

New Zealand Law Society

Submission on Limitation Bill

Overview

1. The Limitation Bill is the product of substantial work over many years, by many contributors. There are some very valuable ideas in the Bill and in the reports leading to it. The Law Society agrees with the objective of simplifying, improving and making more accessible the law of limitation.
2. There are different views within the profession about how to approach reform of the limitation law. The Society through its representatives, on the Civil Litigation and Tribunals Committee has been engaged in the reform process for a number of years. One view is that the law at present is well-established and anchored to the concept that time runs from the accrual of a cause of action irrespective of the claimants' knowledge. The Bill, on the other hand, takes the act or omission as the starting point and allows for later acquisition of knowledge. The Society accepts this approach.
3. Representatives of the Society's participated in the Law Commission deliberations on this project. The perfect approach to the reform would be to have a single comprehensive structure covering all limitation periods. The Society appreciates that this is not currently possible but urges that consideration be given to a unified approach in the future.

Reasonable discoverability

4. The doctrine of reasonable discoverability has caused difficulties in the case law. This was largely a function of the fact that the doctrine was a judicial innovation, of uncertain scope. The Supreme Court's decision in *Murray v. Morel & Co. Ltd.* [2007] 3 N.Z.L.R. 721 did assist in reducing the uncertainty which had developed as a result of inconsistent decisions of the High Court and Court of Appeal. The Supreme Court urged legislative review of this issue in that case.
5. The changes in this Bill will, inevitably, create some uncertainty. In particular, the following issues may arise:
 - a. In some cases it may be more difficult to advise defendants about their exposure to claims.

- b. Plaintiffs may argue that their claims fall within the late knowledge period (clause 10(3)).
 - c. If money claims can now be brought at any time up to 15 years after the triggering act or omission, provided the late knowledge requirements are satisfied, there may be: (a) an increase in the absolute number of proceedings; and (b) new disputes within proceedings about whether the late knowledge requirements are satisfied.
 - d. Defendants, in particular professionals, will have to insure on the basis that they might be found liable even for breaches of contract up to 15 years after the breach.
6. The current law is generally too favourable to defendants, and “reasonable discoverability” was developed by the Courts in order to alleviate that unfairness. It has also been adopted in the Fair Trading Act 1986. Developments have been piecemeal, and the Bill introduces a general rule which brings more clarity to the law.

Clause 10 Defence to money claim filed after applicable period

Triggers for money claims

7. The change of the starting point of limitation from “accrual of cause of action” to “act or omission on which the claim is based” is a levelling of the playing field generally. Instead of depending on the legal niceties of a cause of action, a uniform starting point applies to all money claims. This is effectively a compromise position in the interests of conformity.

Negligence and nuisance

8. This will bring about some changes in relation to negligence cases, but that is because the law is currently too far-reaching. A negligence claim has no limitation period until damage is suffered. The Bill attempts to ensure that no act will be actionable after 15 years have passed, regardless of when damage is suffered.
9. Education will be required on the way in which negligence and nuisance claims will be affected. In general terms, however, the Bill has sought to achieve certainty and consistency that does not presently exist.
10. The Bill introduces entirely new rules for limitation. Lawyers will need to be careful to ensure that they understand the implications. For instance, the law of limitation for negligence and nuisance would be that a claimant would have, at most, 6 years (where damage is simultaneous with the act or omission) and, potentially, as few as 3 years (where damage occurs more than 3 years after the commencement of the initial period) to bring proceedings.

(By contrast, under the present Act the claimant has 6 years from the date of damage.) In very rare cases where damage is not suffered until more than 15 years after the causative act or omission, the claimant will have no right to sue for damages at all.

Distinguishing between types of relief rather than heads of claim

11. The Limitation Act 1950 sets limitation rules according to the legal categorisation of the obligation (contract, tort, restitution) rather than the relief sought. By contrast, clauses 10 to 12 of the Bill differentiate between claims for money and other types of relief.
12. A policy decision has been made that the equitable rules be retained. While there is an argument that it would have been tidier to harmonise the rules for all remedies, the compromise struck in the Bill is inevitable unless there is a wholesale revision of property law.
13. It is to be noted, therefore, that different rules will apply depending on whether the claimant is seeking common law or ‘Lord Cairns Act’ damages.

Comprehensiveness

14. A deliberate policy choice has been made not to attempt to include all statutory limitation rules in the Bill.
15. It should also be noted that
 - a. the general ‘discoverability’ test will be different from that applying to Fair Trading Act claims (s43(5)); and
 - b. its ‘long stop’ will be longer than that applicable under s393 of the Building Act 2004.

Arbitration v. litigation

16. Clause 9(a)(ii) provides that every defence prescribed in the Bill applies “*only to a claim [...] made in a civil proceeding in a specified court or tribunal*”, which is defined so as not to include an arbitral tribunal. However, clause 37(2) then provides that ‘limitation enactments’, including the Limitation Act, “*apply to claims made in arbitrations as they apply to claims made in a proceeding commenced in a specified court or tribunal*”.
17. Clause 37(2) is broader in scope in that it relates to all enactments relating to the limitation of claims. Nevertheless, there is an inconsistency between clause 9(a)(ii) and clause 37(2) in

respect of the Limitation Act itself. Clause 9(a)(ii) might be amended to read “*made in a civil proceeding in a specified court or tribunal, or in arbitrations*”.

Clause 14 Defamation claims: primary period 2 years not 6 years

Defamation

18. The Bill retains the 2-year limitation period for defamation as the “primary period” but introduces a “late knowledge date” extension of time in certain circumstances (Clause 13).
19. This is a significant change from the present position which is 2 years with Court having power to extend this to 6 years.

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