

## 6. Limitation of Actions

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### *Term of Reference*

5. ***Develop and evaluate options for a limitation period of 3 years for all persons, while ensuring appropriate protections are established for minors and disabled persons.***

***In developing options the panel must consider:***

- (a) the relationship with limitation periods for other forms of action, for example arising under contract or statute; and***
- (b) establishing the appropriate date when the limitation period commences.***

### The nature of limitation periods

6.1 Limitation periods provide a time limit for the bringing of legal proceedings. They should not be seen as arbitrary cut-off points unrelated to the demands of justice or the general welfare of society. They represent the legislature's judgment that the welfare of society is best served by causes of action being litigated within a limited time, notwithstanding that their enforcement may result in good causes of action being defeated.<sup>1</sup>

6.2 It has been said that there are four broad rationales for the enactment of limitation periods. These are:

- (a) As time goes by relevant evidence is likely to be lost.
- (b) It is oppressive to a defendant to allow an action to be brought long after the circumstances that gave rise to it occurred.
- (c) It is desirable for people to be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them after a certain time.
- (d) The public interest requires that disputes be settled as quickly as possible<sup>2</sup>.

6.3 A workable limitation system needs to provide fairness to both plaintiffs and defendants. Plaintiffs need sufficient time to appreciate that they have

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<sup>1</sup> *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 553 per McHugh J.

<sup>2</sup> *Ibid.* 552 per McHugh J

claims, to investigate their claims and to commence proceedings. In some cases plaintiffs may be under a disability that prevents prompt action. In other cases, the detection of a disease or injury (or its cause) may not be possible until many years after the date of the event that caused it. A limitation system must be sufficiently flexible to cope fairly, not only with patent damage that is suffered immediately or shortly after the occurrence of a wrongful act, but with latent damage that can only be detected years after the relevant event.

6.4 The interests of defendants are encapsulated in the four rationales set out above.

6.5 Limitation rules should, as far as possible, be of general application, and undue complexity should be avoided. While procedural in nature, a limitation system operates on the substantive rights and liabilities of the parties. Therefore, striking a just balance is imperative.

## Limitation period issues

6.6 When evaluating an appropriate limitation system, consideration needs to be given to the following issues:

- (a) The date when the limitation period commences to run;
- (b) The length of the limitation period;
- (c) Whether there should be an ultimate bar to commencing proceedings (a “long-stop” provision);
- (d) Whether the court should have discretion to extend the limitation period and, if so, on what basis; and
- (e) Whether the limitation period should be suspended, particularly for minors and incapacitated persons.

6.7 None of these issues can be considered in isolation. As will become apparent, the various issues interact.

6.8 There is a bewildering array of different limitation regimes in Australian jurisdictions. The rules relating to the issues set out in paragraph 6.6 differ from jurisdiction to jurisdiction and, within each jurisdiction, from one cause of action to another. These differences lead to confusion, are themselves causes of litigious disputes, often materially influence the nature of the cause of action relied upon, and occasionally lead to forum shopping. Accordingly, any

sensible reform of the law relating to claims for personal injury or death arising out of negligence should include limitation rules that, as far as possible, are of general application and have nationwide effect.

6.9 Our Terms of Reference require us to 'consider ... the relationship with limitation periods for other forms of action, for example arising under contract or statute'. As we have pointed out in the Introduction to this Report, actions for negligently-caused personal injury and death can be brought under contract, statute and various other causes of action, as well as under the tort of negligence. It is desirable that the limitation periods relating to all actions of this kind, irrespective of the formal causes of action on which they are based, should be the same. This effect will be achieved if the Proposed Act makes it plain that all claims for negligently caused personal injury or death are governed by the limitation provisions proposed in this chapter.

### **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 date when the limitation period should commence**

6.10 There are four principal options in regard to the date from which the limitation period should run, namely:

- (a) The date of the event(s) that resulted in the personal injury or death;
- (b) The date of the accrual of the cause of action;
- (c) The date when damage occurred; and
- (d) The date of discoverability.

6.11 Whichever option is adopted, it will need to cater for many different kinds of damage. Different considerations arise depending upon whether damage is suffered in consequence of an accident that causes trauma or whether it is suffered in consequence of the contraction of a disease. In the case of an accident, the damage is usually (but not always) suffered immediately or soon after the accident. However, there are cases, such as those involving certain kinds of post-traumatic stress disorder, where the damage can manifest

itself many years after an accident. In the case of a disease (such as mesothelioma, for instance), damage may also manifest itself many years after negligent conduct. Damage may occur progressively, with the result that a plaintiff may only realise after many years of being subjected to wrongful conduct that significant damage has been sustained (for example, in the case of industrial deafness). There are some kinds of damage which manifest themselves late and which are not capable of ready classification. An example is the delayed psychological effect of sexual or other physical abuse.

6.12 The date from which the limitation period commences should deal fairly with all these various kinds of damage.

### Date of event

6.13 In statutes dealing with situations where the damage almost invariably arises at the date of the relevant event, it may be reasonable to provide that the date of the event will be the commencement date of the limitation period. Motor accident statutes are an example of this class of statutes<sup>3</sup>. But this approach would lead to injustice if applied in statutes dealing with claims for personal injury and death, generally. That is because, as we have explained, there are many instances when damage will occur many months or even years after the event. It would be unjust to provide for limitation periods to run before claimants have suffered damage or know that they have suffered damage.

### Date of accrual of cause of action

6.14 There is a basic problem in using the date of accrual of the cause of action as the commencing date. The package of reforms recommended and to be recommended by the Panel rests on the premise that, regardless of the cause of action, there should be only one set of rules that govern claims for personal injury or death resulting from negligence. The nature of the cause of action should have no legal significance. That being so, it would be illogical and inconsistent to tie the commencement date to the cause of action.

### Date when damage occurred

6.15 The next option to be considered is the date on which the damage occurred. There are basic problems with this option as well. First, it does not

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<sup>3</sup> See the *Motor Accidents Compensation Act 1999 (NSW)* and the *Motor Accidents (Compensation) Act (NT)*

cater adequately for those cases where damage can only be detected long after it occurs. Claims of that kind may easily become statute-barred before the injured party becomes aware of having suffered damage. Secondly, it does not cater adequately for those cases where the plaintiff has no reason to know, at the time the damage occurs, that it was caused by the negligence of another. In such cases, time would run against plaintiffs who had no reason to know that they had a claim.

6.16 Nevertheless, there are many limitation statutes that use the date of the occurrence of damage as the commencement date. Generally, they attempt to cope with the problems referred to in the preceding paragraph by conferring a discretionary power on the court to extend the limitation period at any time, or at any time within a fixed period.

6.17 These attempts to resolve the difficulties are inherently unsatisfactory. The discretionary provisions are often not adequate to cater fairly for cases of latent disease and cases where damage only manifests itself long after the wrongful act. This gives rise to the need for additional special legislation to cover such cases, and the objective of consistency and uniformity is harmed. Moreover, the existence of a discretion to extend the limitation period in every case is a source of expensive and, in the Panel's view, unnecessary, litigation.

### The date of discoverability

6.18 The date of discoverability is the Panel's preferred option<sup>4</sup>.

6.19 The date of discoverability means the date on which the plaintiff knew, or ought to have known, that personal injury or death:

- (a) Had occurred; and

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4 The date of discoverability is used in the Limitations Act 1935 (WA) s 38A, and the Limitation of Actions Act 1958 (Vic) s 5. It has also been adopted in the Limitations Act 1996 (Alta) s 3, Limitation Act 1980 (UK) s 11 and s 14, Statute of Limitations Amendment Act 1991 (Ire), Prescription and Limitation (Scotland) Act 1973 (UK) s 11, Limitation Act 1979 (BC) s 3, Consumer Protection Act 1987 (UK) s 6, and Uniform Limitations Act 1982 (Canada) s 13. Adoption of the date of discoverability has been recommended by the Law Reform Commission of Western Australia, *Limitation and Notice of Actions* (1997), the Alberta Law Reform Institute, *Limitations* (1989), the Newfoundland Law Reform Commission, *Report on Limitation of Actions* (1986), the Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Actions Act: Report to the Minister of Justice* (1989), the Scottish Law Reform Commission, *Report on Prescription and Limitation of Actions (Latent Damage and Other related issues)* (1987), the Irish Law Reform Commission, *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (1987) and the English Law Commission, *Limitation of Actions* (2001).

- (b) Was attributable to negligent conduct of the defendant; and
- (c) In the case of personal injury, was sufficiently significant to warrant bringing proceedings.

6.20 The purpose of the requirement of knowledge that the personal injury was sufficiently significant to warrant bringing proceedings is to deal fairly with those cases where serious injury is sustained progressively over a period.

6.21 Adoption of the date of discoverability resolves all of the problems inherent in the other commencing dates we have discussed, although it brings with it problems of a different kind. In the Panel's view, however, these different problems can be resolved fairly and easily.

6.22 It is first necessary to explain how adopting the date of discoverability as the commencement date of the limitation period resolves the difficulties inherent in the other commencement dates.

6.23 One element of determining the date of discoverability is the time when the plaintiff could reasonably be expected to have discovered that damage had occurred. This means that it provides a fair way of dealing with those cases where damage manifests itself long after the event, or in a form difficult to detect.

6.24 In the same way, adopting the date of discoverability provides a fair way of dealing with those cases where it takes many years for a plaintiff to discover that his or her condition was caused by the negligence of another.

6.25 Because adopting the date of discoverability deals fairly with a wide range of cases, it avoids the need for separate legislation to cover those cases where damage manifests itself long after the event, or in a form difficult to detect. It promotes the cause of consistency and uniformity.

6.26 Adoption of the date of discoverability also allows an important requirement of the Term of Reference discussed in this Chapter to be met, namely that a limitation period of 3 years be applicable to all claims. The Panel is of the view that if time begins to run from the date of discoverability, the limitation period need be no longer than 3 years. Once the plaintiff knows or ought to know both of the damage sustained and the fact that it was attributable to the negligent conduct of the defendant, 3 years is a reasonable period within which to commence proceedings.

6.27 The Panel is also of the view that if time begins to run from the date of discoverability, it is unnecessary and indeed undesirable to give the court a discretion to extend the limitation period. Once the plaintiff knows or ought to

know the facts necessary to enable an action to be commenced, a period of 3 years provides a reasonable time for this to be done.<sup>5</sup>

6.28 The fact that the test proposed for determining the date of discoverability is objective will make it easier to prove when the date for commencement of the limitation period occurs. The date of discoverability is not when the claimant in fact discovered the damage and that the damage was caused by the negligence of another, but rather when a reasonable person in the claimant's position should have made the discovery. Accordingly, the evidence about what individual plaintiffs knew will carry less weight, as the date of discoverability will depend on what a reasonable person in the plaintiff's position would have known, and not what the plaintiff personally knew.

## The long-stop provision and the discretionary power to extend

6.29 We now turn to the difficulties that may be caused by adoption of the date of discoverability as the date for commencement of the limitation period.

6.30 These potential difficulties stem from the fact that the date of discoverability is not a fixed date, capable of ready determination. In cases where damage manifests itself long after the event, or in a form difficult to detect, the date of discoverability could extend interminably into the future.

6.31 Thus, unlike the date of the damage-causing event, or the date of accrual of the cause of action, or the date the damage occurred (which are all potentially unfair to plaintiffs), the date of discoverability is potentially unfair to defendants. The unfairness arises because, in cases where the date of discoverability may not occur until many years after the damage-causing event, witnesses may die or be difficult to find, memory may be impaired and records may be lost. In that event, the defendants could be hampered in the preparation of their defence and the fairness of the trial may be prejudiced.

6.32 Cases of the kind that lead to delay sufficiently long as to result, potentially, in an unfair trial are likely to be relatively few in number (although important in themselves). In the Panel's view, these cases could fairly be dealt with by what is termed an 'ultimate bar' or 'long-stop provision', coupled with a discretionary power on the part of the court, exercisable at any time, to extend the long-stop period.

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5 Examples of limitation statutes that do not confer power to extend the limitation period are the Work Health Act 1986 (NT), the Trade Practices Act 1974 (Cwth), and the Civil Aviation (Carriers Liability) Act 1959 (Cwth).

6.33 The purpose of a long-stop period is to fix a date on which an action will become statute-barred, irrespective of whether the date of discoverability has occurred. In other words, under the proposed system, a claim will become statute-barred on the expiry of the limitation period or the long-stop period, **whichever is the earlier.**

6.34 In the Panel's view, the long-stop period should run from the date on which the allegedly negligent conduct took place.

6.35 As the long-stop period is designed to cater for cases where damage manifests itself long after the event, or in a form difficult to detect, it has to be a relatively lengthy period. Various periods, ranging from 10 to 30 years, have been suggested as appropriate long-stop periods. The longer the long-stop period, the greater the danger of unfairness in the trial process.

6.36 The choice of the long-stop period is necessarily arbitrary. The Panel has concluded that the period should be 12 years from the date the allegedly negligent conduct occurred. In our view, this strikes a reasonable balance between the need to cater for cases in which damage manifests itself late and the need to ensure a fair trial. The Panel is aware that in some cases, damage will not manifest itself until after the expiry of the 12-year period. But plaintiffs who suffer such damage will be protected by the discretion to extend the long-stop period referred to in paragraph 6.37.

6.37 The Panel has previously noted that it is desirable to avoid providing for a discretionary extension of the limitation period. When it comes to the long-stop period, however, justice requires a discretionary power to extend in order to provide fairly for cases (including cases of diseases with a long latency period) in which damage is not discoverable until after the expiry of the long-stop period.

6.38 The long-stop coupled with the discretion to extend also caters for the legitimate interests of defendants. It does this by requiring a plaintiff who wishes to commence an action after the expiry of the long-stop period to seek the permission of the court. At this point the court is able to take account of the defendant's interest in securing a fair trial of the claim.

6.39 Because the date of discoverability will occur after the expiry of the long-stop period in only relatively few cases, occasions for the exercise of the discretion to extend the long-stop period will arise much less often than if the limitation period could be extended. For this reason, it will be less creative of uncertainty than a discretion to extend the limitation period would be.

6.40 A prospective plaintiff should be entitled to apply at any time before the expiry of 3 years after the date of discoverability for an extension of the long-stop period. The court should have the power to extend the long-stop period to the expiry of that 3-year 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.**

## Suspension of the limitation period: minors and incapacitated persons

6.41 The Panel has heard persuasive evidence from several sources about difficulties that are experienced by reason of the rule that limitation periods do not run against minors and mentally incapacitated persons. We shall give two examples of categories of persons who experience such difficulties.

6.42 The first is public liability and professional indemnity insurers. Their problems are caused by uncertainty in forecasting claims by minors and incapacitated persons. They emphasise the phenomenon that the older the claim, the more likely it is that the law will have changed substantially since the time the risk was underwritten. This gives rise to major difficulties in assessing premiums. This, in turn, gives rise to problems for defendants and, hence, is a consideration the Panel is required to take into account.

6.43 The second affected group consists of persons whose business or profession it is to deal with young children or incapacitated persons. Obstetricians are the obvious example of persons who fall into this category. The main problem for obstetricians is the possibility of being faced with claims, sometimes 20 years or more after the relevant event. Claims may be made years after the obstetrician has retired. The Panel was told, on the basis of anecdotal evidence, that this has led to shortage of obstetricians in some areas as a result of some ceasing to practise as such.

6.44 The Panel is not in a position to verify this assertion, but many people clearly perceive it to be correct. We have also been told that this perception is adversely affecting the availability of insurance at reasonable premiums. Having regard to our Terms of Reference, the Panel is required to take account of the perception.

6.45 One view, reflected in the limitation legislation in most jurisdictions, is that it is unjust to provide for the running of limitation periods against children and incapacitated persons. Generally, limitation periods are suspended in favour of minors and incapacitated persons.

6.46 Another view that has been expressed to the Panel is that society can reasonably expect parents and guardians, and those who care for incapacitated persons, to take necessary steps on behalf of their charges to initiate claims within the time limits imposed on the rest of the community.

6.47 Existing legislation in some jurisdictions is consistent with this view. Limitation periods run against minors in Tasmania<sup>6</sup> and against minors and the mentally incapacitated under the *Motor Accident Compensation Act 1999* (NSW). The TPA has been construed<sup>7</sup> to mean that the limitation period in s 82 of the Act runs against minors and incapacitated persons.

6.48 After giving the issue careful consideration,<sup>8</sup> the Panel is satisfied that it is in the overall interests of the community as a whole that, as a general rule, the limitation period should run against minors and incapacitated persons. The Panel is accordingly of the view that the limitation and long-stop periods should run against minors except for periods when the minor is not in the custody of a parent or guardian, and against incapacitated persons except for periods during which no administrator has been appointed in respect of the person.

6.49 Minors who are not in the custody of a parent or guardian, minors who are in the custody of parents or guardians who are themselves under a disability, and incapacitated persons in respect of whom an administrator has not been appointed, should be regarded as persons under a disability. In those instances, the limitation period should not run against the minor or incapacitated person.

6.50 In cases where the plaintiff becomes a person under a disability after time has commenced running, the limitation period should be suspended for any period during which the plaintiff is under a disability.

6.51 In cases where a minor or incapacitated person is not under a disability, for the purposes of determining when the limitation period commences, the relevant knowledge would be that of the parent, guardian or administrator, as the case may be, and not that of the minor or incapacitated person.

6.52 There will also be cases where a parent or guardian of a minor, or a person in a close relationship with the parent or guardian, is the potential defendant. A close relationship is a relationship such that

- (a) 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

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6 Limitation Act 1974 (Tas) s 26.

7 TPA s 82 see *Re: Vink And: Schering Pty Ltd* (1991) ATPR 41-073.

8 The Panel has relied heavily in this respect on the work of the Western Australian Law Reform Commission in its *Report on Limitation and Notice of Actions* (1997), paras 17.45-17.65.

- (b) the minor might be unwilling to disclose to the parent or guardian the nature of the actions that allegedly caused the damage.

Special rules should be laid down for such cases.

6.53 In cases where the parent, guardian, or a person in a close relationship with the parent or guardian, is the potential defendant, the Panel recommends that the limitation period commence only when the plaintiff turns 25 years of age. This will give plaintiffs a reasonable time to be free of the influence of the parent, guardian or potential defendant (as the case may be) before having to commence proceedings. The Panel also recommends that the limitation period in such cases (which will be referred to as 'the close-relationship limitation period') should be 3 years.

6.54 In some cases of this sort, the date of discoverability may not occur until after the expiry of the close-relationship limitation period. Therefore, the Panel recommends that in such cases the court should have a discretion, exercisable at any time, to extend the close-relationship limitation period to the expiry of a period of 3 years from the date of discoverability.

6.55 In most limitation statutes, the limitation period is suspended where the plaintiff is prevented from knowing of the claim by reason of fraud or concealment on the part of the defendant. Such a provision is unnecessary under the system proposed as the principle of time running from the date of discoverability caters for this.

### **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.<sup>9</sup>**

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<sup>9</sup> Recommendation 25 is based on recommendation 69 of the West Australian Law Reform Commission *Report on Limitation and Notice of Actions* (1997), discussed in paras 22.17-22.24.

- (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<sup>10</sup>

### 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:

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<sup>10</sup> Recommendation 26 is based on paragraph 22.23 of the Law Reform Commission of Western Australia Report.

- (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.**

## Early notification system

6.56 The Panel received submissions about a system for early notification of claims. Such systems currently exist in virtually all motor accident and workers compensation schemes in Australia, and in particular the *Personal Injuries Proceedings Act 2002* (Qld). The Panel has been informed that early notification systems are beneficial for effective injury-management and early resolution of claims. Given the time constraints on the Panel, it is not able to comment on these systems. The Panel does suggest, however, that this is an issue that warrants further investigation.