

STANDING COMMITTEE ON LEGISLATION

LIMITATION BILL 2005 AND LIMITATION LEGISLATION AMENDMENT AND REPEAL BILL 2005

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
ON FRIDAY, 2 SEPTEMBER 2005**

SESSION 2

Members

**Hon Graham Giffard (Chairman)
Hon Giz Watson (Deputy Chairman)
Hon Ken Baston
Hon Peter Collier
Hon Sally Talbot**

Hearing commenced at 10.20 am**HOBDAY, MR ANDREW, examined:****BUTTON, MR JOHN, examined:****YOUNG, MR JOHN****Deputy State Solicitor, State Solicitor's Office,
Level 14, 141 St Georges Terrace,
Perth 6000, examined:**

The CHAIRMAN: Good morning. As the chairman of the committee, I need to read a short statement before we proceed. On behalf of the committee, I welcome you to the meeting. Thank you for attending to assist the committee with its inquiry.

Mr Hobday: Excuse me, sir. Could you speak up, please, as I am deaf.

The CHAIRMAN: There are a few formalities that I need to quickly address before our discussions commence. To begin with, please state the capacity in which you appear before the committee.

Mr Hobday: I address the committee in the capacity of a citizen concerned about the future rights of the people of Western Australia.

Mr Button: Like Andrew, I appear as a concerned citizen as far as justice goes in this state.

The CHAIRMAN: You would have signed a document entitled "Information for Witness". Have you read and understood that document?

Mr Button: Yes, I have.

Mr Hobday: Yes.

The CHAIRMAN: Thank you. Today's discussions are public. They are being reported by Hansard and a copy of the transcript will be provided to you. Please note that until such time as the transcript of your public evidence is finalised, the transcript should not be made public. I advise you that a premature publication of the transcript or inaccurate disclosure of public evidence may constitute a contempt of Parliament and may mean that material published or disclosed is not subject to parliamentary privilege. If you wish to make a confidential statement, you can ask the committee to consider taking your statement in private. If the committee agrees, the public will be asked to leave the room before we continue.

Would you like to make an opening statement to the committee in addition to, and not repeating, your submission? Is there any addition you would like to make to the committee?

Mr Hobday: Our intention was to give some additional support for the submission you have received. As an introduction, I would like the committee to know that neither of us feel that that we would personally benefit from the submission. Our motivation is that this is an opportunity to have the Limitation Act corrected to benefit the people of Western Australia to ensure more regular justice is achieved. We want to utilise this opportunity to do so - without personal benefit.

Mr Button: My intent is basically to support Andrew in that sense.

The CHAIRMAN: I have a few questions about your submission. Firstly, the committee notes your concerns for sufferers of latent diseases and diseases that progress gradually. You seem to

approve of clause 55 of the Limitation Bill, which is essentially a repeat of the amendment made for asbestos-related diseases in the amending legislation of 1983. Is that correct?

Mr Hobday: No. I would not say so. Our submission has two main thrusts really. One concerns the recommendation from the government: the government was basically saying that it does not trust the judiciary to have discretionary powers. In the government's recommendation to the Law Reform Commission submission in 1997, the government said that it did not believe that a broad discretionary process should be allowed due to the increased costs of insurance premiums and the uncertainty involved. I think that the statement the government made has been proved to be quite baseless. I do not know how the government got away with making that statement because it is not based on anything. For instance, of the nine jurisdictions presented in the discussion paper, which are all the Australian states, New Zealand and the United Kingdom, seven allow full judiciary scope to have extensions of time. In other words, a plaintiff may approach the court with the full information, and the judge has the power to make a decision on the information available. If seven of nine jurisdictions are able to operate like that, I fail to see how the Western Australian government believes it is going to be very different here, and somehow we will not be able to contain the alleged increases in costs and things it alleges will happen. There is no basis to this claim at all. In removing judicial discretion, the people of Western Australian have had improvements to the current system only by very small degrees. It is not so much with latent diseases. My concern is not about latent diseases. My main concern is the process in which people find themselves experiencing delays. Often it is through no fault of their own. People have exercised due diligence early in the process of illness. My experience - I have fully documented experience in this area - is that quite often state government agencies will lie to people and give them misinformation, and, basically, stop the correct information coming to light. If somebody has experienced a delay, they need to be able to approach the court for an extension of time if their limitation has passed to explain the matter fully. The judge or the court should be allowed to take all that information into account and make a decision based on that information, as opposed to the defined criteria, which is the new proposal. Several examples are presented in my submission. The asbestos story is well known.

The situation with the Department of Health is well published in the book *Blue Murder*. The Department of Health had full air quality readings showing that the air quality in the area concerned was 7 000 times over the safety limit. The department allowed people to continue working. There were concerned voices in the health department at the time saying an epidemic was coming. People were allowed to be put at risk. That continued. I believe that Western Australia is now the world capital for mesothelioma. All these things were avoidable, yet nothing happened.

[10.30 am]

We also had the case of the APB workers in the Kimberley. Once again, this was not a case of latent illness. These men complained of bad practices and questioned the source of the chemical they were supplied with during the early 1980s. They still have not got justice for their illnesses. About 50 people have died as a result of that work, and more people are dying every year. In these cases it is not about latent illnesses. In my case, I was severely lead poisoned. I presented to the health department of Western Australia seeking help. I was shaking, I had memory loss and my weight went down to 52 kilograms. I expressed that I believed that the problem was a result of lead exposure. At the time, the health department monitored my blood and the blood of other workers, and I was told that I had nothing to worry about. For 15 years I suffered severe illnesses, but because I had word from the health department - the experts - I believed that my health problems had nothing to do with lead because the experts had told me that there was nothing to worry about. In 1996 a front-page story in the *Sunday Times* discussed the health department covering up the public lead testing during the 1980s. As a result of that story, I was able to check my history and I found that I was indeed severely lead poisoned. I have been fighting the state government ever since that time, trying to get justice. I cannot claim damages from the state government for

negligence because of the Limitation Act. There is a dispute about when I found out - discoverability. It is the same with the other workers. I was told that there was nothing wrong with me; yet I complained in 1981. When does the time begin - in 1981 or when I found out in 1996? If I were in another jurisdiction that allowed judicial scope for an extension of time, I would be able to approach the court for an extension of time and it would be granted if I gave all the evidence. It is the same with the APB workers. They have plenty of records to show that they complained and questioned the use of the chemical supplied to them at the time. In the meantime, in the case of the APB workers the government has said that it is not responsible; yet, because of the Limitation Act, those workers cannot go through due legal process to prove it. On the one hand, the government is saying that it is not responsible, but, on the other hand, it will not allow legal process to disprove its responsibility. It is a complete removal of justice. We do not have in place a mechanism for a judge or court to be aware of the full details. The proposal for the act does not allow for that judicial discretion; it allows it only within set criteria. If the criteria are met, an extension of time may be granted. There are too many cases in which people will not fit the criteria, because misinformation has been generated and there have been concerted efforts to cover up the true facts. In a court process, these things would come to light. There is no opportunity for that under the current proposal.

I have been trying for more than seven years to get the true facts to come to light with the Attorney General. I have a stack of correspondence proving that the Crown Solicitor's Office has generated misinformation to the Attorney General, which has weakened my case. Sometimes it has been a fabrication, sometimes it has not been true, and sometimes very pertinent information has been left out in advising the Attorney General. After seven years I have got nowhere; yet there is a clear act of negligence. I contracted a disease and I was not told that I had the disease. I even complained about the disease. I exercised due diligence. I cannot do anything. I have lost my earning capacity. I have several health problems. I have spent more than \$50 000 on my health, and those costs are ongoing. I have never been able to sue anybody. The state government is still practising the cover-up mentality that caused the problem.

In answer to your question about whether it is a matter of only latent diseases as referred to in the asbestos-related diseases act - no, it is not. It is a case of having full scope for judicial discretion for an extension of time. As I have said, the government's recommendation that it will cause extra cost for Western Australia is completely baseless. It borders on a fraudulent argument. There is no evidence to support it whatsoever. It seems to serve only one purpose; that is, to deprive the people of Western Australia of a true opportunity for justice in particular circumstances. The proposed legislation will not allow truth and information to come to light. In all the cases I have put forward in my submission, the government would have the people believe that all these people decided to poison themselves or that they have just had bad luck. None of the three cases - that is, the exposure to asbestos and lead and to excessive dioxin levels by APB workers - has been an accident. Criminal acts have taken place in all these cases. In the legislation as it now stands there is an item to cover fraudulent and unlawful acts, and people can get an extension of time. Scores of people are dead as a result of the APB case and probably thousands are dead as a result of Wittenoom; yet there has not been one single conviction of the people who allowed this to happen and who, in fact, took very active roles in encouraging the poisoning of these people. How can somebody apply to the court on the grounds of an unlawful act when the government refuses to pursue criminal convictions of the people and agencies that have caused these deaths? I have tried to pursue this by due process through the public sector investigation unit. I am still waiting for a response to my last one application. I have proved that the Criminal Code has been broken several times over; yet there has been a complete refusal by anybody to take action to pursue these breaches of the Criminal Code. The proposal that I can get an extension of time due to a criminal act is useless. I do not know whether the police are not allowed to do their investigations or whether the money is not available to them. I would like to know why we have all these dead bodies everywhere and not a single conviction. It just does not ring true. None of these things was an

accident. None of these things was bad luck. People were killed or injured due to criminal acts, but there have been no convictions. If we went to the court and proved that a criminal act took place, a court could exercise its discretion and apply an extension of time if it saw genuine reasons for the delay. I think that gets to the core of my submission. There are too many opportunities for people to be deprived of justice without having the right to apply to the court for a judge to exercise his discretion on an extension of time. If it works in seven out of the nine jurisdictions that have presented, as I said, there is no argument. Of the two jurisdictions that have acts similar to the Western Australian proposal, I also point out that both those jurisdictions - Tasmania and New Zealand - are very undynamic economies. In other words, quite often they have to use subsidies to attract businesses. There is no case at all for saying that discretionary scope for extension of time causes excess costs. It is just not true. I would really like to know how whoever wrote that got away with it, and what basis it has. In closure, I would like to say that it is certainly not in Western Australia's public interest to squander the opportunity to change the Limitations Act and not allow Western Australian citizens to have the full rights to finding justice, especially in cases of personal injuries, where people have lost income and suffered personal damage. Too much of this has happened and people have no right to seek justice.

[10.40 am]

The CHAIRMAN: Can I take you to another aspect of your submission now? You indicate in your submission your concern about potential defendants who prevent potential plaintiffs from accessing information about their health, and defendants who hide or destroy evidence in order to prevent actions being commenced against them. You suggest that, in some cases, allowing courts to extend limitation periods on the basis of their fraud or improper conduct would be useless against that activity because it is too difficult to prove. If that is what you are saying, are you in a position to explain to the committee how you think the bill ought to be amended or improved to overcome that difficulty?

Mr Hobday: Contrary to what you are saying, I am saying that it is not difficult to prove. I am saying that it is very easy to prove that fraudulent conduct or generation of misinformation has taken place. It is very easy to prove this. If somebody presented these to a judge in court, he would agree. What is difficult is to get a conviction. That is where the difficulty lies, and therefore, under the proposed act, we are saying that people can get an extension of time if they are subject to an act of crime. I am saying that is fine, but nobody ever seems to get convicted around here when they cause all these delays. Therefore, that is too difficult; however, in presenting my case from that position, I would certainly be able to present documentation, and other people in similar circumstances could show that misinformation is being generated, perhaps for the sole purpose of allowing time to run out. I think we saw this in the days prior to the asbestos-related diseases legislation. That was the very purpose of Larry Graham's private member's bill, because there was excessive delay, in which claimants, and therefore their claims, died. It is only the passage very recently of the private member's bill introduced by Larry Graham that allowed the claims to continue. But, yes, you could apply to the court and show that the delay had been caused through no fault of your own, through concerted efforts by the powers that be, whether that be the defendant or a state government agency. If they have deliberately delayed, or even unnecessarily delayed - it need not be deliberate - but caused time to run out -

The CHAIRMAN: Are you familiar with clause 37 of the bill?

Mr Hobday: I have read the bill, but I am not familiar with that point.

The CHAIRMAN: The bill is there in front of you, if you want to take the opportunity to quickly look at it. Clause 37 is on page 20.

Mr Hobday: That is just a case of -

The CHAIRMAN: - fraud or misconduct.

Mr Hobday: I just go back to what I say. It is too difficult to get a conviction, or to prove that there has been criminal conduct, because you cannot say “look, there has been criminal conduct” if there is no conviction, but you can go to a court and show that people have been producing misinformation. You can produce documents to show that, otherwise you would not have an argument at all.

The CHAIRMAN: You may feel as though you have already answered this, but I probably should try to get a specific and clear answer on this point. I think you have broached this subject already. Do you agree that there should be any point at which a person will no longer be vulnerable to having any legal proceedings instituted against them? Is there any cut-off point that you would find acceptable?

Mr Hobday: I understand what you are asking. The Limitation Act exists for a purpose, and there is a very good purpose for us to have a Limitation Act. In most other jurisdictions you can ask for an extension of time if you can show that you have good cause to keep the brief. That seems to work in other jurisdictions. There is a proviso - I have looked at the other state acts - that basically says that, if the delay has caused undue hardship for the defendant due to the extension of time, that is a reason to bar that extension of time. I do not really see this as a problem. I think it is also part of the benefit that we have from full discretionary powers of the court that that consideration can be made at the time. That you can ask for an extension of time after demonstrating good reasons for it seems to work very adequately in seven out of nine jurisdictions. Within that discretionary power that the judge has, he can also take into account what is a reasonable time limit. I think in New South Wales it is 15 years, but they have no time stopped, for instance, on dust conditions. I do not have an opinion one way or the other on those sort of stops, but I do believe that would be adequately catered for within a discretionary role of the judge when an application comes to the court to ask for an extension of time. Obviously, if somebody comes 35 years later with something, a judge will look at the time that has passed, and that person would have to have a pretty damned good excuse to say why he had not come up before that time.

The short answer, is no, I do not have a particular viewpoint, but I believe that that issue appears to have been adequately addressed in seven out of the nine jurisdictions that allow for an extension of time.

The CHAIRMAN: Through judicial discretion?

Mr Hobday: Yes. Because my submission has not really homed in on that, I have not given it a great deal of consideration. I understand your question, and I can just say that I support the objectives of the Limitation Bill.

[10.50 am]

Hon GIZ WATSON: My reading of the relevant clause, clause 37, is that an extension can be granted, but for only three years. I am assuming that you are saying that the extension should be discretionary. There are two aspects of it, from what I hear you say. First, the test of what has delayed the case should be more flexible. Secondly, you are saying that if someone can prove that the action was improper or fraudulent, he could be granted up to three years' extension, but it would not be open-ended.

Mr Hobday: I do not have an issue. The proposal is saying to lessen the extension for personal injury, for instance, under the Limitation Act from six years to three years. It then allows a three-year extension once you apply. I do not have a problem with any of that. If you apply to a court and you get an extension of time, it allows you three years to start your action, and that is fine. I do not have a problem with that. Where the problem lies is with the criteria the proposal sets out for those three additional years to be granted. That is where we must have that discretionary power. To set it in stone means that there are so many opportunities for people to come undone and not be able to seek justice. That is my concern. I do not have an issue with shortening the period from six

years to three years, because you have to have limitations, but I do have an issue with how the opportunity to get the extension of time is presented. If it is three years or 12 months or a six-year extension, I do not really see that as a problem.

The CHAIRMAN: I do not have any further questions. If there are any other concerns or issues that you want to raise with us, I am happy to hear from you.

Mr Hobday: There is one last thing. In the recommendations of the law reforms discussion paper, the WA government is basically stating that it does not have faith in the judiciary. It says that in as many words. I find that an extremely serious outlook for the government to have, and I find it totally unacceptable that the government does not have faith in the judiciary. It is unbelievable that it is written there.

The CHAIRMAN: Mr Button, is there anything you want to add?

Mr Button: I would like to say that what Andrew has been saying applies right across the board. My particular area is to look at how it applies to those in the criminal justice system. I am finding now that just recently with the advance in forensic science, a lot of innocent people are being released from long-term prison. We must understand that innocent people are being put in prison. It was not of their own doing but because of some criminal action on the part of the authorities somewhere along the line; yet, they have no way of going back to that. I believe that the six-year limitation still applies. Because the cause of their imprisonment was known right back in the early days, that six years has run out; it does not start from the time they are released or the time they are exonerated. A person now has no chance of being reimbursed or seeing justice done, because of that time limitation. I am finding more and more that while there is a strict limitation on time, there are those who will find it beneficial to use that time up, so that once the time has passed it will be impossible to start any action.

As Andrew said, I fully believe that we must have that discretionary power in the courts and we must have faith in our judiciary. If we have no faith in our courts, I think it is the end of justice for WA. If the government has no faith in the courts, it should be looking at why it has not, and not just taking power away from the courts and saying that it, and not the courts, will decide what is right. We need to leave it up to a human being who can look into matters and who has emotion, rather than legislation. Even though everybody might want to go against it, if the legislation is written, they must abide by it and we are stuck. There are many areas other than Andrew's examples and asbestos-related diseases; it goes right across the board. Our main point is that once you take the authority out of the courts to decide what is right or wrong and pass it over to the government to enshrine it in legislation, we will lose right across the board. If that is altered - look at what the Law Reform Commission said on that - and if we can solve that problem, I think every other problem will be solved. Every other problem hinges on the fact that we need somebody there to look at what is happening and to make a decision. We must have faith in the judiciary system to do that.

The CHAIRMAN: Thank you.

Hearing concluded at 10.56 am