

# List of Recommendations

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## Implementation of the Panel's Recommendations

### *A national response*

#### **Recommendation 1**

The Panel's recommendations should be incorporated (in suitably drafted form) in a single statute (that might be styled the *Civil Liability (Personal Injuries and Death) Act* ('the Proposed Act')) to be enacted in each jurisdiction.

### *Overarching recommendation*

#### **Recommendation 2**

The Proposed Act should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action.

## Professional Negligence

### *Treatment by a medical practitioner — standard of care*

#### **Recommendation 3**

In the Proposed Act, the test for determining the standard of care in cases in which a medical practitioner is alleged to have been negligent in providing treatment to a patient should be:

A medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the court considers that the opinion was irrational.

***Standard of care — professionals generally***

**Recommendation 4**

The Proposed Act should embody the following principles:

In cases involving an allegation of negligence on the part of a person holding himself or herself out as possessing a particular skill, the standard of reasonable care should be determined by reference to:

- (a) What could reasonably be expected of a person professing that skill.
- (b) The relevant circumstances at the date of the alleged negligence and not a later date.

***Duties to inform***

**Recommendation 5**

In the Proposed Act the professional's duties to inform should be legislatively stated in certain respects, but only in relation to medical practitioners.

**Recommendation 6**

The medical practitioner's duties to inform should be expressed as duties to take reasonable care.

**Recommendation 7**

The legislative statement referred to in Recommendation 5 should embody the following principles:

- (a) There are two types of duties to inform, a proactive duty and a reactive duty.
- (b) The proactive duty to inform requires the medical practitioner to take reasonable care to give the patient such information as the reasonable person in the patient's position would, in the circumstances, want to be given before making a decision whether or not to undergo treatment.
- (c) The information referred to in paragraph (b) should be determined by reference to the time at which the relevant decision was made by the patient and not a later time.
- (d) A medical practitioner does not breach the proactive duty to inform by reason only of a failure to give the patient information about a risk or other matter that would, in the circumstances, have been obvious to a

reasonable person in the position of the patient, unless giving the information is required by statute.

- (e) Obvious risks include risks that are patent or matters of common knowledge; and a risk may be obvious even though it is of low probability.
- (f) The reactive duty to inform requires the medical practitioner to take reasonable care to give the patient such information as the medical practitioner knows or ought to know the patient wants to be given before making the decision whether or not to undergo the treatment.

### ***Procedural recommendations***

#### **Recommendation 8**

Consideration should be given to implementing trials of a system of court-appointed experts.

#### **Recommendation 9**

Consideration should be given to the introduction of a rule requiring the giving of notice of claims before proceedings are commenced.

### **Not-for-Profit Organisations**

#### ***No exemption for NPOs***

#### **Recommendation 10**

Not-for-profit organisations as such should not be exempt from, or have their liability limited for, negligently-caused personal injury or death.

#### ***Recreational services generally***

#### **Recommendation 11**

The Proposed Act should embody the following principles:

The provider of a recreational service is not liable for personal injury or death suffered by a voluntary participant in a recreational activity as a result of the materialisation of an obvious risk.

- (a) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the participant.

- (b) Obvious risks include risks that are patent or matters of common knowledge.
- (c) A risk may be obvious even though it is of low probability.

**Recommendation 12**

For the purposes of Recommendation 11:

- (a) 'Recreational service' means a service of
  - (i) providing facilities for participation in a recreational activity; or
  - (ii) training a person to participate in a recreational activity; or
  - (iii) supervising, adjudicating, guiding or otherwise assisting a person's participation in a recreational activity.
- (b) 'Recreational activity' means an activity undertaken for the purposes of recreation, enjoyment or leisure which involves a significant degree of physical risk.

**Recommendation 13**

The principles contained in Recommendation 11 should not apply in any case covered by a statutory scheme of compulsory liability insurance.

***Warning and giving notice of obvious risks***

**Recommendation 14**

The proposed Act should embody the following principles:

A person does not breach a proactive duty to inform by reason only of a failure to give notice or to warn of an obvious risk of personal injury or death, unless required to do so by statute.

- (a) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the person injured or killed.
- (b) Obvious risks include risks that are patent or matter of common knowledge.
- (c) A risk may be obvious even though it is of low probability.

**Recommendation 15**

The principles contained in Recommendation 14 should not apply to 'work risks', that is, risks associated with work done by one person for another.

***Emergency services***

**Recommendation 16**

There should be no provision regarding the liability of not-for-profit organisations as such for personal injury and death caused by negligence in the provision of emergency services.

**Trade Practices**

***Part IVA***

**Recommendation 17**

The TPA should be amended to provide that the rules relating to limitation of actions recommended in this Report, and those relating to the quantum of damages that will be recommended in the Panel's second report, apply to any claim for negligently-caused personal injury or death brought under Part IVA of the TPA in the form of an unconscionable conduct claim.

**Recommendation 18**

The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report, and that will be recommended in the Panel's second report, apply to any claim for negligently-caused personal injury or death brought under Part IVA of the TPA in the form of an unconscionable conduct claim.

***Part V Div I***

**Recommendation 19**

The TPA should be amended to prevent individuals bringing actions for damages for personal injury and death under Part V Div I.

**Recommendation 20**

The TPA should be amended to remove the power of the ACCC to bring representative actions for damages for personal injury and death resulting from contraventions of Part V Div 1.

## ***Part V Div IA, Part V Div 2A and Part VA***

### **Recommendation 21**

The TPA should be amended to provide that the rules relating to limitation of actions recommended in this Report, and those relating to the quantum of damages that will be recommended in the Panel's second report, apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA of the TPA.

### **Recommendation 22**

The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report, and that will be recommended in the Panel's second report, apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA of the TPA.

## **Limitation of Actions**

### ***General provision***

#### **Recommendation 23**

The Proposed Act should provide that all claims for damages for personal injury or death resulting from negligence are governed by the limitation provisions recommended in this Chapter.

### ***The limitation period and the long-stop period***

#### **Recommendation 24**

The Proposed Act should embody the following principles:

- (a) The limitation period commences on the date of discoverability.
- (b) The date of discoverability is the date when the plaintiff knew or ought to have known that personal injury or death:
  - (i) had occurred; and
  - (ii) was attributable to negligent conduct of the defendant; and
  - (iii) in the case of personal injury, was sufficiently significant to warrant bringing proceedings.
- (c) The limitation period is 3 years from the date of discoverability.

- (d) Subject to (e), claims become statute-barred on the expiry of the earlier of
  - (i) the limitation period; and
  - (ii) a long-stop period of 12 years after the events on which the claim is based ('the long-stop period').
- (e) The court has a discretion at any time to extend the long-stop period to the expiry of a period of 3 years from the date of discoverability.
- (f) In exercising its discretion, the court must have regard to the justice of the case, and in particular:
  - (i) whether the passage of time has prejudiced a fair trial of the claim.
  - (ii) the nature and extent of the plaintiff's loss.
  - (iii) the nature of the defendant's conduct.

### ***Suspending the limitation period — minors and incapacitated persons***

#### **Recommendation 25**

The Proposed Act should embody the following principles:

- (a) The running of the limitation period is suspended during any period of time during which the plaintiff is a person under a disability.
- (b) 'Person under a disability' means:
  - (i) a minor who is not in the custody of a parent or guardian;
  - (ii) an incapacitated person (such as a person who is unable, by reason of mental disorder, intellectual handicap or other mental disability to make reasonable judgments in respect of his or her affairs) in respect of whom no administrator has been appointed.
  - (iii) a minor whose custodial parent or guardian is a person under a disability.
- (c) In the case of minors and incapacitated persons who are not persons under a disability, the relevant knowledge for the purpose of determining the date of discoverability is that of the parent, guardian or appointed administrator, as the case may be.

- (d) Where the parent or guardian of a minor is the potential defendant or is in a close relationship with the potential defendant, the limitation period (called 'the close-relationship limitation period') runs for 3 years from the date the plaintiff turns 25 years of age.
- (e) A close relationship is a relationship such that:
  - (i) the parent or guardian might be influenced by the potential defendant not to bring a claim on behalf of the minor against the potential defendant; or
  - (ii) the minor might be unwilling to disclose to the parent or guardian the conduct or events on which the claim would be based.
- (f) In cases dealt with in (d), the court has a discretion at any time to extend the close-relationship limitation period to the expiry of a period of 3 years from the date of discoverability.

### ***Survival of actions***

#### **Recommendation 26**

The Proposed Act should embody the following principles:

- (a) Subject to sub-para (b), the limitation principles contained in Recommendations 24 and 25 should apply to an action brought by the personal representative of a deceased person acting as such.
- (b) In such a case, the limitation period should begin at the earliest of the following times:
  - (i) When the deceased first knew or should have known of the date of discoverability, if that knowledge was acquired more than 3 years before death;
  - (ii) When the personal representative was appointed, if he or she had the necessary knowledge at that time;
  - (iii) When the personal representative first acquired or ought to have acquired that knowledge, if he or she acquired that knowledge after being appointed.

***Contribution between tortfeasors***

**Recommendation 27**

The Proposed Act should provide for limitation periods in regard to contribution between tortfeasors.

