be examined. Everybody wants to get a decent piece of legislation in place and nobody wants to destroy the intent of the Bills. However, because of the importance of these Bills, they should be properly scrutinised. I have taken over the handling of these Bills for the Greens from another member. It may be that I do not understand the Bills as well as I could. With further briefings and so on, it might become clearer to me. However, I am uncertain about the effect of some areas of the Bills and the use of certain words, which I think leave the interpretation of them pretty wide. I will find an example.

Hon Kim Chance: If you intend to support the motion to refer the Bills, we can just get on with that.

Hon JIM SCOTT: Okay. I do not believe that it would cause a terrible problem to the Government if the House referred the Bills to a committee. At this stage, I support that motion.

**HON KIM CHANCE** (Agricultural - Leader of the House) [10.34 am]: I have noted the indication of the will of the House. The Government will not divide on the question.

Question put and passed.