

Positive Outcome - Recommendation from Royal Commission into Institutional Responses to Child Sexual Abuse

TIME LIMITATION PERIODS

The Royal Commission has announced recommendation to remove time limitation periods for the making of claims for civil compensation by survivors of childhood sexual abuse.

This is a major change to the existing rule of law which has created large barrier to genuine claims in the past. To become law, the recommendation needs to be introduced by State Governments, yet the announcement by the Royal Commission is a massive positive step.

EXISTING TIME BARRIER CAUSED BY TIME LIMITATION RULES

Limitation periods are the time limits within which a person may bring a claim for civil compensation. The limitation periods are prescribed by State Government law. The legislation is sometimes referred to as the "Statute of Limitations". Although there are different variations, most Australian States impose a time limit of 3 years from the date of injury within which to commence the civil claim in Court. If it is a child who is injured, the limitation period usually does not commence until 3 years after the child turns 18 years of age.

Historically, the limitation periods were created by Government in the context of public liability or motor accident or work accident claims, such as someone tripping over in Kmart. The rationale for creating the law was that the claim should be notified (within the 3 year time limit) so that relevant evidence could be collected and the merits of the case evaluated in a timely fashion. There was also business reason for such time limit in that those types of claims usually involve an insurance company and for its effectiveness the early notification of the claim was necessary to allow for proper budgeting. It goes without saying that the time limitation law was clearly inappropriate to the application of claims by victims of child sexual abuse because it can often take many years for the abuse to be disclosed.

EXISTING LIMITATION PERIODS

Key elements in the various limitation periods can be summarised as follows:

- Length of limitation period: Most jurisdictions have set the relevant limitation period at 3 years.
- When the limitation period commences: In some jurisdictions, the limitation period begins from the time of the tortious conduct (for example, the sexual abuse), while in other it begins from when the claimant first knows of the injury or from when the claimant could have known of the injury.
- Application to children: In most jurisdictions, the limitation period does not begin until the child turns 18. In some States, this applies only if the child did not have a parent or guardian, although there is a further extension if the child had a "close relationship" with the defendant or the defendant was a "close associate" of the child's parent or guardian.

- Suspension for a disability: All jurisdictions provide for suspending, or lengthening, the limitation period to account for periods when the claimant was under a disability, although they differ in what they recognise as a relevant disability.
- Circumstances of extension: All jurisdictions provide for the limitation period to be extended, but the circumstances in which this may be done vary significantly between jurisdictions.
- Whether there is a “long stop”: Some jurisdictions include a “long stop” provision that applies an absolute time bar. For example, the limitation period might be 3 years from when the claimant first knows of the injury, but it is subject to a “long stop” of 12 years from the date of the abuse.

IMPACT OF THE EXISTING LIMITATION PERIODS

Survivors who commence civil claims against institutions have in the past faced the risk that the institutions will raise the limitation period and, in effect, block the progression of the case.

The existing law requires that the survivor does the “hard running” in seeking an extension of time, in cases where the institution raises the limitation period as a defence. These preliminary issues can take considerable time (many years in some past cases) with substantial associated legal expenses.

The Royal Commission heard evidence from a number of survivors, some of whom felt the injustice of the use of the limitation period as a defence to otherwise prospective genuine claims.

Here is a quote of the evidence given by 1 of the survivors, Mr Clifford Walsh:

“What I couldn’t understand is how the Christian Brothers could raise a limitation defence. We were kids. It seemed to me that we couldn’t do anything about the abuse when it was happening, and by the time we were able as a group to do something about it, in particular being in the right mental state to do so, we were told it was too late. We were just being abused all over again.”

COMPETING CONSIDERATIONS

Limitation periods may be justified by thinking about the following factors:

- Prevent and discourage people with claims from “sleeping on their rights” and encourage them to institute proceedings as soon as it is reasonably possible to do so.
- Avoid the difficult questions of proof – for example, in relation to missing documentary trails or the weak recollections of witnesses – that arise when a long period of time elapses between the injury and determination of the claim.
- Prevent oppression to a defendant by allowing an action to be brought long after the circumstances giving rise to it have passed.
- Create certainty by recognising the status quo that presently exists between parties and give certainty to a potential defendant that a possible case against it is closed.

Limitation periods may also be justified as providing some certainty to insurers. In some cases, these assertions are appropriate. In many personal injury cases, it will be desirable to resolve claims quickly – not just to give the defendant certainty and to ensure evidence is not lost but also to ensure that the claimant receives financial compensation as soon as possible so that the claimant can take steps to make good their injury or loss.

However, in many circumstances, limitation periods operate unreasonably to deny claimants’ access to justice.

CONCLUSIONS BY THE ROYAL COMMISSION

The Royal Commission was satisfied that the current limitation period law was inappropriate given the length of time that many survivors of child sexual abuse take to disclose their abuse.

The Royal Commission recognised that there are benefits to all parties if civil claims are determined as close as possible to the time of injury. For the claimant, the sooner that they can obtain financial compensation the better the practical outcome for them. For the institutions and their insurance companies, there is benefit if the matter is resolved sooner and with certainty.

Notwithstanding those considerations, the Royal Commission was satisfied that the limitation period law for commencing civil claims for personal injury related to child sexual abuse should be removed and that the removal should be retrospective in operation.

The Royal Commission referred to clear evidence that it is likely to take many survivors years, even decades, to disclose their experience of

sexual abuse as a child. There is also an increasing understanding of the devastating impact of child sexual abuse and how this abuse may work against a survivor even being able to disclose the abuse to a family member or friend, let alone seek legal advice and commence a civil claim.

The Royal Commission also announced the desirability that the law in this area be consistent across each State of Australia.

The removal of the limitation periods would mean that additional claims can be made with the institutions at fault, including past claims which may have been denied because of the limitation period law. This removal of the time limit will have a business consequence, which was acknowledged by the Royal Commission. However, the Royal Commission was satisfied that limitation periods have worked great injustices against survivors for some time. Further, the Royal Commission considers that institutions' interests are adequately protected by the need for a claimant to prove the entitlement to a case on admissible evidence and, if the Court considers that there is insufficient evidence, the Court can order a stay of the claim. Interestingly, the Royal Commission also commented that institutions can take steps to limit expensive and time-consuming litigation by offering effective redress and by moving quickly and fairly to investigate, accept and settle meritorious claims.

RECOMMENDATIONS OF THE ROYAL COMMISSION

Here are the full details of the recommendations made by the Royal Commission on the topic of time limitations:

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.

State and territory government 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.

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.

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 our recommendations in relation to the duty of institutions and identifying a proper defendant are implemented.

This Article has been prepared by Mitchell Clark Partner at MBA Lawyers and 1 of the first Lawyers in Queensland to receive recognition from the Law Society as an Accredited Specialist in the field of Personal Injuries Law.

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