



LAW REFORM COMMISSION  
*of*  
WESTERN AUSTRALIA

# PROVISIONAL DAMAGES AND DAMAGES FOR GRATUITOUS SERVICES

PROJECT 106 DISCUSSION PAPER

NOVEMBER 2015

## THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

### COMMISSIONERS

#### CHAIR:

Dr D Cox BSc (Hons), PhD (UWA), LLB (Hons) (Murd)

#### MEMBERS:

Ms F Seaward BComm, LLB (Hons) (UWA)

Dr A Zimmermann LLB, LLM (PUC-Rio), PhD (Monash)

© Government of Western Australia

### ALL RIGHTS RESERVED

Law Reform Commission of Western Australia  
Level 12, Westralia Square  
141 St Georges Terrace  
Perth WA 6000  
Australia

Telephone: +61 8 9264 1340

Facsimile: +61 8 9264 6114

ISBN: 978-1-74035-031-0

Printed by XXXXX

Portions of text in this Paper may be reproduced with due acknowledgement.

Except for the purposes of research—and subject to the provisions of the *Copyright Act 1968* (Cth)—all other forms of graphic or textual reproduction or transmission by any means requires the written permission of the Law Reform Commission of Western Australia.

This document can be provided in alternative formats for people with disabilities.

#### Disclaimer

This Discussion Paper is intended to provide general information and discussion points on matters that are relevant to the Law Reform Commission of Western Australia's inquiry into provisional damages and damages for gratuitous services. While all reasonable efforts have been made to prepare the content of this Discussion Paper, it is not intended to be comprehensive nor does it constitute legal advice. Members of the public should seek legal or other professional advice before acting or relying upon any of the content of this Discussion Paper.

# TABLE OF CONTENTS

<b>FOREWORD</b> .....	<b>3</b>
<b>ACKNOWLEDGEMENTS</b> .....	<b>4</b>
<b>EXECUTIVE SUMMARY</b> .....	<b>5</b>
<b>1. INTRODUCTION</b> .....	<b>6-7</b>
1.1 Reference .....	6
1.2 About this Discussion Paper .....	7
<b>2. BACKGROUND</b> .....	<b>8-10</b>
2.1 Background to the Reference .....	8
2.2 Current provisions and jurisdictional variances .....	8
2.3 Asbestos related diseases .....	9
2.4 Other diseases and injuries .....	10
<b>3. THE COMMISSION’S APPROACH</b> .....	<b>11-12</b>
3.1 Introduction .....	11
3.2 Practical implications of reform .....	11
3.3 Clarification of scope .....	11
<b>4. MODIFYING THE “ONCE AND FOR ALL” RULE IN WESTERN AUSTRALIA</b> .....	<b>13-23</b>
4.1 Introduction .....	13
4.2 Proposed reform for provisional damages .....	15
4.3 Should victims of a tort be able to claim provisional damages? .....	15
4.4 Should provisional and further damages be confined to a particular class of personal injury or disease? .....	17
4.5 Should further damages be available only if the injury or disease was identified at the time of the initial judgment/settlement? .....	18
4.6 Where an award of provisional damages is made, should the plaintiff be confined to only one further application? .....	19
4.7 How should a Court approach awards of further damages? .....	21
4.8 Time limits on bringing an application for further damages .....	22
4.9 Estate claims .....	23
<b>5. DAMAGES FOR GRATUITOUS SERVICES IN WESTERN AUSTRALIA</b> .....	<b>26-37</b>
5.1 Introduction .....	26
5.2 Proposed reform for gratuitous services .....	26
5.3 Should plaintiffs be able to recover damages calculated by reference to the value of gratuitous services provided to others? .....	27
5.4 Should damages for the value of services be awarded in all personal injury claims? .....	28
5.5 Should the criteria for assessing damages be limited by reference to the character of the services provided? .....	29

5.6	Should the criteria for assessing damages be limited by reference to the relationship between the plaintiff and the recipient of services?.....	30
5.7	Should regard be had to the likelihood that the services would have been provided by the plaintiff? .....	32
5.8	Should damages only be awarded where recipient has spent money on services from alternative service provider?.....	34
5.9	Where the plaintiff is deceased, should damages be provided for services that would have been provided but for the plaintiff’s death? .....	36

**APPENDIX A: SUMMARY OF CONSULTATION QUESTIONS ..... 38-39**

**APPENDIX B: LIST OF PEOPLE CONSULTED ..... 40**

**APPENDIX C: RESEARCH TABLE ..... 41-63**

**LIST OF TABLES**

Table 1:	Australian legislation dealing with provisional damages and damages for gratuitous services provided to others.....	9
Table 2:	Should victims of a tort be able to claim provisional damages?.....	16
Table 3:	Should provisional damages be confined to a particular class of injury or disease?.....	17-18
Table 4:	Should further damages be available only if the injury was identified at the time of the initial judgment/settlement? .....	19
Table 5:	Where an award of provisional damages is made, should the plaintiff be confined to only one further application?.....	20
Table 6:	How should a Court approach awards of further damages? .....	21
Table 7:	Estate claims.....	23-24
Table 8:	Should damages for the value of services be awarded in all personal injury claims?.....	29
Table 9:	Should the criteria for assessing damages be limited by reference to the character of the services provided? .....	30
Table 10:	Should the criteria for assessing damages be limited by reference to the relationship between the plaintiff and the recipient of services?.....	31
Table 11:	Should regard be had to the likelihood that the services would have been provided by the plaintiff? .....	33
Table 12:	Should damages only be awarded where recipient has spent money on services from alternative service provider? .....	12
Table 13:	Options for whether damages include “lost years” after the victim’s death .....	36

# FOREWORD

In recognition of the impact that asbestos has had on the health of Western Australians, the compensation claims that have come before the courts and the private member's Asbestos Diseases Compensation Bill 2013, the Attorney General of Western Australia requested the Law Reform Commission of Western Australia in May 2014 to examine the law and make recommendations for reform in relation to provisional damages and damages for gratuitous services. Specifically, the Commission has been requested to consider whether:

1. the "once and for all" rule applicable to judgments for personal injury should be reformed so that, where the victim of a tort develops, subsequent to judgment, an injury or disease which is of a different or more serious character than the injury or disease from which the person suffered at the time of judgment, a Court should be authorised in certain circumstances to award further damages to that victim; and
2. where a personal injury prevents a plaintiff from providing gratuitous services, domestic or otherwise, to another person, the damages recoverable by the plaintiff should include a specific head of damages calculated by reference to the value of those services.

The Commission, having completed its first consideration of these matters, now issues this Discussion Paper and welcomes input from all stakeholders in the Western Australian community until the consultation period ends on 15 February 2016.

David Cox  
Chairman  
Law Reform Commission of Western Australia

# ACKNOWLEDGEMENTS

**Authors:**

Andrew Douglas (M+K Lawyers)  
Alex Marsden (Marsden Jacob  
Associates)

**Research Assistants:**

Sarah Colmanet (M+K Lawyers)  
Elizabeth O'Brien (Marsden Jacob  
Associates)

# EXECUTIVE SUMMARY

## Introduction

The Law Reform Commission of Western Australia (“the Commission”) has been requested to examine the law and make recommendations in relation to two areas:

1. whether the “once and for all” rule under the common law should be modified through the introduction of “provisional damages”; and
2. whether a specific head of damages for the value of gratuitous services (domestic or otherwise) provided by the plaintiff to others should be introduced.

The purpose of this Discussion Paper is to summarise various reform options identified by the Commission, outline the Commission’s preliminary assessment of these options and invite responses from the Western Australian community in relation to these areas.

## Modifying the “once and for all” rule

The Commission’s preliminary assessment in relation to the first area of potential reform is to propose that the “once and for all” rule be modified in Western Australia through the introduction of a provisional damages regime, in the following circumstances:

1. provisional damages be permitted where there is a chance that a different injury or disease (that is, a new condition) may arise after the initial judgment or settlement (but not in relation to the development of a more serious injury or disease, that is, a deterioration of the plaintiff’s existing condition);
2. provisional damages be permitted in relation to all classes of personal injury or disease;
3. further damages be available only where the potential for the development of a different injury or disease was expressly identified at the time of the initial judgment or settlement;
4. plaintiffs not be restricted in the number of claims that can be made for further damages, provided that such claims relate to the development of a different injury or disease which was expressly identified at the time of the initial judgment or settlement;
5. when assessing further damages, courts be allowed to take into account the provisional damages initially awarded to the plaintiff;

6. there be no additional time limit imposed for bringing a further claim after the initial judgment or settlement; and
7. estate claims be allowed where the deceased victim had commenced, but not completed, an action for further damages prior to his/her death.

## Damages for gratuitous services

The Commission’s view in relation to the second area of potential reform is that it raises a number of significant policy issues. Accordingly, the Commission has not reached a preliminary view at this stage about whether such reform is appropriate in Western Australia. The Commission welcomes input from stakeholders on this area of potential reform. However, the Commission’s preliminary view is that if damages for the value of gratuitous services provided by the plaintiff to others are to be introduced in Western Australia, they should be available for all classes of personal injury, subject to the following restrictions:

1. they should only be available for gratuitous domestic services;
2. such damages should be restricted to services provided to “relatives” which should align with the definition used in the *Fatal Accidents Act 1959* (WA) (the *Fatal Accidents Act*);
3. the services must have been provided before the plaintiff’s injury for a defined number of hours per week and consecutive period of time, or, there must be a reasonable expectation that, after development of the injury, the services would have been provided for a defined number of hours per week and consecutive period of time;
4. there be a reasonable need for the services to be provided for those hours per week and that consecutive period of time after the development of the injury;
5. the plaintiff should not need to prove expenditure incurred in consequence of his/her inability to continue providing the services; and
6. calculation of such damages should include the “lost years” after the plaintiff’s death, the “lost years” being the years in which the services might have been provided after the plaintiff’s actual death until the date to which he or she was expected to have lived had the injury or disease not occurred.

# 1. INTRODUCTION

In May 2014, the Law Reform Commission of Western Australia (**the Commission**) received a letter of reference (**the Reference**) from the Attorney General of Western Australia, the Honourable Michael Mischin MLC, which requested that the Commission examine the law and make recommendations in relation to the areas set out in section 1.1 below.

The origin of the Attorney General's request stems from concerns about the impact that asbestos has had on the health of Western Australians, the compensation claims that have come before the courts and the introduction of the Asbestos Diseases Compensation Bill 2013 to the Western Australian Parliament by the Honourable Kate Doust MLC.

Although the Asbestos Diseases Compensation Bill 2013 applies to asbestos related claims only, the Reference requested that the Commission consider whether reform is required in relation to all personal injury claims or whether it should be confined to claims of a particular class (such as asbestos related claims).

## 1.1 Reference

The Reference requested the Commission to inquire into compensation regimes for persons suffering from asbestos related diseases with particular regard to the following areas:

### 1. Modifying the "once and for all" rule – "provisional" damages

1. Whether the "once and for all" rule applicable to judgments in personal injury actions should be reformed so that, where the victim of a tort develops, subsequent to judgment, an injury or disease which is of a different or more serious character than the injury or disease from which the person suffered at the time of judgment, a Court will be authorised in certain circumstances to award further damages to that victim.
2. If such reform is recommended, the form of the proposed regime for award further damages, including but not limited to identifying:
  - (a) the circumstances in which a Court is to be authorised to award further damages, including whether such a power -
    - (i) should be available in all personal injury claims or should be confined to claims of a particular class, such as claims relating to the contraction of an asbestos related disease;

- (ii) should be available whenever a different or more serious injury or disease develops or only where the potential for the development of a different or more serious injury or disease was expressly identified at the time of the initial judgment;
  - (b) the manner in which an award of further damages is to be approached by a Court, including:
    - (i) whether the entirety of the damages the subject of the initial judgment should be assessed afresh or only a head or heads of the damages further assessed;
    - (ii) how the damages the subject of the initial judgment are to be taken into account;
    - (iii) in circumstances where the initial judgment was entered by consent or where heads of the damages awarded had been agreed between the parties;
  - (c) whether there should be any time limit for bringing an application for further damages;
  - (d) whether, generally or (in view of section 4(2a) of the *Law Reform (Miscellaneous Provisions) Act 1941*) in the case of actions for latent injury attributable to the inhalation of asbestos, it should be open to the estate of a deceased victim to seek from a Court an award of further damages which could have been sought from the victim during his or her lifetime.
2. Damages for the value of services provided by the plaintiff to others
  1. Whether, where a personal injury prevents a plaintiff from providing gratuitous services, domestic or otherwise, to another person, the damages recoverable by the plaintiff should include a specific head of damages calculated by reference to the value of those services.
  2. If the inclusion in an award of such a head of damages is recommended:
    - (a) whether such a head of damages should be awarded in all personal injury claims or should be confined to claims of a particular class, such as claims relating to the contraction of an asbestos related disease;

- (b) the criteria that ought to be applied in the assessment of such a head of damages including, but not limited to:
  - (i) the character of the services which should attract compensation;
  - (ii) the character of the relationship between the plaintiff and the recipients of the services which the plaintiff is prevented from providing;
  - (iii) whether regard should be had to the likelihood that the services would have been provided by the plaintiff;
  - (iv) whether damages should be awarded only where expenditure has been incurred in consequence of the plaintiff being prevented from providing a particular service;
- (c) whether such damages should be awarded only in respect of services which the plaintiff was prevented from providing during his or her lifetime or whether, in the case of injury or disease resulting in death, damages should be awarded for the “lost years”, i.e. for the years in which the services might have been provided after the plaintiff’s actual death until the date to which he or she was expected to have lived had the injury or disease not occurred.

## 1.2 About this Discussion Paper

### 1.2.1 Research and preliminary consultation

The Discussion Paper draws on research conducted by M+K Lawyers and Marsden Jacob Associates, preliminary submissions provided to the Commission when the Reference was initially announced and feedback from targeted discussions with a number of individuals and organisations who have an interest or expertise in asbestos related injuries and litigation.

A copy of the research conducted by M+K Lawyers, including legislation and case law, is provided at Appendix C.

A list of the people who were consulted in the preparation of this Discussion Paper is provided at Appendix B.

### 1.2.2 Structure of this Discussion Paper

The remainder of this Discussion Paper is divided into four chapters:

- Chapter Two provides background to the Reference, including information on asbestos related diseases and a high level overview of the jurisdictional variances across Australia;

- Chapter Three sets out the Commission’s approach to the Reference;
- Chapter Four addresses the first area of reform outlined in the Reference in relation to modifying the “once and for all” rule through the introduction of “provisional damages”; and
- Chapter Five addresses the second area of reform outlined in the Reference in relation to damages for the value of services provided by the plaintiff to others.

### 1.2.3 Comments and submissions

The Commission invites interested parties to make comments or submissions on the aspects of reform proposed in this Discussion Paper. These comments and submissions will assist the Commission in formulating its final recommendations for reform in relation to the areas set out in the Reference.

Comments and submissions may be made by letter or email to the addresses set out in the box below. Those who wish to request a meeting with the Commission may telephone for an appointment.

#### Law Reform Commission of Western Australia

Address: Level 12, Westralia Square  
141 St Georges Terrace  
Perth WA 6000  
Australia  
Telephone: (08) 9264 1340  
Facsimile: (08) 9264 6114  
Email: [provisionaldamages@justice.wa.gov.au](mailto:provisionaldamages@justice.wa.gov.au)

Submissions received by 5.00pm on 15 February 2016 will be considered by the Commission in the preparation of its Final Report.

### 1.2.4 Confidentiality

Submissions from members of the public are considered to be an important form of evidence to the Commission’s enquiries.

Law reform is a public process. The Commission assumes that comments on this Discussion Paper are not confidential. The Commission may quote from or refer to your comments in whole or in part and may attribute them to you, although we usually discuss comments generally and without attribution. If you would like your comments to be treated confidentially, please clearly identify which information is confidential and we will do our best to protect that confidentiality, subject to our other legal obligations. The Commission is subject to the requirements of the *Freedom of Information Act 1994* (WA).

## 2. BACKGROUND

The Asbestos Related Diseases Bill 2013, which was introduced into the Western Australian Parliament by the Honourable Kate Doust MLC, seeks to provide for a second award of damages in the case of an injured person suffering from more than one asbestos related disease and to provide compensation for the loss or impairment of the injured person's capacity to perform domestic services for another person.

While the Bill is limited to compensation for asbestos related diseases, it highlights two aspects of the law in Western Australia where there are perceived fairness concerns and anomalies with other Australian jurisdictions. The first is the "once and for all" rule and the second is damages for gratuitous services which the plaintiff can no longer provide to others due to personal injury.

This chapter provides background to the Reference which has led to the Commission's inquiry and outlines the jurisdictional variances across Australia which exist for provisional damages and for damages in relation to gratuitous services provided by the plaintiff.

Information on asbestos related diseases and exposure in Western Australia is also provided as a useful case study and background to the inquiry.

### 2.1 Background to the Reference

The Honourable Kate Doust MLC presented the Asbestos Related Diseases Bill 2013 on 31 October 2013. The Bill includes two key proposals for victims of asbestos related diseases. First, the Bill proposed the introduction of "provisional damages" for plaintiffs that may develop another asbestos related disease. Secondly, the Bill proposed to provide compensation for the impairment of a plaintiff's capacity to perform domestic services for another person.

The Attorney General, the Honourable Michael Mischin MLC, stated in his response to the Bill on 8 May 2014 that he would ask the Commission to inquire into the matters raised and consider whether the proposed changes should be extended to litigants generally.

### 2.2 Current provisions and jurisdictional variances

The Reference, and the jurisdictional variances which have arisen across Australia, are briefly described following.

#### 2.2.1 The "once and for all" rule

Under the common law, plaintiffs who have suffered a personal injury are awarded damages on the basis of the "once and for all" rule. This means that damages are assessed at a single stage, cannot be subsequently enlarged, and are calculated as a lump sum (whether by Court judgment or by agreement between the parties). The consequence of this is that, once an award of damages is made, a plaintiff cannot obtain any further damages in relation to the original claim, even if the plaintiff develops a different or more serious injury or disease after the initial judgment<sup>1</sup>. This creates obvious difficulties where a Court is required to make provision for future losses in circumstances where there is a chance that the plaintiff could suffer a serious deterioration of his/her condition or develop a further condition<sup>2</sup>.

Some jurisdictions have modified the common law position by passing legislation which allows a Court to make an award of "provisional damages". Such an award involves an immediate assessment of all losses (including future losses), except those attributable to the happening of a future event, most usually the development of a specified medical condition or a serious deterioration of the plaintiff's existing condition. The plaintiff is given the right to apply to the Court for further damages should the specified condition or serious deterioration come about.

Legislation providing for provisional damages for asbestos or dust-related conditions has been passed in Victoria, New South Wales, South Australia and Tasmania (see Table 1 on page 9). However, it should be noted that the legislation in each of these jurisdictions is not identical. The differences, and the underlying policy rationales, are discussed in Chapter Four.

#### 2.2.2 Damages for gratuitous services provided by the plaintiff

"Gratuitous services" include work or labour which is rendered without charge and is usually domestic in nature. Gratuitous services may be provided to the plaintiff by others or by the plaintiff to others.

Gratuitous services provided to the plaintiff by others are already provided for under the common law across Australia. However, plaintiffs have been unable to seek damages at common law for their inability to provide gratuitous services to others since the High Court of Australia in *CSR Limited v Eddy*<sup>3</sup>

1 *Fitter v Veal* (1701) 12 MOD REP 542; 88 ER 1506.

2 The distinction between provisional damages in the United Kingdom and provisional damages in the relevant Australian jurisdictions is discussed in section 4.1.1.

3 [2005] 226 CLR 1.

unanimously overturned the decision of the New South Wales Court of Appeal in *Sullivan v Gordon*<sup>4</sup>. Such damages are commonly referred to as “Sullivan v Gordon damages” (see section 5.1).

This means that plaintiffs are unable to seek compensation for unpaid care-giving or domestic services provided to others, such as family members, in the event of personal injury.

All jurisdictions in Australia, except for Western Australia and the Northern Territory, have modified the common law position by introducing legislation to enable damages to be awarded for gratuitous services provided to others (see Table 1 below). However, it should be noted that the legislation in each of these jurisdictions is not identical. The differences, and the policy rationales, are discussed in detail in Chapter Five.

**Table 1: Australian legislation dealing with provisional damages and damages for gratuitous services provided to others**

Jurisdiction <sup>5</sup>	Provisional damages	Damages for gratuitous services provided by plaintiff
VIC	<i>Asbestos Diseases Compensation Act 2008 (Vic)</i>	The <i>Wrongs Amendment Act 2015 (Vic)</i> was recently enacted by the Victorian Parliament. It inserts an entitlement to damages for loss of capacity to provide gratuitous care in the <i>Wrongs Act 1958 (Vic)</i>
NSW	<i>Dust Diseases Tribunal Act 1989 (NSW)</i>	Civil Liability Act 2002 (NSW)
QLD	-	<i>Civil Liability Act 2003 (Qld)</i>
SA	<i>Dust Diseases Act 2005 (SA)</i>	<i>Dust Diseases Act 2005 (SA)</i>
TAS	<i>Civil Liability Act 2002 (Tas)</i>	<i>Civil Liability Act 2002 (Tas)</i>
ACT	-	<i>Civil Law (Wrongs) Act 2002 (ACT)</i>
NT	-	-
WA	-	-

## 2.3 Asbestos related diseases

While the Commission’s inquiry contemplates potential reforms which are broader than asbestos related diseases, it is useful to consider asbestos as an example or case study.

### 2.3.1 Asbestos related diseases

Asbestos related diseases (such as asbestosis and mesothelioma) can be contracted by breathing in tiny airborne particles when asbestos containing material is disturbed. Diseases arising from asbestos exposure are characterised by long latency periods between exposure and development of symptoms and a single exposure to asbestos can result in multiple diseases.

Mortality rates associated with asbestos related diseases such as lung cancer and mesothelioma are very high, with these diseases often arising some period after the development of lesser, yet still debilitating, asbestos related conditions (for example, asbestosis and pleural plaques).

The World Health Organisation has stated that there is no minimum safe exposure level for some forms of asbestos fibres<sup>6</sup>. The National Health and Medical Research Council likewise has noted that asbestos is highly toxic, and environmentally persistent.

The long latency period for asbestos related diseases, and the ability for exposure to lead to a secondary (potentially more serious) disease, means that the extent of injury due to asbestos exposure may not be apparent with an initial disease diagnosis or for many years afterwards.

Four key categories of asbestos related disease and the corresponding latency periods are<sup>7</sup>:

- pleural diseases (such as pleural plaques, pleural effusion and pleural thickening) which – depending on the form of disease - can have a latency of less than 10 years or of over 20 years;
- asbestosis which can have a latency of over 20 years;
- lung cancer which can have a latency of 15 to 20 years or longer; and
- mesothelioma which can have a latency of 20 to 40 years.

### 2.3.2 Asbestos production and exposure in Western Australia

In Western Australia, most exposure to asbestos is through three key sources – asbestos mining, asbestos production and use of asbestos in residential housing.

4 (1999) NSWLR 319.

5 Provisional damages may also be awarded in the United Kingdom under the *Senior Courts Act 1981* (UK). New Zealand does not appear to provide a statutory entitlement to either provisional damages or damages for services provided by a plaintiff.

6 [http://apps.who.int/iris/bitstream/10665/69479/1/WHO\\_SDE\\_OEH\\_06.03\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/69479/1/WHO_SDE_OEH_06.03_eng.pdf).

7 Based on content of Ondrich, R. and Muir, E, Submission on behalf of Griffith University, Brisbane, Queensland, June 2015, Table 2.0, p. 17-26.

Crocidolite asbestos (blue asbestos) was mined at Wittenoom in the Pilbara until final closure of the mine in 1966. Chrysotile (white asbestos) was also mined in Australia<sup>8</sup> until a complete ban on mining asbestos came into effect in 1984.

Despite this ban, importation of raw chrysotile asbestos and use of chrysotile asbestos products remained lawful until the asbestos use ban in 2003.

Prior to the asbestos use ban in 2003, asbestos products – such as asbestos cement sheeting – were both manufactured in Western Australia and imported from interstate and overseas.

Until the 1980s, asbestos products were extensively used to build residential houses in Western Australia. The peak years for use of asbestos-containing materials in the construction of domestic dwellings in Australia were between 1945 and 1987<sup>9</sup> and it is estimated that, until the 1960s, approximately 25% of all new housing was clad in asbestos cement. The use of asbestos in building and construction materials declined in the 1980s and had virtually ceased by the early 1990s.

Accordingly, through occupational exposure (such as through mining and building construction) and exposure at home or elsewhere, exposure to asbestos in Western Australia has been widespread.

### 2.3.3 Future disease development in Western Australia

While asbestos related diseases have traditionally been linked to workers who have had direct contact with the material, either through mining or working with asbestos in manufacturing processes (referred to as the “first wave”), and to construction workers, carpenters and other trades people exposed to asbestos fibres from building materials (referred to as the “second wave”), a “third wave” of exposure is currently occurring in relation to “do-it-yourself” home renovators and home handy people who have been exposed to existing asbestos products in the home<sup>10</sup>.

The long incubation period means the incidence of mesothelioma and other asbestos related diseases caused by exposures prior to bans on asbestos use are still increasing in Australia.

### 2.3.4 Asbestos and the law

By the nature of asbestos products, a substantial proportion of asbestos disease sufferers were exposed to asbestos as part of their occupation – whether asbestos mining, asbestos production or construction related jobs. For this reason, asbestos related disease compensation is strongly linked to workers’ compensation under statute. In Western Australia, this is governed by the *Workers’ Compensation and Injury Management Act 1981* (WA) (**the Workers’ Compensation Act**). Under the Workers’ Compensation Act, employees who are injured in the course of their employment can claim weekly payments, medical and other expenses and compensation for permanent impairment in relation to that injury (which includes diseases). If the injury reaches the required statutory threshold, the employee may make a claim for common law damages under the Workers’ Compensation Act. Such damages are offset against the workers’ compensation benefits which the employee has already received.

In the case of personal injuries which are sustained outside the course of employment (for example, by a member of the public) due to the commission of a tort, common law damages may be sought and awarded pursuant to civil liability legislation such as the *Civil Liability Act 2002* (WA). Relatives of a person who dies due to the commission of a tort may also claim common law damages pursuant to fatal accidents legislation such as the *Fatal Accidents Act 1959* (WA).

It is noted that the focus of the Commission’s inquiry is on claims for common law damages, other than those which are made pursuant to workers’ compensation or fatal accidents legislation (see section 3.3.3 on page 12).

## 2.4 Other diseases and injuries

The Reference for the inquiry leaves open the question of whether causes of action in relation to other diseases or injuries, beyond asbestos related diseases, should be included in proposed reforms. This has been considered in Chapters Four and Five.

8 Such as at Woodsreef near Barraba in New South Wales.

9 Asbestos Management Review Report, June 2012.

10 Asbestos Management Review Report, June 2012.

# 3. THE COMMISSION'S APPROACH

## 3.1 Introduction

In undertaking its functions under the *Law Reform Commission Act 1972 (WA)*, the Commission must, on reference made to it by the Attorney General:

- examine critically the law with respect to the matter mentioned in the reference; and
- report to the Attorney General on the results of the examination of that law and make any recommendations with respect to the reform of that law, that it considers to be desirable<sup>11</sup>.

The reference provided by the Attorney General identifies the scope and matters the Commission is asked to investigate.

The Reference for the Commission's current inquiry includes a number of elements for consideration and multiple options arise for each one.

To assist stakeholders in responding to the Discussion Paper in a focussed manner, the Commission has identified a proposed approach for each element.

The Commission's proposed approach has been identified by considering each option against the legislative principles set out in section 11(4) of the *Law Reform Commission Act 1972 (WA)* which provides that the Commission must examine the law for the purposes of ascertaining and reporting whether that law:

- is obsolete, unnecessary, incomplete or otherwise defective;
- ought to be changed so as to accord with modern conditions;
- contains anomalies; or
- ought to be simplified, consolidated, codified, repealed or revised, and, if appropriate, whether new or more effective methods for the administration of that law should be developed.

Anomalies identified and considered in this Discussion Paper include inconsistencies within Western Australian law as well as inconsistencies between jurisdictions within Australia.

The effectiveness of the current legislative framework is also considered in this Discussion Paper, together with the question of whether alternative arrangements would be more effective and offer greater fairness.

## 3.2 Practical implications of reform

In responding to the Reference, the Commission is tasked with assessing the current legislation and recommending desired law reforms.

In considering the practical implications of law reform for this inquiry, the Commission is aware that any change to the existing legislation would impose additional costs on some parties. Initially, implementation costs would be borne by the community in the form of increased court and administration costs. Additionally, there is a risk that costs may be disproportionately borne by plaintiffs and defendants (including insurers) as the new provisions in the legislation are tested in the initial cases that come before the courts. In the longer term, any changes to personal injury law that increase the amount of compensation paid would impact on insurance premiums and may involve other changes to existing cost levels.

While the quantification of such costs do not fall within the scope of the Reference, the Commission understands that these implications are likely to be of interest to policy makers.

The Commission invites stakeholders to provide feedback on any cost implications arising from the potential reforms being considered under the Reference. The information may then be used as the basis for further analysis of the likely costs and benefits of any changes to the law once a definitive reform proposal has been identified.

## 3.3 Clarification of scope

In considering the complex issues which form the subject of this inquiry, the Commission has clarified the scope of the Reference and any subsequent law reform as follows:

<sup>11</sup> *Law Reform Commission Act 1972 (WA)*, s 11(3).

### 3.3.1 Court judgments and out-of-court settlements

It is proposed that any law reform that follows this inquiry would apply equally to court judgments and out of court settlements enacted through a signed deed or agreement.

### 3.3.2 Interim damages

In considering the first area for potential reform in relation to modifying the “once and for all” rule, it is necessary to differentiate between “provisional damages” and “interim damages”. The Commission notes that interim damages fall outside the scope of the current Reference.

Interim damages are paid to a plaintiff on account of final damages (that is, before the assessment of damages has been completed) to primarily overcome financial difficulties which a plaintiff might experience pending final assessment such as ongoing out-of-pocket expenses<sup>12</sup>. The Commission notes that the United Kingdom and some Australian jurisdictions<sup>13</sup> have introduced legislation which allows interim damages or payments to be awarded for certain personal injury claims.

As mentioned in section 2.2.1 above, provisional damages involve an immediate assessment of all losses (including future losses) except those attributable to the happening of a future event, most usually the development of a specified medical condition or a serious deterioration of the plaintiff’s existing condition. The plaintiff is given the right to apply to the Court for further damages should the specified condition or serious deterioration come about.

### 3.3.3 Common law only

As noted above in section 2.3.4, the scope of the Reference is limited to damages that are awarded at common law in relation to the commission of a “tort” (that is, a civil wrong) such as negligence. The Reference does not extend to claims which are made pursuant to workers’ compensation or fatal accidents legislation.

### 3.3.4 No retrospective law reform

In this Reference, the Commission considers that the retrospective application of any reforms would not be desirable. While the Commission acknowledges that this may result in a disparity between historical claims and future claims, the complexity and costs associated with re opening previous settlements and Court decisions are likely to be significant.

---

12 New South Wales Law Reform Commission, *Provisional Damages* (Report 78, 1996).

13 See, for example, the *Safety, Rehabilitation and Compensation Act 1988* (Cth), the *Motor Accidents Act 1988* (NSW) and the *Supreme Court Act 1935* (SA).

# 4. MODIFYING THE “ONCE AND FOR ALL” RULE IN WESTERN AUSTRALIA

## 4.1 Introduction

Under the common law the “once and for all” rule requires damages to be assessed at a single stage, meaning that they cannot be subsequently enlarged and are calculated as a lump sum (whether by Court judgment or by agreement between the parties). This rule provides finality of litigation for the parties and avoids defendants being exposed to multiple claims arising from the same cause of action. The effect is that the plaintiff can only make one claim for damages which must include all past and future loss arising from the tortious act that constitutes the cause of action<sup>14</sup>. The rule therefore provides finality and financial certainty, reduces court congestion and avoids protracted litigation.

In 1982, the *Supreme Court Act 1981* (UK)<sup>15</sup> was amended to allow for the awarding of provisional damages in respect of personal injuries. This amendment was introduced in accordance with the recommendations of the UK Law Commission’s Report on Personal Injury Litigation – Assessment of Damages<sup>16</sup> which were endorsed, in general terms, by the United Kingdom’s Royal Commission on Civil Liability and Compensation for Personal Injury<sup>17</sup>.

It is clear from the Parliamentary Debates that took place before the House of Lords in 1982 that the objective of the reform was, in general terms, to overcome the inadequacy of the “once and for all” rule in cases where there is evidence that the medical prognosis is uncertain and there is a chance that a serious disease or deterioration of the plaintiff’s condition will occur at a later date. This was illustrated through the following examples:

- a person whose sight was impaired following an accident at work and could still work but, according to the medical evidence, was at risk of going blind within the next five years; and
- a young child whose skull was fractured in a motor accident and appeared to have made a complete recovery by the time the case is heard but had a slight possibility of developing epilepsy in future.

In cases of this kind, it was said that the only remedy under the existing law (that is, damages being awarded “once and for all”) was inadequate because, if the chance event never happened, the plaintiff was over-compensated and, if it did happen, the plaintiff is under-compensated, sometimes to a very high degree. Either way, it was said that the award of damages was bound to be wrong. As such, the purpose of provisional damages being introduced in the United Kingdom was to make it possible for the Court to take a different approach, that is, to award nothing in respect of the chance event but to give damages for what is known, and then allow the plaintiff to apply for damages later if the chance event actually takes place. It was anticipated that this procedure would not be employed very often because it would only be invoked if the plaintiff wanted it and the Court was satisfied that it would not cause serious prejudice to the defendant. However, in those cases where it was used, the result would be manifestly fairer to both parties than the existing rule.

Subsequent to this change in the United Kingdom, New South Wales introduced provisional damages in the *Dust Diseases Tribunal Act 1989* (NSW). During the Second Reading of the Courts Legislation Amendment Bill 1995, the Attorney General for New South Wales noted that the Dust Diseases Tribunal (like any other common law court) had to calculate damages on a once-only basis and therefore had to frequently include in its award a component based on a best guess as to the probability of a further condition arising from the same injury. An example was provided of asbestosis which may or may not progress to mesothelioma, with the probability being often impossible to evaluate. The changes in New South Wales were heralded as a major step forward in the Australian common law jurisdiction and were followed by similar legislative reform in Tasmania, South Australia and Victoria (see Table 1 on page 9).

Given the nature of asbestos related diseases (that is, the long latency periods and the possibility of an individual contracting multiple but separate diseases), some groups considered that the traditional method

<sup>14</sup> Tilbury, Michael, *Damages for Personal Injuries: A Statement of the Modern Australian Law*, Western Australian Law Review, 1980.

<sup>15</sup> Now named the *Senior Courts Act 1981* (UK).

<sup>16</sup> Law Com No 56, 1973 (UK).

<sup>17</sup> The Pearson Report, March 1978 (UK).

of awarding damages at common law pursuant to the “once and for all” rule lacks fairness. As the examples set out above illustrate, the current regime is likely to result in either under-compensation (if a subsequent disease does, in fact, develop) or over-compensation (if no further disease develops) due to the difficulty involved in assessing future contingencies. In turn, this may cause plaintiffs to delay bringing a claim until their condition has stabilised and/or to delay compromising their claim through a negotiated settlement.

This Chapter summarises some reform options and outlines the Commission’s preliminary assessment of the options. Finally, it poses a series of questions for the Western Australian community to consider in relation to the awarding of damages on either a “once and for all” or provisional basis for personal injuries. Broadly, the overarching alternatives are to either retain the current common law position in Western Australia (that is, the “once and for all” rule) or to introduce statutory reform to allow provisional damages for all personal injury actions or a limited subset thereof (with or without further restrictions).

The Reference relating to provisional damages can be summarised simplistically as:

1. Should victims of a tort be able to claim provisional damages?
2. If victims of a tort *should* be able to claim provisional damages:
  - (a) In what cases should such a claim be made?
  - (b) How should further damages be calculated?
  - (c) What limits should be imposed?

#### 4.1.1 Potential triggers for provisional damages

It is generally understood that provisional damages allow plaintiffs to seek further compensation after their original claim has been resolved if they develop a “different” injury or disease (that is, a “new” condition) or suffer “a more serious injury or disease” (that is, a “deterioration” in an existing condition).

By their nature, provisional damages are most suitable to situations where an act or omission giving rise to a cause of action could result in the victim developing multiple conditions over a prolonged period of time. Provisional damages may be awarded in the United Kingdom where there is a chance that the plaintiff will develop, at some time in the future, a serious disease or suffer a serious deterioration of his/her physical or mental condition<sup>18</sup>. In contrast, the relevant Australian

jurisdictions (see Table 1 on page 9) only allow provisional damages to be awarded where there is a chance that “another” condition will develop (not a “deterioration” of the plaintiff’s condition).

Preliminary discussions with stakeholders indicate that provisional damages would not be relevant in most cases of personal injury (even if provisional damages were broadly available) as few torts would result in the development of a new condition (compared to the deterioration of an existing condition) subsequent to the initial judgment. For this reason, personal injury claims for asbestos related diseases are unusual compared to most personal injury claims.

The distinction between the deterioration of an existing condition and the development of a new condition is of fundamental importance in determining the limits for the introduction of provisional damages in Western Australia (see Box 1 below).

#### Box 1: Deterioration of an *existing* condition compared to development of a new condition under the “once and for all” rule

##### Deterioration of an *existing* condition

In obtaining compensation for a personal injury, the damages payment (whether through a court action or settlement) will include provision for the likelihood that the injury will deteriorate over time. Three examples are:

- vision impairment developing into blindness;
- a serious knee injury requiring a knee reconstruction may result in a knee replacement in later life; and
- when first diagnosed, asbestosis may result in a low level of incapacitation, but the victim’s condition may deteriorate over time without becoming malignant.

##### Development of a *new* condition

In contrast, the damages payment may not include provision for the possible development of a new condition or, at best, it will be speculative. Two examples are as follows:

- a sufferer of asbestosis is statistically unlikely to develop mesothelioma and, if this occurs, it is considered to be a separate medical condition; and
- a skull fracture injury can result in the victim developing epilepsy after a delay in time.

18 Section 32A, *Senior Courts Act 1981* (UK).

## 4.2 Proposed reform for provisional damages

The Commission's preliminary assessment in relation to the first area of potential law reform is to propose that the "once and for all" rule be modified in Western Australia through the introduction of provisional damages (subject to the requirements set out below). The Commission considers that this approach would deliver the maximum benefit to the Western Australian community as a whole when considering the advantages and disadvantages of each reform option (as presented in the remainder of Chapter Four) and the desirability of delivering certainty, consistency, equity and efficiency to both plaintiffs and defendants.

In light of the above, the Commission's proposed approach is as follows:

1. provisional damages be introduced in Western Australia, but defendants have the right to argue liability and factors such as contributory negligence in an action for further damages;
2. provisional damages be permitted where there is a chance that a different injury or disease (that is, a new condition) may arise after the initial judgment or settlement (but not in relation to the development of a more serious injury or disease, that is, a deterioration of the plaintiff's existing condition);
3. provisional and further damages be permitted in relation to all classes of personal injury or disease;
4. further damages be available only where the potential for the development of a different injury or disease was expressly identified at the time of the initial judgment or settlement for provisional damages;
5. plaintiffs not be restricted in the number of claims that can be made for further damages provided that such claims relate to the development of a different injury or disease which was expressly identified at the time of the initial judgment or settlement (for example, if two such injuries develop at different times after the initial

judgment/settlement, the plaintiff is allowed to make two applications for further damages in relation to those injuries);

6. when assessing further damages, courts be allowed to take into account the damages initially awarded to the plaintiff;
7. there be no additional time limit imposed for bringing a further claim after the initial judgment or settlement; and
8. estate claims be allowed where the deceased victim had commenced, but not completed, an action for further damages prior to his/her death.

The remainder of Chapter Four sets out the options identified and considered by the Commission in response to each of the questions raised by the Reference. Under each of the options set out on page 16, the Commission's proposed approach is shaded in grey.

The Commission welcomes comments on this proposed approach.

## 4.3 Should victims of a tort be able to claim provisional damages?

In relation to paragraph 1 of the Reference, the Commission has identified the following options:

- Option 1 – retain the "once and for all" rule;
- Option 2 – introduce provisional damages in relation to the development of a different injury or disease only; or
- Option 3 – introduce provisional damages in relation to the development of a different or more serious injury or disease.

Table 2 below summarises the advantages and disadvantages of modifying the "once and for all" rule through the introduction of a statutory provision which enables a Court to make an order for provisional damages in an appropriate case.

**Table 2: Should victims of a tort be able to claim provisional damages?**

Options	Jurisdictions	Advantages	Disadvantages
<p><b>Option 1:</b> retain the “once and for all” rule</p>	<p>WA NT ACT</p>	<ul style="list-style-type: none"> <li>• No change from common law position</li> <li>• Finality and financial certainty in litigation for all parties (including insurers)</li> <li>• Encourages settlements as defendant’s liability will be known</li> <li>• Maintains low levels of court congestion by encouraging settlements, avoiding delay and reducing protracted litigation</li> </ul>	<ul style="list-style-type: none"> <li>• Uncertainty regarding future injury or disease and future needs result in over or under compensation depending on the future circumstances of the plaintiff (unjust)</li> <li>• Dilemma of when to claim</li> <li>• Delay and pressure to settle</li> <li>• Inconsistent with the other Australian jurisdictions</li> </ul>
<p><b>Option 2:</b> introduce provisional damages – development of a different injury or disease only</p>	<p>VIC NSW SA TAS</p>	<ul style="list-style-type: none"> <li>• Avoids over or under compensation (greater accuracy and justice)</li> <li>• Allows for clarity on rights and responsibilities as advancements in medicine and science which may reveal subsequent injuries or diseases caused by the same tort</li> <li>• Avoids dilemma of when to claim</li> <li>• Reduces delay by encouraging plaintiffs to claim once initial injury or disease has stabilised</li> <li>• Potentially easier to establish the development of a new condition compared to deterioration of an existing condition</li> <li>• Lower increase in court congestion due to more claims compared to option 3</li> <li>• Lower potential increase in costs and insurance premiums compared to option 3</li> <li>• Consistent with the other Australian jurisdictions</li> </ul>	<ul style="list-style-type: none"> <li>• Statutory reform will be required</li> <li>• Lack of finality and financial certainty in litigation for all parties (including insurers)</li> <li>• Advancements in medicine and science may reveal subsequent injuries or diseases caused by the same tort which were not reasonably foreseeable, and it may be unfair to a defendant to allow unforeseeable events to be compensated</li> <li>• Court congestion due to an increase in claims and protracted litigation</li> <li>• Potential increase in costs and insurance premiums</li> <li>• Assumes there will be an increase to the loss suffered by the plaintiff which may not be the case if the plaintiff dies as a result of his/her new condition</li> <li>• Unfair to exclude plaintiffs who suffer a serious deterioration to their existing condition but do not develop a new condition compared to option 3</li> </ul>
<p><b>Option 3:</b> introduce provisional damages – development of a different or more serious injury or disease</p>	<p>UK</p>	<ul style="list-style-type: none"> <li>• Same advantages as option 2</li> <li>• Greater justice compared to option 2 for plaintiffs who suffer a deterioration of their existing condition but do not develop a new condition</li> </ul>	<ul style="list-style-type: none"> <li>• Same disadvantages as option 2</li> <li>• Greater lack of finality and financial certainty in litigation for all parties (including insurers) compared to option 2</li> <li>• Difficulties associated with defining, and proving, the required level of deterioration to entitle a plaintiff to further damages</li> <li>• Deterioration assumes there will be an increase to the injury or disease and therefore the loss suffered by the plaintiff (which may not be the case if the plaintiff dies as a result of his/her condition)</li> <li>• Higher increase in court congestion due to more claims compared to option 2</li> <li>• Higher potential increase in costs and insurance premiums compared to option 2</li> <li>• Inconsistent with the other Australian jurisdictions</li> </ul>

### 4.3.1 The Commission’s preliminary assessment

The Commission’s preliminary assessment is that maintaining the “once and for all” rule is inconsistent with most Australian jurisdictions which, amongst other things, creates an anomaly in the treatment of asbestos victims. In addition, the “once and for all” rule is ineffective at appropriately allocating compensation for torts which potentially result in multiple but separate conditions with long latency periods.

The Commission’s preliminary assessment is that provisional damages (aligning with option 2 in Table 2 above) should be introduced in Western Australia, subject to the further limitations set out below.

If provisional damages are introduced in Western Australia, the Commission’s preliminary assessment is that they should only be available where there is a chance that a different injury or disease (that is, a new condition) will develop in future, not a more serious injury or disease (that is, a deterioration of an existing condition), for the reasons set out in relation to options 2 and 3 in Table 2 above. The Commission notes that this will not abrogate a plaintiff’s right to resolve his/her claim on a “once and for all” basis at common law instead.

Consideration must also be given to the scope of the Court’s power to award such damages and whether

the power should be confined in some way. The following sections explore the key considerations and the relevant options.

Under each of the options set out below, it is assumed that the relevant defendant may choose to contest liability or argue contributory negligence in relation to a claim for further damages after the initial judgment/settlement (for example, in the case of a heavy cigarette smoker who develops lung cancer subsequent to asbestosis).

### 4.4 Should provisional and further damages be confined to a particular class of personal injury or disease?

If provisional damages are introduced in Western Australia, the Commission has identified the following options in relation to paragraph 2(a)(i) of the Reference:

- Option 1 – provisional damages be available for all classes of personal injury or disease;
- Option 2 – provisional damages be available for some classes of personal injury or disease; and
- Option 3 – provisional damages be available for asbestos related diseases only.

Table 3 below summarises the advantages and disadvantages for each option.

**Table 3: Should provisional and further damages be confined to a particular class of injury or disease?**

Options	Jurisdictions	Advantages	Disadvantages
<b>Option 1:</b> All classes of personal injury or disease	UK (all classes of personal injuries)	<ul style="list-style-type: none"> <li>• Equal treatment of personal injury victims where the medical prognosis is uncertain and there is a chance that a more serious condition, or a deterioration of an existing condition, may occur (fairness)</li> <li>• Equal treatment of conditions arising from the same tort</li> <li>• Allows for advancements in medicine and science which may reveal subsequent injuries or diseases caused by the same tort</li> </ul>	<ul style="list-style-type: none"> <li>• Greater court congestion due to a higher increase in litigation (compared to options 2 and 3)</li> <li>• Higher potential increase in insurance premiums (compared to options 2 and 3)</li> <li>• Inconsistent with other jurisdictions in Australia</li> </ul>

<p><b>Option 2:</b> Some classes of personal injury or disease</p>	<p>NSW<sup>19</sup> (dust-related condition) SA<sup>20</sup> (dust disease) TAS<sup>21</sup> (dust disease)</p>	<ul style="list-style-type: none"> <li>• Can be restricted to classes of claims where there is the greatest need</li> <li>• Limits court congestion due to a lower increase in litigation (compared to option 1)</li> <li>• Limits the potential increase in insurance premiums</li> <li>• Consistent with other jurisdictions in Australia</li> </ul>	<ul style="list-style-type: none"> <li>• Unequal treatment of personal injury victims (unfair) – no logical distinction between types of claims</li> <li>• Unequal treatment of conditions arising from the same tort</li> <li>• Higher increase in litigation (and therefore court congestion) compared to option 3</li> <li>• Higher potential increase in insurance premiums (compared to option 3)</li> </ul>
<p><b>Option 3:</b> asbestos related conditions only</p>	<p>VIC<sup>22</sup> (asbestos related condition only)</p>	<ul style="list-style-type: none"> <li>• Recognises the nature of asbestos related conditions (i.e. long latency and multiple but separate diseases)</li> <li>• Limits court congestion due to a lower increase in litigation (compared to options 2 and 3)</li> <li>• Limits the potential increase in insurance premiums</li> </ul>	<ul style="list-style-type: none"> <li>• Unequal treatment of personal injury victims (unfair) – no logical distinction between types of claims, especially other dust diseases</li> <li>• Unequal treatment of conditions arising from the same tort</li> <li>• Inconsistent with other jurisdictions in Australia (except for VIC)</li> </ul>

#### 4.4.1 The Commission’s preliminary assessment

The Commission notes that, under the legislation in each of the Australian jurisdictions listed in Table 3 above, provisional damages may be awarded for an asbestos or dust-related condition (as defined in the legislation) and further damages may be awarded for another asbestos or dust-related condition. The initial and subsequent conditions are therefore defined within the legislation and fall within the same class of injury or disease.

The Commission considers that options 2 and 3 set out in Table 3 above would reduce anomalies between Western Australia and other Australian jurisdictions by aligning the legislative requirements with one or other jurisdiction. However, option 1 would provide the highest level of equity by ensuring that all victims of a tort, and all conditions arising from that tort (including impairment to mental health), are treated in the same manner.

In relation to option 2, the Commission notes that during discussions with stakeholders, the only other example of a substance that has a similar effect on a person to asbestos was silica dust (which may result in silicosis, scleroderma, silica induced carcinoma of the lungs, massive progressive fibrosis, tuberculosis, silica-tuberculosis, oesophageal dysfunction, renal disease and scleroderma lung). However, it was generally agreed that some carcinogenic products may result in both short term and long term reactions (for example, cancer). As part of the consultation for the inquiry,

the Commission invites stakeholders to provide input on any incidents or exposures to particular substances (other than asbestos) which can result in multiple, but separate, latent diseases or injuries.

In light of the above, the Commission’s preliminary assessment is that provisional damages should be allowed for all classes of personal injury or disease in Western Australia (subject to the further limitations set out in section 4.3 above and the remainder of Chapter Four below).

#### 4.5 Should further damages be available only if the injury or disease was identified at the time of the initial judgment/settlement?

If provisional damages are introduced in Western Australia, the Commission has identified the following options with regard to paragraph 2(a)(ii) of the Reference:

- Option 1 – further damages be available whenever a different or more serious injury or disease develops; and
- Option 2 – further damages be available only where the potential for the development of a different or more serious injury or disease was expressly identified at the time of the initial judgment/settlement.

Table 4 below summarises the advantages and disadvantages for each option.

19 In New South Wales, provisional and further damages may be awarded under the *Dust Diseases Tribunal Act 1989* (NSW) in respect of a “dust-related condition” as defined in that Act.  
20 In South Australia, provisional and further damages may be awarded under the *Dust Diseases Act 2005* (SA) in respect of a “dust disease” as defined in that Act.  
21 In Tasmania, provisional and further damages may be awarded under the *Civil Liability Act 2002* (Tas) in respect of “dust related disease” as defined in that Act.  
22 In Victoria, provisional damages may be awarded under the *Asbestos Diseases Compensation Act 2008* (Vic) in respect of an “asbestos-related condition” as defined in that Act.

**Table 4: Should further damages be available only if the injury was identified at the time of the initial judgment/settlement?**

Options	Jurisdictions	Advantages	Disadvantages
<b>Option 1:</b> further damages – whenever a different or more serious injury or disease develops	-	<ul style="list-style-type: none"> <li>• Fairness to plaintiffs (ensures they are correctly compensated regardless of whether they identify the potential for another condition or deterioration of an existing condition to develop in future)</li> <li>• Less room for advocate/plaintiff error (compared to option 2)</li> <li>• Allows for advancements in medicine and science which may reveal subsequent injuries or diseases caused by the same tort</li> </ul>	<ul style="list-style-type: none"> <li>• Unfairness to defendants – uncertainty, lack of finality and unforeseeability of conditions due to advancements in medicine and science</li> <li>• Greater court congestion due to a higher increase in litigation (compared to option 2)</li> <li>• Higher potential increase in insurance premiums (compared to option 2)</li> <li>• Inconsistent with other jurisdictions in Australia</li> </ul>
<b>Option 2:</b> further damages – only where the potential for the development of a different or more serious injury or disease was expressly identified at the time of the initial judgment or settlement	VIC NSW <sup>23</sup> SA TAS UK <sup>24</sup>	<ul style="list-style-type: none"> <li>• Fairness to defendants (and insurers) - limits the causative nexus of secondary liability to the time of the initial award of damages</li> <li>• Limits court congestion due to a lower increase in litigation (compared to option 1)</li> <li>• Limits the potential increase in insurance premiums compared to option 1</li> <li>• Avoids concerns regarding retrospectivity of any proposed statutory reform, as past cases would not meet the express identification requirement at the time of the initial judgment or settlement</li> <li>• Consistent with other jurisdictions in Australia</li> </ul>	<ul style="list-style-type: none"> <li>• Imposes an arbitrary limit on the injuries which are regarded as compensable</li> <li>• Unequal treatment of plaintiffs (unfair) – does not allow for advancements in medicine and science</li> <li>• Greater room for advocate/plaintiff error (compared to option 1)</li> </ul>

#### 4.5.1 The Commission’s preliminary assessment

The Commission notes that the legislation in each of the Australian jurisdictions listed in Table 4 above requires that it be proved or admitted in the initial action for provisional damages in relation to an asbestos or dust-related condition that another asbestos or dust-related condition may develop in future as a result of the breach of duty giving rise to the cause of action.

In light of this, and after consideration of the advantages and disadvantages set out in Table 4 above, the Commission’s preliminary assessment is that further damages should only be available in Western Australia where the potential for the development of a different or more serious injury or disease was expressly identified at the time of the initial judgment/settlement for provisional damages (option 2 set out in Table 4 above).

#### 4.6 Where an award of provisional damages is made, should the plaintiff be confined to only one further application?

In relation to paragraph 2 of the Reference, the Commission has identified the following options:

- Option 1 - allow one application for further damages; and
- Option 2 – allow an unlimited number of applications for further damages.

Table 5 below explores the advantages and disadvantages of each option.

<sup>23</sup> According to rule 5(4) of the *Dust Diseases Tribunal Rules* (NSW), an order for an award of provisional damages must specify the dust-related condition in respect of which an award of further damages may be made. According to rule 5(6), the plaintiff must, in the Statement of Claim, specify the condition(s) in respect of which the plaintiff claims provisional damages and in respect of which the plaintiff seeks an order that further damages may be claimed. Rule 5(5) states that an award of provisional damages may be made in respect of more than one dust-related condition.

<sup>24</sup> According to rule 41.2(2) of the *Civil Procedure Rules 1998* (UK), an order for an award of provisional damages must specify the disease or type of deterioration in respect of which an application may be made at a future date and may be made in respect of more than one disease or type of deterioration.

**Table 5: Where an award of provisional damages is made, should the plaintiff be confined to only one further application?**

Options	Jurisdictions	Advantages	Disadvantages
<b>Option 1:</b> plaintiff allowed one further application only	VIC NSW <sup>25</sup> UK	<ul style="list-style-type: none"> <li>Provides limit on defendant’s future exposure to further damages</li> <li>Reduces court congestion by limiting number of applications</li> <li>Legislation could allow judge making subsequent award to grant a further right to return</li> </ul>	<ul style="list-style-type: none"> <li>Over or under compensation depending on the future circumstances of the plaintiff (unjust)</li> <li>Dilemma of when to claim</li> </ul>
<b>Option 2:</b> plaintiff allowed unlimited applications	VIC NSW <sup>25</sup> SA TAS UK <sup>24</sup>	<ul style="list-style-type: none"> <li>Avoids over or under compensation (greater accuracy and justice)</li> <li>Allows for advancements in medicine and science which may reveal subsequent injuries or diseases caused by the same tort</li> <li>Avoids dilemma of when to claim</li> </ul>	<ul style="list-style-type: none"> <li>Lack of finality and financial certainty in litigation for all parties (including insurers)</li> <li>Court congestion due to an increase in claims</li> <li>Potential increase in costs and insurance premiums</li> </ul>

#### 4.6.1 The Commission’s preliminary assessment

The Commission notes that, in Victoria, only one subsequent award of damages for an asbestos related condition is permitted (section 5 of the *Asbestos Diseases Compensation Act 2008* (Vic)). In the United Kingdom, rule 41.3(2) of the *Civil Procedure Rules 1998* states that only one application for further damages may be made in respect of each disease or type of deterioration specified in the award of provisional damages.

Following the targeted consultations with key stakeholders, it appears that allowing one application for further damages by plaintiffs (option 1 in Table 5 above) would effectively cover the majority of cases where provisional damages would be appropriate. In contrast, it was reported that allowing unlimited applications for further damages would provide limited benefits to plaintiffs, impose uncertainty on defendants and may act as a catalyst to more litigation and less meritorious claims.

However, the Commission notes that if more than one different injury or disease is identified at the time of the initial judgment or settlement, it would seem inconsistent with the purpose of provisional damages, to limit the plaintiff to only one application for further damages. Accordingly, the Commission’s preliminary assessment is to not limit the number of claims for further damages that a plaintiff can make, provided that such claims relate to the development of a different injury or disease which was expressly identified at the time of the initial judgment or settlement (in line with the Commission’s proposed approach to paragraph 2(a)(ii) of the Reference in section 4.5.

#### QUESTIONS

- Should Western Australia keep the “once and for all” rule OR introduce provisional damages? Please explain your reasons.  
If Western Australia should introduce provisional damages:
- Should provisional damages be available where there is a chance that the plaintiff will:
  - develop a different injury or disease (that is, a new condition) or more serious injury or disease (that is, a deterioration of an existing condition) in future (the UK approach);
  - develop a different injury or disease in future (the Australian approach); or
  - develop a more serious injury or disease in future?
- Should provisional and further damages be available for all classes of personal injury or disease OR only some personal classes of injury or disease?
- If provisional and further damages should be available for only some classes of personal injury or disease, should they be restricted to asbestos related conditions or restricted in some other way? Please explain your reasons.
- Further to your answer to question 2, should further damages be available:

<sup>25</sup> According to rule 5(8)(c) of the *Dust Diseases Tribunal Rules*, one application for further damages may be made in respect of each dust-related condition specified in the order for the award of provisional damages.

- (a) whenever a different and/or more serious injury or disease develops; or
  - (b) only where the potential for the development of a different and/or more serious injury or disease was expressly identified at the time of the initial judgment?
6. Should any restrictions be placed on the number of times that a plaintiff can seek further damages after provisional damages have been awarded (as in Victoria, for example, where only one subsequent award of damages is permitted)?

#### 4.7 How should a Court approach awards of further damages?

In line with paragraphs 2(b)(i), 2(b)(ii) and 2(b)(iii) of the Reference, the Commission has considered how a Court should approach awards of further damages, and whether a Court’s discretion to assess further damages should be confined in any way. In particular, it may be desirable to limit a subsequent Court’s discretion in some way to reduce the risk of over compensation and to increase certainty for defendants. Possible limitations which may be imposed upon the award of subsequent damages are set out in Table 6.

**Table 6: How should a Court approach awards of further damages?**

Options	Jurisdictions	Advantages	Disadvantages
<b>Option 1:</b> confine the further assessment of damage to one or more specified heads of damage	-	<ul style="list-style-type: none"> <li>• Confines the subsequent assessment in a pre-determined way</li> <li>• Enables some heads of damage to be settled with finality</li> </ul>	<ul style="list-style-type: none"> <li>• Places a pre-determined limit on the type of losses which are further compensable</li> <li>• Inconsistent with other Australian jurisdictions</li> </ul>
<b>Option 2:</b> allow a Court take into account the damages initially awarded to the plaintiff	VIC <sup>26</sup> TAS <sup>27</sup>	<ul style="list-style-type: none"> <li>• Reduces the chances of over-compensation by ensuring that a subsequent Court is directed to consider the earlier award of damages</li> <li>• Consistent with other Australian jurisdictions (VIC and TAS)</li> </ul>	<ul style="list-style-type: none"> <li>• The need to have regard to the earlier award is inherent in the exercise of awarding “further damages”, therefore an express requirement in the legislation is unnecessary</li> </ul>
<b>Option 3:</b> differentiate between damages awarded by a Court or entered into by consent	-	<ul style="list-style-type: none"> <li>• Where damages have been arrived at by consent, any subsequent assessment of damages should not disturb previous assessments of current and future loss which the parties have agreed on</li> <li>• Where parties agree to a lump sum award, a subsequent Court may face difficulties in ascertaining the components of compensation which form part of that award</li> </ul>	<ul style="list-style-type: none"> <li>• Inconsistent with other Australian jurisdictions - consent judgments are not treated any differently because, in all cases, the approach to be taken to any subsequent award of damages is simply a matter for the Court</li> </ul>

<sup>26</sup> The *Asbestos Diseases Compensation Act 2008* (Vic) s 6 allows a court to have regard to the initial award of damages.

<sup>27</sup> The *Civil Liability Act 2002* (Tas) s 28 allows a court to refer to earlier decisions of that or other courts for the purpose of establishing the appropriate award of damages for non-economic loss in the proceedings.

#### 4.7.1 The Commission’s preliminary assessment

The Commission’s preliminary assessment is to support option 2 set out above because it aligns with other jurisdictions (Victoria and Tasmania), improves the effective allocation of compensation funds (compared to option 1) and does not create an anomaly between Court judgments and out-of-court settlements as would occur under option 3.

##### QUESTIONS

7. In providing for the calculation of further damages, should the legislation:
  - (a) Confine the further assessment of damage to one or more specified heads of damage OR allow the further assessment to be unrestricted?
  - (b) Include a statutory power to have regard to the damages already awarded OR remain silent on the issue?
  - (c) Take a different approach where the initial award of damages was arrived at by consent?

#### 4.8 Time limits on bringing an application for further damages

In relation to paragraph 2(c) of the Reference the Commission has considered whether there should be any additional statutory time limits imposed on bringing an application for further damages after the initial judgment/settlement.

The United Kingdom requires an award of provisional damages to specify a period of time within which the plaintiff is permitted to bring a return claim for further damages, although the plaintiff may apply to extend the time period specified<sup>28</sup>. This has the obvious benefit of placing a temporal cap on the defendant’s liability, creating greater certainty. However, the relevant legislation in the Australian jurisdictions is silent on the question of whether a time limit should be imposed on the bringing of applications for further damages, leaving it to the judge making the provisional award to decide whether a time limit should be imposed. This enables the judge to decide if the circumstances of the particular case require such a limit<sup>29</sup>. It is noted that while the approach followed in Australia is different to that in the United

Kingdom, they both result in similar policy objectives being achieved.

#### 4.8.1 The Commission’s preliminary assessment

The Commission’s preliminary assessment is that, while an additional statutory limitation should not be imposed, the legislation should authorise the judicial officer to set a time limit if the circumstances deem it appropriate. Currently, the Commission considers that a statutory time limit would potentially reduce the benefits of introducing provisional damages and would be anomalous with the other Australian jurisdictions.

##### QUESTIONS

8. Should there be any time limit for bringing an application for further damages?
9. If your answer was “yes” to question 8, what should the time limit be? Please explain your reasons.

#### 4.9 Estate claims

In relation to paragraph 2(d) of the Reference, the Commission has considered whether the estate of a deceased victim of a tort should be allowed to make a claim for further damages which could have been sought by the victim during his or her lifetime.

As the law currently stands in Western Australia, where a cause of action survives the death of a person for the benefit of his or her estate, the general rule is that the estate may not seek damages for the pain or suffering of that person, for any bodily or mental harm suffered by him or her, or for the curtailment of his or her expectation of life unless:

- the death resulted from a latent injury that is attributable to the inhalation of asbestos which has been caused by the act or omission giving rise to the cause of action; and
- proceedings in respect to the cause of action had been instituted by that person before his or her death and were pending at the time of death<sup>30</sup>.

Similar provisions exist in Victoria<sup>31</sup>, New South Wales<sup>32</sup>, Queensland<sup>33</sup>, South Australia<sup>34</sup> and the Australian Capital Territory<sup>35</sup>. These provisions confer on the estate of a claimant a significant capacity to seek

28 *Civil Procedure Rules 1998* rule 41.2(2).

29 It should be noted that the *Limitation Act 2005* (WA) imposes a time limit of three years from the date that the cause of action accrues which, in the case of an asbestos related illness, is when the person has knowledge of the relevant facts.

30 *Law Reform (Miscellaneous Provisions) Act 1941* (WA), sections 4(1), (2) and (2a).

31 *Administration and Probate Act 1958* (Vic), section 29(2A).

32 *Dust Diseases Tribunal Act 1989* (NSW), section 12B.

33 *Succession Act 1981* (QLD), section 66(2A).

34 *Survival of Causes of Action Act 1940* (SA), section 3(2).

35 *Civil Law (Wrongs) Act 2002* (ACT), section 16(4).

damages in respect of the losses sustained by the victim of the tort. Paragraph 2(d) of the Reference raises the question of whether the estate should also be able to exercise a victim's right to claim further damages under a provisional damages award or whether this right should terminate on the victim's death. This raises the further question of whether

such a right should only be conferred on an estate in respect of asbestos related claims or to personal injury claims more generally.

Table 7 below sets out some options with respect to estate claims for the award of further damages pursuant to a provisional damages award.

**Table 7: Estate claims**

Options	Jurisdictions	Advantages	Disadvantages
<p><b>Option 1:</b> estate of a victim who died due to any personal injury can claim further damages on behalf of the deceased, even where the deceased had not yet filed an application for further damages</p>	-	<ul style="list-style-type: none"> <li>• Avoids potential for injustice where victim's condition deteriorates quickly</li> <li>• Equal treatment of personal injury victims (fairness)</li> </ul>	<ul style="list-style-type: none"> <li>• Plaintiffs must bring a claim willingly – if the deceased had not commenced an action for further damages before their death, this may be difficult to establish</li> <li>• Greatest potential for court congestion due to a higher increase in litigation (compared to the other options)</li> <li>• Highest potential increase in insurance premiums (compared to the other options)</li> <li>• Compensates the estate, not the victim contrary to the purpose behind damages awarded for torts</li> <li>• Inconsistent with other Australian jurisdictions.</li> </ul>
<p><b>Option 2:</b> estate of a victim who died due to any personal injury can claim further damages on behalf of the deceased if proceedings for further damages had been commenced by the deceased before death and were pending at the time of death</p>	VIC <sup>26</sup> TAS <sup>27</sup>	<ul style="list-style-type: none"> <li>• Takes into account the rapid deterioration of victims with asbestos related conditions who may not have time to conclude an action for further damages</li> <li>• Avoids prejudice to the defendant from an evidentiary perspective if proceedings already commenced</li> <li>• Equal treatment of personal injury victims (fairness)</li> </ul>	<ul style="list-style-type: none"> <li>• Greater potential for court congestion due to a higher increase in litigation (compared to options 3 and 4)</li> <li>• Higher potential increase in insurance premiums (compared to options 3 and 4)</li> <li>• Compensates the estate, not the victim contrary to the purpose behind damages awarded for torts</li> </ul>
<p><b>Option 3:</b> estate of a victim who died due to a latent injury attributable to asbestos/dust can claim further damages on behalf of the deceased, even where the deceased had not yet filed an application for further damages</p>	-	<ul style="list-style-type: none"> <li>• Avoids for potential for injustice in circumstances where the deceased victim's injury is not diagnosed until after, or shortly before, his/her death</li> <li>• Recognises the unique nature of asbestos related conditions (i.e. long latency and multiple but separate diseases)</li> <li>• Limits the potential increase in insurance premiums (but not as far as option 4)</li> </ul>	<ul style="list-style-type: none"> <li>• Unequal treatment of personal injury victims (unjust) - no logical distinction between types of injuries</li> <li>• Greater potential for court congestion due to a higher increase in litigation (compared to option 4)</li> <li>• Higher potential increase in insurance premiums (compared to option 4)</li> <li>• Compensates the estate, not the victim contrary to the purpose behind damages awarded for torts</li> <li>• Inconsistent with other Australian jurisdictions</li> </ul>

<p><b>Option 4:</b> estate of a victim who died due to a latent injury attributable to asbestos/dust can claim further damages on behalf of the deceased if proceedings for further damages had been commenced by the deceased before death and were pending at the time of death</p>	<p>VIC NSW</p>	<ul style="list-style-type: none"> <li>• Takes into account the rapid deterioration of victims with asbestos related conditions who may not have time to conclude an action for further damages</li> <li>• Avoids prejudice to the defendant from an evidentiary perspective if proceedings already commenced</li> <li>• Recognises the unique nature of asbestos related conditions (i.e. long latency and multiple but separate diseases)</li> <li>• Least potential for an increase in insurance premiums compared to the other options</li> <li>• Consistent with other jurisdictions in Australia</li> </ul>	<ul style="list-style-type: none"> <li>• Unequal treatment of personal injury victims (unjust) - no logical distinction between types of injuries</li> <li>• Compensates the estate, not the victim contrary to the purpose behind damages awarded for torts</li> <li>• Consistent with other Australian jurisdictions (VIC and NSW)</li> </ul>
<p><b>Option 5:</b> estate of a victim who died due to a latent injury attributable to asbestos/dust can claim further damages on behalf of the deceased if proceedings for further damages had been commenced by the deceased before death and were pending at the time of death</p>	<p>-</p>	<ul style="list-style-type: none"> <li>• Limits defendant's exposure to claims from the estate, providing greater certainty</li> </ul>	<ul style="list-style-type: none"> <li>• Unjust to the deceased victim and his/her relatives</li> <li>• Inconsistent with other Australian jurisdictions</li> </ul>

#### 4.9.1 The Commission's preliminary assessment

The Commission's preliminary assessment is that while option 4 set out in Table 7 above aligns with other Australian jurisdictions, it creates an anomaly for asbestos related diseases.

In line with the Commission's proposed approach in relation to paragraph 2(a)(i) of the Reference (see section 4.4), the Commission's preliminary assessment is to support option 2 set out in Table 7 above in order to allow the estate of a victim who died due to any personal injury to claim further damages on behalf of the deceased, provided that the deceased had commenced proceedings for further damages before his/her death and those proceedings were pending at that time.

The Commission notes that there is currently an anomaly between asbestos related diseases and other personal injury claims that are continued as estate claims. Under the *Law Reform (Miscellaneous Provisions) Act 1941* (WA), the estate of asbestos related disease sufferers are able to obtain damages for pain, suffering and curtailment of life. However, these provisions do not apply to any other personal injury claims.

The Commission's preliminary assessment is that this anomaly should be removed. However, the Commission has not reached a position on whether damages after death of the plaintiff for pain, suffering and curtailment of life should be available for all personal injury claims, or not.

The Commission welcomes input from stakeholders on this matter in responses to the Discussion Paper.

## QUESTIONS

10. Should it be open to the estate of a deceased victim to seek further damages which could have been sought by the victim during his or her lifetime?
11. If your answer was “yes” to question 10:
  - (a) Should such claims be allowed where the victim died due to any personal injury OR only a latent injury attributable to asbestos?
  - (b) Should such claims be allowed without limitation OR only where the victim commenced the proceedings for further damages prior to his/her death and were pending at the time of death?

# 5. DAMAGES FOR GRATUITOUS SERVICES IN WESTERN AUSTRALIA

## 5.1 Introduction

In Australia, the common law until recently allowed a plaintiff to claim the commercial value of gratuitous services which they could no longer provide to others due to suffering a personal injury. This was known as “Sullivan v Gordon damages”<sup>36</sup>. The principle was overruled unanimously by the High Court of Australia in *CSR Limited v Eddy* which held that loss or impairment of the amenity constituted by capacity to assist others could not be compensated by reference to the commercial value of the services, although the Court allowed that they may be compensated as part of general damages. While the Court determined that such damages should not be part of the common law of Australia, it did observe that:

*...if it is desired to confer the rights recognised in Sullivan v Gordon on plaintiffs, the correct course to follow is that taken in the Australian Capital Territory and Scotland: to have the problem examined by an agency of law reform, and dealt with by the legislature if the legislature thinks fit.*<sup>37</sup>

Prior to *CSR Limited v Eddy*, the Australian Capital Territory was the only jurisdiction which had introduced a legislative right to damages for the loss of capacity to perform domestic services for another<sup>39</sup>. Following *CSR Limited v Eddy*, South Australia (in 2005)<sup>40</sup>, New South Wales (in 2006)<sup>41</sup>, Queensland (in 2010)<sup>42</sup>, Tasmania (in 2014)<sup>43</sup> and Victoria (in 2015)<sup>44</sup> enacted legislation to restore the effect of *Sullivan v Gordon*.

This Chapter summarises some reform options and poses a series of questions for the Western Australian community to consider in relation to the awarding of damages for the value of services provided by the plaintiff to others. Broadly, the overarching alternatives are to either retain the current common law position in Western Australia or introduce such damages, subject to certain criteria and limitations.

The Reference relating to damages for gratuitous services can be summarised simplistically as:

1. Should victims of a personal injury tort be able to claim damages for gratuitous services that they can no longer provide to others?
2. If victims of a personal injury tort should be able to claim damages for gratuitous services that they can no longer provide to others:
  - (a) In what cases may such a claim be made?
  - (b) How should damages for gratuitous services be calculated?
  - (c) What limits should be imposed?

## 5.2 Proposed reform for gratuitous services

The Commission considers that the second area for potential law reform in relation to compensation for services which a plaintiff can no longer provide to others is a matter of principle as it raises a number of significant policy issues. While six Australian jurisdictions have introduced reforms in this area, it is noted that the legislation is relatively new and therefore continues to be tested before the courts. Accordingly, the Commission has not reached a preliminary view at this stage about whether such reforms are appropriate in Western Australia.

The Commission welcomes input from stakeholders on this area of potential reform. If damages for the value of gratuitous services provided by the plaintiff to others are to be introduced in Western Australia then the Commission proposes that the approach set out below be taken. This approach would align with other jurisdictions in Australia and maximise the benefit to the community as a whole when considering the advantages and disadvantages of each reform option (as presented in the remainder

36 (1999) NSWLR 319.

37 [2005] 226 CLR 1.

38 Ibid at [67].

39 *Civil Law (Wrongs) Act 2002* (ACT), s 100 (which was formerly s 39 in that Act and s 33 in the *Law Reform (Miscellaneous Provisions) Act 1955* (ACT)). In Victoria, the right to Sullivan v Gordon damages was limited by statutory provision (s 28ID of the *Wrongs Act 1958*) but the entitlement to such damages still arose from the common law.

40 *Dust Diseases Act 2005* (SA), section 9(3).

41 *Civil Liability Act 2002* (NSW), section 15B.

42 *Civil Liability Act 2003* (Qld), section 59A.

43 *Civil Liability Act 2002* (Tas), section 28BA.

44 The *Wrongs Amendment Act 2015* (Vic) was recently enacted prior to the publication of this Discussion Paper. It inserts an entitlement to damages for loss of capacity to provide gratuitous care in the *Wrongs Act 1958* (Vic) in a new section 28ID.

of Chapter Five) and the desirability of delivering certainty, consistency, equity and efficiency to both plaintiffs and defendants. However, the Commission recognises that there are several valid approaches that could be taken in this area and has not discounted the validity of these alternatives. In light of the above, Commission's proposed approach is as follows:

1. If damages for gratuitous services which a plaintiff can no longer provide to others are to be introduced in Western Australia then;
2. such damages should be introduced for all personal injury claims;
3. such damages should only be available for gratuitous domestic services;
4. such damages should be restricted to services provided to "relatives" which should align with the definition used in the *Fatal Accidents Act 1959 (WA)* (the **Fatal Accidents Act**);
5. the services must have been provided before the plaintiff's injury for a defined number of hours per week and consecutive period of time, or, there must be a reasonable expectation that, after development of the injury, the services would have been provided for a defined number of hours per week and consecutive period of time;
6. there be a reasonable need for the services to be provided for those hours per week and that consecutive period of time after the development of the injury;
7. the plaintiff does not need to prove expenditure incurred in consequence of his/her inability to continue providing the services; and
8. calculation of such damages should include the "lost years" after the plaintiff's death.

The remainder of Chapter Five sets out the options identified and considered by the Commission in response to each of the questions raised by the Reference. Under each of the options set out below, the Commission's proposed approach is shaded in grey.

### **5.3 Should plaintiffs be able to recover damages calculated by reference to the value of gratuitous services provided to others?**

In relation to paragraph 1 of the Reference, the Commission has considered whether plaintiffs should be able to recover damages calculated by reference to the value of gratuitous services provided to others.

Some of the policy arguments in support of introducing legislation to restore the effect of *Sullivan v Gordon* include:

1. it recognises that the true subject matter of the loss to be compensated is the plaintiff's "accident-created need", regardless of whether it is productive of financial loss. The exclusion of services performed for others from an award for damages discriminates against those who devote themselves to the care of others within the family household (usually women) to the benefit of the wrongdoer;
2. the loss of, or impairment to, a plaintiff's capacity to provide services to others is capable of evaluation by reference to the market value of the services, therefore it is a compensable form of damage;
3. appropriate compensation cannot be found by relying only on recovery for loss of amenities as part of general damages because, commonly, the supply of the services does not generate the pleasurable feelings often connected with amenities which have been lost;
4. if the work is not done, the health and safety of families will suffer, and if compensation is refused, the injured plaintiff's family will suffer hardship;
5. the wrongdoer may be advantaged at the expense of the plaintiff or his/her family members; and
6. the law should recognise the economic value of the domestic contribution of a spouse and parent to his/her family and treat the loss or diminution of the capacity to make that contribution as the spouse's loss.

Some of the policy arguments against introducing legislation to restore the effect of *Sullivan v Gordon* include:

1. *Sullivan v Gordon* damages are anomalous from the usual rule that financial loss is recoverable as special damages and non-financial loss is recoverable as undifferentiated general damages. The effect of *Sullivan v Gordon* is that it separates one aspect of the plaintiff's post-injury incapacity from the global award of general damages. There is no other instance where the diminished capacity of an injured plaintiff is compensated by special damages except for *Griffiths v Kerkemeyer* damages (in respect of gratuitous services provided to the plaintiff);

2. this head of damage can result in disproportionately large awards, in circumstances where there is no guarantee that the care would have continued, compared to the sums payable under traditional heads of damage;
  3. it is difficult to evaluate the “need” of the plaintiff to care for others compared to the need of the recipient of that care;
  4. the plaintiff’s family indirectly benefits from this head of damage. However, the law of tort concentrates on compensating injured plaintiffs, not as a means of avoiding loss to their families;
  5. it is difficult to define the limits of this head of damage; and
  6. the ageing nature of the population creates a wider need for care, which increases the liability of defendants who have tortiously injured the carers of those people.
3. the services must have been provided before the plaintiff’s injury for a defined number of hours per week and consecutive period of time, or, there must be a reasonable expectation that, after development of the injury, the services would have been provided for a defined number of hours per week and consecutive period of time;
  4. there be a reasonable need for the services to be provided for those hours per week and that consecutive period of time after the development of the injury;
  5. the plaintiff should not need to prove expenditure incurred in consequence of his/her inability to continue providing the services; and
  6. calculation of such damages should include the “lost years” after the plaintiff’s death, the “lost years” being the years in which the services might have been provided after the plaintiff’s actual death until the date to which he or she was expected to have lived had the injury or disease not occurred.

### 5.3.1 The Commission’s preliminary assessment

The Commission has not reached a preliminary view at this stage about whether reform to allow *Sullivan v Gordon* damages is appropriate in Western Australia. The Commission welcomes input from stakeholders on this area of potential reform.

If *Sullivan v Gordon* damages are introduced in Western Australia, consideration must be given to the scope of the Court’s power to award such damages and whether the power should be confined in some way. The following sections explore the key considerations and the relevant options. However, the Commission’s preliminary view is that if damages for the value of gratuitous services provided by the plaintiff to others are to be introduced in Western Australia, they should be available for all classes of personal injury, subject to the following restrictions:

1. they should only be available for gratuitous domestic services;
2. such damages should be restricted to services provided to “relatives” which should align with the definition used in the *Fatal Accidents Act 1959 (WA)* (the **Fatal Accidents Act**);

### QUESTIONS

1. Should Western Australia introduce a specific head of damages for the incapacity of a plaintiff to provide gratuitous services, domestic or otherwise, to another person? Please explain your reasons.

### 5.4 Should damages for the value of services be awarded in all personal injury claims?

In relation to paragraph 2(a) of the Reference, the Commission has identified the following options:

- Option 1 – damages for services to others made available for all personal injury claims;
- Option 2 – damages for services to others made available for some personal injury claims; and
- Option 3 – damages for services to others made available for asbestos related diseases only.

The advantages and disadvantages of each option are set out in Table 8 below.

**Table 8: Should damages for the value of services be awarded in all personal injury claims?**

Options	Jurisdictions	Advantages	Disadvantages
<b>Option 1:</b> damages for services to others – all personal injury claims	NSW ACT QLD	<ul style="list-style-type: none"> <li>• Equal treatment of personal injury victims (fairness)</li> </ul>	<ul style="list-style-type: none"> <li>• Greater court congestion due to a higher increase in litigation (compared to options 2 and 3)</li> <li>• Higher potential increase in insurance premiums (compared to options 2 and 3)</li> <li>• Inconsistent with other jurisdictions in Australia</li> </ul>
<b>Option 2:</b> damages for services to others - some personal injury claims	TAS (all personal injuries excluding intentional acts to cause injury or death, sexual misconduct and injuries from smoking etc.) SA ("dust disease action")	<ul style="list-style-type: none"> <li>• Can be restricted to classes of claims where there is the greatest need</li> <li>• Limits court congestion due to a lower increase in litigation (compared to option 1)</li> <li>• Limits the potential increase in insurance premiums</li> </ul>	<ul style="list-style-type: none"> <li>• Unequal treatment of personal injury victims (unfair) – no logical distinction between types of claims</li> <li>• Higher increase in litigation (and therefore court congestion) compared to option 3</li> <li>• Higher potential increase in insurance premiums (compared to option 3)</li> </ul>
<b>Option 3:</b> damages for services to others – asbestos related diseases only	-	<ul style="list-style-type: none"> <li>• Limits court congestion due to a lower increase in litigation (compared to options 2 and 3)</li> <li>• Limits the potential increase in insurance premiums)</li> </ul>	<ul style="list-style-type: none"> <li>• Unequal treatment of personal injury victims (unfair) – no logical distinction between types of claims, especially other dust diseases</li> <li>• Inconsistent with other jurisdictions in Australia</li> </ul>

**5.4.1 The Commission’s preliminary assessment**

The Commission’s preliminary assessment is that option 1 set out in Table 8 above provides a high level of fairness and equity. It is recognised that Option 2 may be a preferable interim measure while the legislation is in its infancy. However, options 2 and 3 introduce further anomalies into the law in Western Australia with some conditions enlivening an entitlement to compensation for gratuitous services which a plaintiff can no longer provide while others do not.

**QUESTIONS**

**If Western Australia should introduce such a head of damages:**

2. Should damages for gratuitous services be available for all claims OR only some claims? Please explain your reasons.
3. If damages for gratuitous services should be available for only some claims, should they be restricted to asbestos related diseases?

**5.5 Should the criteria for assessing damages be limited by reference to the character of the services provided?**

In relation to paragraph 2(b)(i) of the Reference, the Commission has identified the following options:

- Option 1 – gratuitous services of any kind; and
- Option 2 – gratuitous domestic services only.

The most common form of gratuitous service provided to others is the provision of unpaid, caring services within the domestic setting. Less commonly, gratuitous services can refer to services that are not readily classed as “domestic services”. These may include sporting or educational services. Paragraph 2(b)(i) of the References raises the question of whether compensation for gratuitous services should be extended to any type of service, or limited to services which are domestic in nature.

The advantages and disadvantages of the two options are set out in Table 9 below.

**Table 9: Should the criteria for assessing damages be limited by reference to the character of the services provided?**

Options	Jurisdictions	Advantages	Disadvantages
<b>Option 1:</b> gratuitous services of any kind	NSW ACT QLD	<ul style="list-style-type: none"> <li>Enables the fullest compensation for claimants</li> <li>Recognises the vast range of services that may be provided on a voluntary basis, including some which may not be readily classifiable as “domestic services”</li> </ul>	<ul style="list-style-type: none"> <li>May be too broad - greater court congestion due to a higher increase in litigation and higher potential increase in insurance premiums</li> <li>Unlimited or, if limits are imposed, they are difficult to define</li> <li>Inconsistent with other Australian jurisdictions, which focus on domestic services</li> </ul>
<b>Option 2:</b> gratuitous domestic services only	VIC QLD ACT SA NSW TAS	<ul style="list-style-type: none"> <li>Consistent with the principles in <i>Sullivan v Gordon</i> (i.e. lost capacity to care for dependents)</li> <li>The most common unpaid services are domestic services, so it targets the damages where needed</li> </ul>	<ul style="list-style-type: none"> <li>May be too narrow, and may miss some gratuitous services that ought to be compensable</li> </ul>

### 5.5.1 The Commission’s preliminary assessment

The Commission notes that preliminary discussions with the Asbestos Diseases Society Inc. focussed on domestic services where a particularly high level of care is required, such as parental care for young children and care for disabled or unwell relatives.

Restricting the damages to domestic services (option 2 in Table 9 above) would avoid some “ambit” claims for other types of services, align with the compensation that is available to relatives of a person who was killed by accident under the Fatal Accidents Act<sup>45</sup> and align with other jurisdictions in Australia.

Accordingly, the Commission’s preliminary assessment is that the character of services that should enliven a plaintiff’s entitlement to damages should be gratuitous domestic services (which the plaintiff can no longer provide due to personal injury).

### 5.6 Should the criteria for assessing damages be limited by reference to the relationship between the plaintiff and the recipient of services?

In relation to paragraph 2(b)(ii) of the Reference, the Commission has identified the following options:

- Option 1 – relatives;
- Option 2 – members of the plaintiff’s household / residence;
- Option 3 – another person (for example, friends, neighbours, hospital patients, elderly people etc.); and
- Option 4 – include unborn children of the plaintiff at the time of injury.

Table 10 below sets out the advantages and disadvantages of each option.

<sup>45</sup> For loss of “services around the home”: *De Sales v Ingrilli* (2002) 212 CLR 338.

**Table 10: Should the criteria for assessing damages be limited by reference to the relationship between the plaintiff and the recipient of services?**

Options	Jurisdictions	Advantages	Disadvantages
<p><b>Option 1:</b> Relatives (see Box 3 on page 32)</p>	NSW VIC	<ul style="list-style-type: none"> <li>• Consistent with the principals in <i>Sullivan v Gordon</i> (i.e. lost capacity to care for dependents)</li> <li>• Restricted to services performed for those where there is the greatest need (e.g. children or people with a mental or physical disability), compared to options 2 and 3 - limits court congestion due to a lower increase in litigation and limits potential increase in insurance premiums</li> <li>• Easier for a Court to establish the duration of the need for the plaintiff's services after his/her injury based on the likely duration of the dependency (e.g. until children reach the age of 18)</li> </ul>	<ul style="list-style-type: none"> <li>• More exclusive - definition of "dependents" may exclude some people</li> <li>• Difficult to distinguish between services plaintiffs performed for their own benefit or the benefit of their dependents</li> <li>• Unequal treatment of the people the plaintiff provided services to prior to his/her injury</li> </ul>
<p><b>Option 2:</b> Members of the plaintiff's household / residence</p>	ACT QLD	<ul style="list-style-type: none"> <li>• More inclusive, therefore may capture more services performed by the plaintiff for those who reside with them but are not necessarily dependent on them</li> <li>• More restricted than option 3 - limits court congestion due to a lower increase in litigation and limits potential increase in insurance premiums</li> </ul>	<ul style="list-style-type: none"> <li>• Potentially broader than the principles in <i>Sullivan v Gordon</i> (i.e. lost capacity to care for dependents) – may capture people who are not dependent on the plaintiff</li> <li>• Difficult to distinguish between services plaintiffs performed for their own benefit or the benefit of the household</li> <li>• More difficult for a Court to establish the need for the plaintiff's services after his/her injury</li> <li>• Greater court congestion due to a higher increase in litigation and higher potential increase in insurance premiums compared to option 1</li> <li>• Unequal treatment of the people the plaintiff provided services to prior to his/her injury</li> </ul>
<p><b>Option 3:</b> another person  (e.g. friends, neighbours, hospital patients, elderly etc.)</p>	TAS SA	<ul style="list-style-type: none"> <li>• The most inclusive option which will capture more services provided by the plaintiff to others</li> <li>• Equal treatment of the people the plaintiff provided services to prior to his/her injury</li> </ul>	<ul style="list-style-type: none"> <li>• Broader than the principals in <i>Sullivan v Gordon</i> (i.e. lost capacity to care for dependents) – will capture people who are not dependent on the plaintiff</li> <li>• Unlimited or, if limits are imposed, they are difficult to define</li> <li>• Difficult to distinguish between services plaintiffs performed for their own benefit or the benefit of others</li> <li>• More difficult for a Court to establish the need for the plaintiff's services after his/her injury</li> <li>• Greatest potential increase in court congestion due to a higher increase in litigation and higher potential increase in insurance premiums compared to options 1 and 2</li> </ul>

<p><b>Option 4:</b> another person  (e.g. friends, neighbours, hospital patients, elderly etc.)</p>	<p>VIC QLD NSW</p>	<ul style="list-style-type: none"> <li>• If born after the injury, they will become dependents of the plaintiff and the services the plaintiff would have provided to them, but for the injury, should be treated in the same way as services performed for other dependents who were born at the time of the injury</li> <li>• Contingencies (e.g. divorce etc.) can be factored into the assessment of damages</li> <li>• Consistent with other jurisdictions in Australia</li> </ul>	<ul style="list-style-type: none"> <li>• Assumes the plaintiff would have provided services to the child but for the injury but this may not have been the case – there is no way of proving this</li> </ul>
---	----------------------------	---	--

### 5.6.1 The Commission’s preliminary assessment

The Commission’s preliminary assessment is that statutory reform should be restricted to relatives (including unborn children<sup>46</sup>) of the plaintiff (options 1 and 4 in Table 10 above) to focus on the most important cases, where the victim has a legal, moral and/or ethical duty to provide support and care.

In addition, the Commission considers that alignment with existing Western Australian legislation is more important than alignment with other jurisdictions as this provides consistency and clarity in Western Australia. For this reason the Commission proposes that the term “relative”, as defined in the Fatal Accidents Act, be used (see Box 3 below).

#### Box 3: Definition of relatives

While other jurisdictions use the term “dependents” the Western Australian Fatal Accidents Act allows for compensation to be sought by “relatives”. As these terms have similar meanings, the Commission has used the term “relatives” to ensure consistency with the Fatal Accidents Act. Under this Act “relatives” is defined to include:

- a spouse or de facto partner of the deceased; or
- a parent, grandparent or step parent of the deceased;
- a son, daughter, grandson, granddaughter, stepson or stepdaughter of the deceased (including children not born at the time of death);

- any person to whom the deceased person stood in loco parentis;
- any person who stood in loco parentis to the deceased person;
- a brother, sister, half brother or half sister of the deceased person; and
- any former spouse or former de facto partner of the deceased person whom the deceased was legally obliged, to make provision for with respect to financial matters.

### 5.7 Should regard be had to the likelihood that the services would have been provided by the plaintiff?

In relation to paragraph 2(b)(iii) of the Reference, the Commission has identified four options which are considered in Table 11 below.

<sup>46</sup> The Commission notes that the legal status of unborn children is a complex issue and needs to be considered more broadly in Western Australia which falls outside the scope of the current Reference. In this instance, the Commission considers that aligning with the Fatal Accidents Act is appropriate.

**Table 11: Should regard be had to the likelihood that the services would have been provided by the plaintiff?**

Options	Jurisdictions	Advantages	Disadvantages
<p><b>Option 1:</b></p> <p>only require that services were provided before the injury (no minimum) or, in the case of an unborn child, there is a reasonable expectation that, after the injury, the services would have been provided for a defined number of hours per week and consecutive period of time;</p> <p>there is a reasonable expectation that, after the injury, the services would have been provided for a defined number of hours per week and consecutive period of time; and</p> <p>there will be reasonable need for the services to be provided for those hours per week and that consecutive period of time</p>	<p>NSW (after injury - at least 6 hours per week for at least 6 consecutive months)</p> <p>VIC (same as NSW)</p> <p>QLD (same as NSW)</p>	<ul style="list-style-type: none"> <li>• Restricted to claims where there is the greatest need, that is, where the plaintiff’s dependents have an ongoing need for significant services previously provided by the plaintiff</li> <li>• Greater fairness to defendants to establish the services were provided before the injury and would have continued but for the injury due to the ongoing needs of the dependent</li> <li>• Easier for plaintiffs to establish claim if no requirement regarding minimum services provided before the injury (leads to shorter trials and less court congestion than option 2)</li> <li>• Focuses on future need</li> <li>• Potential for more consistent results (compared to options 3 and 4) – fairness to both parties</li> <li>• Avoids frivolous or speculative claims</li> <li>• Consistent with other jurisdictions in Australia</li> </ul>	<ul style="list-style-type: none"> <li>• Unable to test likelihood of future services for a certain duration against past services if such evidence is not admitted at trial</li> </ul>
<p><b>Option 2:</b></p> <p>services provided before the injury for a defined number of hours per week and consecutive period of time, or, in the case of an unborn child, there is a reasonable expectation that, <u>after</u> the injury, the services would have been provided for a defined number of hours per week and consecutive period of time;</p> <p>there is a reasonable expectation that, <u>after</u> the injury, the services would have been provided for a defined number of hours per week and consecutive period of time; and</p> <p>there will be a reasonable need for the services to be provided for those hours per week and that consecutive period of time</p>	<p>TAS (before injury – more than 6 hours per week for more than 6 consecutive months; after injury – more than 6 hours per week for more than 6 consecutive months)</p>	<ul style="list-style-type: none"> <li>• Evidence of past services of certain duration would help plaintiff to establish the likelihood of future services</li> <li>• Restricted to claims where there is the greatest need, that is, where the plaintiff’s dependents have an ongoing need for significant services previously provided by the plaintiff</li> <li>• Greater fairness to defendants to establish the services were provided before the injury and would have continued but for the injury due to the ongoing needs of the dependent</li> <li>• Avoids frivolous or speculative claims</li> <li>• Potential for more consistent results (compared to options 3 and 4) – fairness to both parties</li> </ul>	<ul style="list-style-type: none"> <li>• Harder for plaintiff to establish his/her claim if there are minimum requirements regarding the services provided before the injury</li> <li>• Unnecessary to establish past services provided for a certain duration</li> <li>• Potentially increases length of trial and therefore court congestion (compared to the other options)</li> <li>• Inconsistent with other jurisdictions in Australia (except TAS)</li> </ul>

<p><b>Option 3:</b> reasonable expectation services would have been performed, but for the injury (no time or duration restrictions)</p>	<p>ACT</p>	<ul style="list-style-type: none"> <li>• Easier for plaintiffs to establish a claim (less restrictive without time or duration limitations)</li> <li>• Greater fairness to defendants to establish the services would have continued due to the ongoing need of the dependent</li> <li>• Avoids frivolous or speculative claims</li> <li>• Less court congestion due to shorter trials (compared to options 2 and 3)</li> </ul>	<ul style="list-style-type: none"> <li>• More difficult to establish reasonable expectation if no time or duration limitations – can lead to inconsistent results (unfairness to plaintiffs and/or defendants)</li> <li>• Inconsistent with other jurisdictions in Australia (except ACT)</li> </ul>
<p><b>Option 4:</b> have no regard to the likelihood that the services would have been provided by the plaintiff but for the injury</p>	<p>-</p>	<ul style="list-style-type: none"> <li>• Easier for plaintiffs to establish a claim (no restrictions)</li> <li>• Less court congestion due to shorter trials (compared to the other options)</li> </ul>	<ul style="list-style-type: none"> <li>• Not restricted to claims where there is the greatest need</li> <li>• Assumes plaintiff would continue providing the services which might not be the case – unfair to defendants</li> <li>• Potential for frivolous or speculative claims</li> <li>• Potential increase in insurance premiums because easier to establish a claim</li> <li>• Inconsistent with other jurisdictions in Australia</li> </ul>

### 5.7.1 The Commission’s preliminary assessment

The Commission’s preliminary assessment is that it is appropriate to introduce legislative time requirements and to consider whether the services would have been provided but for the plaintiff suffering a personal injury (option 2 set out in Table 11 above). The Commission considers that this option is consistent with other Australian jurisdictions, balances the imposition on the plaintiff in proving his/her case with the imposition on the defendant to compensate these elements, and ensures that damages are restricted to cases where there is the greatest need (that is, where the plaintiff’s relatives have an ongoing need for significant services which the plaintiff can no longer provide).

### 5.8 Should damages only be awarded where recipient has spent money on services from alternative service provider?

In relation to paragraph 2(b)(iv) of the Reference, the Commission has identified the following options:

- Option 1 – must prove expenditure incurred in consequence of the plaintiff being prevented from providing a particular service; and
- Option 2 – no expenditure required.

These two options are summarised in Table 12, below, together with the advantages and disadvantages of each option.

**Table 12: Should damages only be awarded where recipient has spent money on services from alternative service provider?**

Options	Jurisdictions	Advantages	Disadvantages
<p><b>Option 1:</b> must prove expenditure incurred in consequence of the plaintiff being prevented from providing a particular service</p>	-	<ul style="list-style-type: none"> <li>• Greater fairness to defendants</li> <li>• Compensates actual financial loss to the plaintiff, consistent with tort law</li> <li>• Less court congestion due to a lower increase in litigation and limits potential increase in insurance premiums (compared to option 2)</li> </ul>	<ul style="list-style-type: none"> <li>• Inconsistent with the principals in <i>Sullivan v Gordon</i> (i.e. lost capacity to care for dependents)</li> <li>• Inconsistent with other jurisdictions in Australia</li> </ul>
<p><b>Option 2:</b> no expenditure required</p>	TAS SA ACT QLD NSW VIC	<ul style="list-style-type: none"> <li>• Recognises the gratuitous and domestic/familial nature of the services provided which are likely to be picked up by another household or family member if the plaintiff cannot do them</li> <li>• Consistent with the principals in <i>Sullivan v Gordon</i> (i.e. lost capacity to care for dependents)</li> <li>• Consistent with other jurisdictions in Australia</li> </ul>	<ul style="list-style-type: none"> <li>• Unfair to claimants and does not fully compensate for the lost services</li> <li>• Greater court congestion due to increased litigation and potential for higher increase to insurance premiums (compared to option 1)</li> </ul>

### 5.8.1 The Commission’s preliminary assessment

The Commission’s preliminary assessment is that option 2 set out in Table 12 above is the preferred option as it aligns with the other Australian jurisdictions and the underlying policy reasons supporting *Sullivan v Gordon* damages.

However, the Commission notes that there is an argument that *Sullivan v Gordon* damages should be aligned with what relatives can claim under the Fatal Accidents Act upon the death of a person who dies due to a wrongful act, neglect or default (such as a workplace or motor vehicle accident, medical negligence or asbestos exposure). Under the Fatal Accidents Act, relatives can maintain an action to recover damages for medical and funeral expenses incurred, in addition to “such damages” as the Court thinks fit in proportion to the “injury” which they have suffered as a result of the death. This has been interpreted by the Courts to mean damages for actual economic loss suffered, including both the loss of the deceased’s income and also the loss of “services around the home”<sup>47</sup>.

The Commission acknowledges that restricting *Sullivan v Gordon* damages by requiring plaintiffs to prove expenditure incurred in consequence of their inability to provide a particular service would assist to limit the scope of such damages. However, the Commission’s view is that this approach would be

inconsistent with the other Australian jurisdictions that have introduced *Sullivan v Gordon* damages and the underlying policy reasons supporting such damages.

#### QUESTIONS

- Should the legislation require the character of the services provided by the plaintiff to be:
  - domestic OR general services or care; or
  - of any other description?

Please explain your reasons.

- In relation to the recipients of the plaintiff’s services, should the legislation :
  - require that they be relatives OR household/residence members;
  - include unborn children of the plaintiff at the time of injury who are subsequently born; and/or
  - include any other class of recipients?
- Should regard be had to the likelihood that the services would have been provided by the plaintiff if they had not been injured?

47 Ibid at 38.

7. If you answered “yes” to question 6, should the legislation require the plaintiff to prove that:
  - (a) the services were provided before his/her injury;
  - (b) there is a reasonable expectation that the services would have continued if they had not been injured; and/or
  - (c) there will be a reasonable need for the services to continue after the plaintiff’s injury?
8. If you answered “yes” to question 7(a), should the legislation require the plaintiff to prove that the services were provided before the injury for a minimum period of time and duration (for example, at least 6 hours per week for 6 consecutive months)?
9. If you answered “yes” to question 7(b), should the legislation require the plaintiff to prove that there is a reasonable expectation that the services would have continued after the injury for a minimum period of time and duration (for example, at least 6 hours per week for 6 consecutive months)?

10. If you answered “yes” to question 7(c), should the legislation require the plaintiff to prove that there will be a reasonable need for the services to continue after the plaintiff’s injury for a minimum period of time and duration (for example, at least 6 hours per week for 6 consecutive months)?
11. Are there any other criteria that should be applied when assessing such a head of damages? Please explain your reasons.

### 5.9 Where the plaintiff is deceased, should damages be provided for services that would have been provided but for the plaintiff’s death?

In relation to paragraph 2(c) of the Reference, the Commission has considered whether damages should be provided for services that would have been provided but for the plaintiff’s death, that is, for the “lost years” after his/her death.

Table 13 below sets out some options which the Commission has identified, together with the advantages and disadvantages of each option.

**Table 13: Options for whether damages include “lost years” after the victim’s death**

Options	Jurisdictions	Advantages	Disadvantages
<b>Option 1:</b> damages for services to others – include “lost years” after death	NSW <sup>48</sup> (case law)	<ul style="list-style-type: none"> <li>• Provides Courts with greater certainty about how to calculate damages</li> <li>• Supports the people who would have continued receiving the plaintiff’s services but for his/her death</li> </ul>	<ul style="list-style-type: none"> <li>• Speculative (unfairness to defendants)</li> <li>• The estate may receive double compensation under the Fatal Accidents Act (unfairness to defendants)</li> <li>• Inconsistent with other jurisdictions in Australia</li> </ul>
<b>Option 2:</b> damages for services to others – during the plaintiff’s lifetime (no “lost years” after death)	NSW <sup>49</sup> (case law)	<ul style="list-style-type: none"> <li>• Provides Courts with greater certainty about how to calculate damages</li> <li>• The estate will not receive double compensation (fairness to defendants)</li> </ul>	<ul style="list-style-type: none"> <li>• Potential hardship for the people who would have continued receiving the plaintiff’s services but for his/her death</li> </ul>
<b>Option 3:</b> legislation silent	NSW SA TAS QLD ACT VIC	<ul style="list-style-type: none"> <li>• Gives the Courts greater flexibility to calculate damages as they see fit</li> </ul>	<ul style="list-style-type: none"> <li>• Greater uncertainty for Courts about how to calculate damages – could lead to inconsistent results (unfairness to both parties)</li> </ul>

48 In *(re Dawson) Novek v Amaca Pty Limited* [2008] NSWDDT 12, damages were awarded under s 15B of the *Civil Liability Act 2002* (NSW) from 2008 (when the plaintiff died) until 2020 when one of the plaintiff’s grandchildren reached the age of 16 because it was found that the plaintiff would have continued to care for her grandchildren during this time, but for her illness.

49 In *Perez v State of NSW* [2013] NSWDDT 7, damages were awarded under s 15B of the *Civil Liability Act 2002* (NSW) until the plaintiff reached the age of 75 because it was improbable that he would continue providing domestic care to his grandchildren until his expected death at the age of 80.

### 5.9.1 The Commission's preliminary assessment

The Commission's preliminary assessment is that there is benefit in defining the circumstances in which damages regarding "lost years" may be awarded (options 1 and 2 set out in Table 13 above) over the legislation remaining silent (option 3 set out in Table 13 above). However, at this stage, the Commission's view on this matter is not firmly held. Accordingly, the Commission welcomes input from stakeholders on this matter.

The Commission's preliminary assessment is to support option 1 set out in Table 13 above as this provides Courts with greater certainty about how to calculate damages (therefore reducing potential inconsistencies between cases) and aligns with the existing provisions under the Fatal Accidents Act. However, the Commission notes that a specific provision may be required to avoid double compensation under the Fatal Accidents Act.

#### QUESTIONS

12. Should legislation permitting damages for gratuitous services:
  - (a) Prescribe that damages be awarded for services which the plaintiff was prevented from providing during his or her lifetime only OR should such damages also include the "lost years" after death; or
  - (b) Be silent on whether damages may be awarded for the "lost years"?

# APPENDIX A: SUMMARY OF CONSULTATION QUESTIONS

## Issue 1: modifying the “once and for all” rule – “provisional” damages

To assist the Commission refine its consideration of introducing provisional damages stakeholders are invited to respond to the following questions.

### QUESTIONS

1. Should Western Australia keep the “once and for all” rule OR introduce provisional damages? Please explain your reasons.

#### If Western Australia should introduce provisional damages:

2. Should provisional damages be available where there is a chance that the plaintiff will:
  - (a) develop a different injury or disease (that is, a new condition) or more serious injury or disease (that is, a deterioration of an existing condition) in future (the UK approach);
  - (b) develop a different injury or disease in future (the Australian approach); or
  - (c) develop a more serious injury or disease in future?
3. Should provisional and further damages be available for all classes of personal injury or disease OR only some personal classes of injury or disease?
4. If provisional and further damages should be available for only some classes of personal injury or disease, should they be restricted to asbestos related diseases or restricted in some other way? Please explain your reasons.
5. Further to your answer to question 2, should further damages be available:
  - (a) whenever a different and/or more serious injury or disease develops; or
  - (b) only where the potential for the development of a different and/or more serious injury or disease was expressly identified at the time of the initial judgment?
6. Should any restrictions be placed on the number of times that a plaintiff can seek further damages after provisional damages have been awarded (as in Victoria, for example, where only one subsequent award of damages is permitted)?
7. In providing for the calculation of further damages, should the legislation:
  - (a) Confine the further assessment of damage to one or more specified heads of damage OR allow the further assessment to be unrestricted?
  - (b) Include a statutory power to have regard to the damages already awarded OR remain silent on the issue?
  - (c) Take a different approach where the initial award of damages was arrived at by consent?
8. Should there be any time limit for bringing an application for bringing an application for further damages?
9. If your answer was “yes” to question 8, what should the time limit be? Please explain your reasons.
10. Should it be open to the estate of a deceased victim to seek further damages which could have been sought by the victim during his or her lifetime?
11. If your answer was “yes” to question 10:
  - (a) Should such claims be allowed where the victim died due to any personal injury OR only a latent injury attributable to asbestos?
  - (b) Should such claims be allowed without limitation OR only where the victim commenced the proceedings for further damages prior to his/her death and were pending at the time of death?

## Issue 2: damages for the value of services provided by the plaintiff to others

To assist the Commission refine its consideration of introducing gratuitous services stakeholders are invited to respond to the following questions.

### QUESTIONS

1. Should Western Australia introduce a specific head of damages for the incapacity of a plaintiff to provide gratuitous services, domestic or otherwise, to another person? Please explain your reasons.

If Western Australia should introduce such a head of damages:

2. Should damages for gratuitous services be available for all claims OR only some claims? Please explain your reasons.
3. If damages for gratuitous services should be available for only some claims, should they be restricted to asbestos related diseases?
4. Should the legislation require the character of the services provided by the plaintiff to be:
  - (a) domestic OR general services or care; or
  - (b) of any other description?

Please explain your reasons.

5. In relation to the recipients of the plaintiff's services, should the legislation :
  - (a) require that they be relatives OR household/residence members;
  - (b) include unborn children of the plaintiff at the time of injury who are subsequently born; and/or
  - (c) include any other class of recipients?
6. Should regard be had to the likelihood that the services would have been provided by the plaintiff if they had not been injured?
7. If you answered "yes" to question 6, should the legislation require the plaintiff to prove that:
  - (a) the services were provided before the injury;
  - (b) there is a reasonable expectation that the services would have continued if they had not been injured; and/or
  - (c) there will be a reasonable need for the services to continue after the plaintiff's injury?

8. If you answered "yes" to question 7(a), should the legislation require the plaintiff to prove that the services were provided before the injury for a minimum period of time and duration (for example, at least 6 hours per week for 6 consecutive months)?
9. If you answered "yes" to question 7(b), should the legislation require the plaintiff to prove that there is a reasonable expectation that the services would have continued after the injury for a minimum period of time and duration (for example, at least 6 hours per week for 6 consecutive months)?
10. If you answered "yes" to question 7(c), should the legislation require the plaintiff to prove that there will be a reasonable need for the services to continue after the plaintiff's injury for a minimum period of time and duration (for example, at least 6 hours per week for 6 consecutive months)?
11. Are there any other criteria that should be applied when assessing such a head of damages? Please explain your reasons.
12. Should legislation permitting damages for gratuitous services:
  - (a) Prescribe that damages be awarded for services which the plaintiff was prevented from providing during his or her lifetime only OR should such damages also include the "lost years" after death; or
  - (b) Be silent on whether damages may be awarded for the "lost years"?

# APPENDIX B: LIST OF PEOPLE CONSULTED

In preparing this Discussion Paper, the Commission drew upon written submissions and targeted consultation with key stakeholders.

## Written submissions

While there has been no formal call for submissions prior to the publication of this Discussion Paper, the Commission received submissions from the following interested parties after the announcement of the Reference:

- Richard Naisbitt (submission dated 20 April 2015);
- Dr Kieran Tranter, Emily Muir, and Rudolf Ondrich, Griffith University (submission dated June 2015);
- Laine McDonald, The Asbestos Diseases Society of Australia Inc and Slater and Gordon Lawyers (submission dated March 2015); and
- Kerry White, Shire President, Shire of Ashburton (submission dated 4 June 2014).

## Targeted consultation

In preparing the Discussion Paper, Marsden Jacob Associates, on behalf of the Commission, met with a number of key stakeholders.

The following groups were offered the opportunity to participate in the targeted consultation discussions:

- personal injury lawyers (Slater & Gordon and Maurice Blackburn);
- insurance companies and government insurance regulators (WorkCover WA and the Insurance Commission of Western Australia);
- groups representing asbestos sufferers (Asbestos Diseases Society of Australia Inc. and the Cancer Council of Western Australia);
- members of the Judiciary and legal profession (the Chief Justice, Law Society of Western Australia, Western Australian Bar Association, the Chief Judge of the District Court and the Australian Lawyers Alliance);
- companies and associated liable companies (CSR, James Hardie and the Asbestos Injuries Compensation Fund);
- the office of the Honourable Kate Doust MLC;
- trade unions (Unions WA, CFMEU, and the Teachers Union); and
- medical experts (National Centre for Asbestos Related Diseases).

The information provided by stakeholders was invaluable in the preparation of this Discussion Paper. The Commission is very grateful to all stakeholders who took the time to provide submissions and undertake discussions.

# APPENDIX C: RESEARCH TABLE

**Disclaimer** The Research Table is intended to provide a summary of the research which has been conducted for the purposes of this Discussion Paper. While all reasonable efforts have been made to prepare the content of the Research Table, it is not intended to be comprehensive nor does it constitute legal advice. Members of the public should seek legal or other professional advice before acting or relying upon any of the content of the Research Table.

## 1. Modifying the ‘once and for all’ rule – ‘provisional’ damages

Issue	Jurisdiction	Document	Summary
1. Whether the ‘once and for all’ rule applicable to judgments in personal injury actions should be reformed so that, where the victim of a tort develops, subsequent to judgment, an injury or disease which is of a different or more serious character than the injury or disease from which the person suffered at the time of judgment, a court will be authorised in certain circumstances to award further damages to that victim.	UK	<i>Senior Courts Act 1981</i> (UK), formerly the <i>Supreme Court Act 1981</i> (UK)	Section 32A allows for the awarding of provisional damages for personal injuries. This section was inserted by the <i>Administration of Justice Act 1982</i> (UK) following the publication of the Royal Commission on Civil Liability and Compensation for Personal Injury (Pearson Report) 1978.
		Second Reading speech, Lord Chancellor (8/3/1982)	<p>Section 32A introduces a new procedure for provisional damages on the lines recommended by the Law Commission and endorsed by the Pearson Report. Courts should be empowered to make a provisional award in cases where the medical prognosis is particularly uncertain and where there is a chance, falling short of probability, that some serious disease or serious deterioration in the plaintiff’s condition will accrue at a later date.</p> <p>Two examples are provided: sight impairment with a chance of blindness within 5 years and a skull fracture with a diminishing chance of epilepsy.</p> <p>Under the existing law, the only remedy is inadequate because it is an award made once and for all. If the medical evidence is that there is, for example, a 1 in 10 chance that the plaintiff may become blind or epileptic, a judge must award one-tenth of the damages that would be awarded if there were not a mere chance, but a certainty of that danger coming to pass. This method has the advantage of achieving finality (which is often as important to the plaintiff as to the defendant) but it is extremely crude. It means that if the chance event never happens, the plaintiff is over-compensated, but if it does happen, they are under-compensated, sometimes to a very high degree. In either event, the award is bound to be wrong.</p> <p>The purpose of s 32A is to make it possible for the court to take a different approach, to wait and see; that is, to award nothing in respect of the feared event but to give damages for what is known, and then to allow the plaintiff to apply for damages later if the feared event actually takes place.</p> <p>It is expected that this procedure will not be employed often. It will not be invoked unless the plaintiff wants it and the court is satisfied that this procedure will not cause serious prejudice to the defendant. But in those cases where it is used, it will be manifestly fairer to both parties than the existing rule.</p>
	NZ	-	<p>NZ does not appear to provide a statutory entitlement to provisional damages for personal injury.</p> <p>The <i>Accident Compensation Act 2001</i> (NZ) provides a statutory compensation scheme for “personal injury by accident” which includes “employment-related disease or infection”, amongst a range of other things such as “medical misadventure”. Where cover exists under the Act, actions for common law damages in tort are barred. This follows a Royal Commission report into personal injury law in NZ in which it was recommended that the common law should be replaced by a statutory scheme.</p>
	VIC	<i>Asbestos Diseases Compensation Act 2008</i> (Vic)	<p>Section 4 allows for the awarding of provisional damages for asbestos-related conditions (<b>ARC</b>).</p> <p>Rationale – it can take many years for a person exposed to asbestos to know the full extent of their injuries and the initial award of damages may not provide adequate compensation for a fatal condition that may develop in the future.</p> <p>The injured person can either have their damages awarded by a court or settle their claim on a provisional or once and for all (<b>OAF</b>) basis.</p> <p>* No decisions on s 4 of the Act yet.</p>

	NSW	<p><i>Dust Diseases Tribunal Act 1989</i> (NSW)</p>	<p>Section 11A allows for the awarding of provisional damages for a dust-related condition.</p>
		<p>NSW LRC, <i>Provisional Damages</i>, Report 78 (Sep 1996)</p>	<p><b>Recommendation 1</b> - Provisional damages should be available in personal injury cases in NSW. They should be made available to those limited number of cases where there would be benefit from their introduction to provide greater certainty for plaintiffs.</p> <p>The argument <u>in favour</u> of the introduction of provisional damages is that they will achieve greater justice in appropriate cases by avoiding the possibility of under-compensation.</p> <p>The arguments <u>against</u> the introduction of provisional damages are:</p> <ul style="list-style-type: none"> <li>• additional costs which will be incurred by all parties, including insurers;</li> <li>• financial uncertainty for a defendant, awaiting an assessment of damages;</li> <li>• the possibility that a defendant may become bankrupt or insolvent; and</li> <li>• the negative effects that protracted litigation may have on the parties in general and on the recovery of the plaintiff in particular.</li> </ul> <p>Section 11A in <i>Dust Diseases Tribunal Act 1989</i> (NSW) follows the scheme laid down by s 32A of the <i>Supreme Court Act 1981</i> (Eng), except that it applies to causes of action in relation to a person suffering from a dust-related condition.</p>
		<p>Schultz and BHP, 3 related Wallaby Grip companies and Amaca Pty Ltd (DDT, NSWSC and HCA) 2002 and 2004</p>	<p>Schultz, who resided in SA, issued proceedings in the DDT in NSW against BHP and four other defendants who manufactured and supplied asbestos containing materials to BHP. He claimed that between 1957 and 1964, and again between 1968 and 1977, he was employed by BHP as a welder/boilermaker in SA. He further claimed that the nature of his employment required him to work with materials containing asbestos and in the vicinity of related activities involving the use of materials containing various forms of asbestos.</p> <p>He claimed damages for asbestosis and asbestos-related pleural diseases. He also sought an order preserving his right to make a further claim for damages under s 11A should he develop any of the conditions of asbestos-induced lung cancer, asbestos-induced carcinoma of any other organs, pleural mesothelioma and peritoneal mesothelioma.</p> <p>BHP applied to the NSWSC to have the matter transferred to the SASC. The application was dismissed and then BHP appealed to the HCA where it was granted. <b>Note</b> - no subsequent decision of the SASC could be found.</p> <p>In submissions to the NSWSC, BHPA stated that, subject to proof of exposure and diagnosis, liability will not be an issue. If Schultz proves exposure to asbestos from Wallaby Grip's and Amaca's products and the development of the alleged injuries, then each defendant will admit liability and the hearing will become an assessment of damages.</p> <p>A medical report was prepared by a Professor. Although his general health was good, Schultz was a life-long heavy smoker and had moderately severe air flow obstruction and emphysema. It was estimated that his lung function related to his asbestos conditions had a deficit of 30%. His prognosis was uncertain but it was considered likely that his disability would increase in future and that he carried significant risk for more serious complications of asbestos exposure such as mesothelioma.</p>
		<p><i>Banton v Amaca Pty Ltd</i> [2007] NSWDDT 29 <i>Amaca Pty Ltd v Banton</i> [2007] NSWCA 336</p>	<p><b>Note</b> – at the time, this was the first occasion where a plaintiff had returned to the DDT to seek further damages.</p> <p>Banton made an application in the DDT for an award of further damages under s 11A in August 2007 in respect of peritoneal mesothelioma. His original application in November 1999 for provisional damages in respect of asbestos related pleural disease and asbestosis was settled for the sum of \$800K. The Order for Judgment stated that the dust related conditions in respect of which an award of further damages may be made include lung cancer, mesothelioma and asbestos induced carcinoma.</p> <p>No cases in Australia or the UK could be found about the meaning of “further damages” in s 11A. The NSWCA held that exemplary damages could be awarded, in appropriate cases, under s 11A(2)(a) for provisional damages and s 11A(2)(b) for further damages.</p> <p>O’Meally P mentioned that s 11A was intended to overcome the difficulty which the assessment of damages based on chance involved. The prospect of one asbestos disease (or other dust related condition) being followed by another is random and s 11A was intended to avoid over compensation in cases where a plaintiff did not develop another disease and under compensating a plaintiff who did.</p> <p><b>Note</b> – the hearing of the application for further orders could not be found. Settled?</p>

	NSW	<p><i>Nawaf Hawchar v Dasreef Pty Limited</i> [2009] NSWDDT 18</p> <p><i>Dasreef Pty Limited v Hawchar</i> [2010] NSWCA 154</p> <p><i>Dasreef Pty Limited v Hawchar</i> [2011] HCA 21</p>	<p>The original plaintiff worked as a labourer, then as a stonemason, for Dasreef between 1999 and 2005. Before he moved to Australia, he worked in the family's stonemasonry business in Lebanon. While employed by Dasreef, he undertook some private stonemasonry work. In the course of his work, he was exposed to silica dust. In 2004, he was diagnosed with scleroderma and, in 2006, with silicosis. In 2007, he commenced personal injury proceedings against Dasreef in the DDT seeking common law damages on account of his scleroderma and silicosis.</p> <p>At first instance, he was successful on liability. On the silicosis claim, having regard to the duration and concentrations of exposure to silica, the judge assessed employment exposure to be 20/23 (with the remaining 3 parts being his previous exposure in Lebanon and the private work that he undertook in Australia) – there was no appeal from this finding.</p> <p>The judge made an order under s 11A that an award of further damages may be made with respect to silica induced carcinoma of the lungs, massive progressive fibrosis, tuberculosis, silica-tuberculosis, oesophageal dysfunction, renal disease and scleroderma lung.</p>
		<p><i>Hicks v Amaca Pty Limited</i> [2010] NSWDDT 16</p>	<p>The plaintiff had asbestosis caused by the defendant's negligence. He had also smoked 20 cigarettes a day and had asthma. The medical evidence did not suggest that the plaintiff's breathlessness and his cough have a cause other than his asbestosis. Accordingly, his smoking and asthma were ignored.</p> <p>Damages were awarded on a provisional basis for the condition of asbestosis as there was evidence of a chance that the plaintiff would, as a result of the defendant's breach of duty, develop another dust related condition.. It was ordered that the dust-related conditions in respect of which an award of further damages may be made included asbestos related pleural disease, asbestos related lung cancer, pleural mesothelioma, peritoneal mesothelioma and asbestos induced carcinoma of any other organ. Damages were awarded on the assumption that the plaintiff will not develop another dust related condition.</p>
		<p><i>McGrath v Allianz Australia Insurance Limited</i> [2011] NSWDDT 1</p> <p><i>Allianz Australia Insurance Ltd v McGrath</i> [2011] NSWCA 153</p>	<p><b>Note</b> – this is the first case in which further damages needed to be assessed.</p> <p>In 2009, the plaintiff instituted proceedings in the DDT in which he claimed damages for asbestos related pleural disease (<b>ARPD</b>) and sought an order under s 11A that he might claim further damages in respect of asbestosis, mesothelioma and asbestos induced carcinoma if any should occur in future. This claim was settled and judgment was entered by consent on a provisional basis.</p> <p>In 2010, the plaintiff sought further damages in respect of mesothelioma which presented after entry of judgment in the claim for provisional damages.</p> <p>The DDT held that the method to be adopted in assessing further damages is to identify the disabilities which flow from the original disease (ARPD) and then disregard them. What is to be compensated are the consequences of mesothelioma. The plaintiff is not to be compensated twice and the damages awarded for ARPD are relevant only insofar as they included some of the consequences which have continued. The amount to compensate the plaintiff for mesothelioma was determined by excluding those matters which, as best as could be determined, have been compensated by the award for ARPD.</p> <p>Allianz appealed to the NSWCA but it was dismissed. It was held that s 11A does not prescribe how the Tribunal is to go about its task on the subsequent assessment nor do the rules provide any guidance. Accordingly, the relevant principals arise under the general law and will include the need to avoid double compensation for a particular disability, including pain and suffering. In order to avoid double compensation, it was necessary for the DDT to determine whether any amount had been allowed in the first award for further pain and suffering in respect of ARPD and how allowance should be made for that amount in assessing pain and suffering resulting from mesothelioma. The DDT was entitled to reduce the compensation for pain and suffering resulting from mesothelioma by such amount as had already been awarded for that period (i.e. the overlap). Section 11A makes no provision for reopening the first award. The proper construction of s 11A(2) (b) requires that the second (or subsequent) award relates solely to damages flowing from the further condition, in this case, the mesothelioma.</p> <p><b>Note</b> – the NSWCA compared s 11A to s 32A of the UK legislation. It stated that the causal link in s 11A is weaker because the dust related condition must be "as a result or <u>partly as a result of</u>" the relevant breach of duty. It also does not include a reference to "deterioration" of the plaintiff's condition.</p> <p>The NSWCA also commented that it is likely that the drafter of s 11A assumed that the development of another dust-related condition would increase the injury and therefore the loss suffered by the injured person (which might not be the case if the plaintiff dies as a result of their second condition).</p>

	SA	<p><i>Dust Diseases Act 2005 (SA)</i></p> <p><i>Munzer v State of South Australia</i> [2015] SADC 18</p>	<p>Section 9(1) allows for the awarding of provisional damages for dust diseases.</p> <p>The defendant conceded that during employment between 1964 and 1990, the plaintiff was exposed to asbestos as a result of the defendant's negligence and that he had developed pleural plaques. The proceedings were issued out of time, however, an extension of time was granted under s 48 of the <i>Limitations of Actions Act 1936</i>.</p> <p>The plaintiff had been a heavy smoker, cannabis user and frequently drank to excess. It was also likely that the plaintiff would have developed psychiatric problems whether or not he was exposed to asbestos during his employment.</p> <p>The District Court held that not all of the plaintiff's psychiatric problems were attributable to his pain experiences consequent upon him having pleural plaques. Much is due to the combination of factors that were in existence prior to him developing pleural plaques. However, it held that the defendant should have foreseen that to expose its employees to asbestos might cause some of them to suffer a psychiatric illness.</p> <p>It was accepted as a matter of principle that cigarette smoking can provide a basis to reduce damages on account of contributory negligence. However, there was no evidence that suggested that the plaintiff's continued smoking caused or contributed to his pleural plaques or to the pain they were causing him. However, his long history of smoking was not irrelevant. Appropriate allowance must be made for the contingency that it may be, and in the future might be, contributing to the plaintiff's chest pain and shortness of breath.</p> <p>It was held that although the plaintiff was aware that his pleural plaques were causing him mental stress, it was not until he read a report from a psychiatric expert that he appreciated he suffered a diagnosable psychiatric condition related to his concerns about his pleural plaques. This was over and above the psychological problems that previously existed.</p> <p>The plaintiff sought an order under s 9(1) that he may claim further damages should he develop any of the following conditions: asbestosis, lung cancer, mesothelioma, asbestos induced carcinoma and any other asbestos related condition. In assessing damages, the District Court assumed that the plaintiff would not develop those conditions and it was held that, if he does develop any of these conditions at a later date, he may claim further damages.</p>
		<p><i>Obst v Adelaide Brighton Cement Pty Ltd</i> [2010] SADC 112</p> <p><i>Obst v Adelaide Brighton Cement Pty Ltd (No 2)</i> [2011] SADC 10</p>	<p>The plaintiff suffered pleural plaques (which were asymptomatic) and asbestosis (for which his principal symptom was breathlessness). He had been a smoker for 35 years but had stopped about 20 years before he first noticed breathing problems. A dispute arose about how much of his breathlessness/ loss of respiratory function (which was 30 – 40%) was caused by asbestosis or emphysema.</p> <p>It was held that the asbestosis and emphysema contributed equally to the plaintiff's breathlessness. Were it not for the non-asbestos contributions, the plaintiff would have been awarded \$90K for general damages. However, this was reduced to \$60K for the pain and suffering caused by asbestosis alone. Special damages were also awarded.</p> <p>Judgement was entered on a provisional basis under s 9(1) for the plaintiff's conditions of pleural plaques and asbestosis. The dust diseases for which the plaintiff could make a further claim under s 9(1) were lung cancer, asbestos induced carcinoma, mesothelioma and any other asbestos related condition.</p>
	TAS	<p><i>Civil Liability Act 2002 (Tas)</i></p> <p>Second Reading Speech</p>	<p>Section 8B allows for the awarding of provisional damages for dust-related disease.</p> <p>* No decisions on s 8B yet.</p> <p>The Oafa rule makes sense in most instances as damages will include a component for the estimated future losses and expenses of the plaintiff. However, it can work an injustice for a person suffering from an asbestos related disease as that person may develop a separate and more serious illness at a later time, attributable to the same asbestos injury.</p>
	WA	<p>Introduction and First Reading Speech, Hon Kate Doust (31/10/13)</p>	<p>Yes.</p> <p>Given the special nature of ARC, the traditional way of awarding damages is inappropriate. Inhalation of asbestos can cause a number of debilitating diseases, all of which are latent. Asbestosis sufferers in WA have faced the dilemma of whether to make a claim now and cut off compensation for a more serious fatal disease or wait and potentially miss out on compensation for their existing asbestosis. In order to remedy this injustice, NSW, VIC and SA have enacted legislation to allow for provisional damages.</p>

	WA	Second Reading Speech, Hon Michael Mischin, Attorney General (20/2/14)	For plain public policy considerations, it is desirable that there be finality in legal proceedings. There obviously exists some potential for unfairness in particular cases. The result is an inevitable overcompensation or undercompensation. In the experience of the State Solicitor's Office in asbestos disease litigation, it is very rare for a person who has received compensation to subsequently develop a disease that has not been fully compensated in the original settlement of the claim or judgment of a court.
	-	Luntz, H, Assessment of damages for personal injury and death: general principles (2006)	<p>Criticisms of the Oafa rule:</p> <ul style="list-style-type: none"> <li>• Difficulty of assessment of future contingencies (in circumstances where advances in modern medicine enable handicapped plaintiffs to live for many years but there is no corresponding improvements in the science of prediction);</li> <li>• Losses are not made up of lump sums (e.g. future earnings paid periodically – a lump sum payment is not to restore the plaintiff to the position that he or she would have been in if not injured);</li> <li>• Delay before trial until the plaintiff's condition has stabilised or as long as the limitation period will permit (particularly in times of high inflation where inadequate allowance is made for this after the date of trial);</li> <li>• Lack of incentive for rehabilitation due to the lure of a large lump sum award;</li> <li>• Pressure to settle due to longer delays and higher offers that are made to avoid the possibility of liability if more serious injuries manifest in future;</li> <li>• Dissipation of awards by plaintiffs who are inadequately equipped to invest safely, are unlucky or have received an inadequate amount (e.g. discharging debts, buying furniture, household appliances or motor vehicles and paying off the mortgage on a house);</li> <li>• It is impossible to forecast the effects of inflation on a lump sum; and</li> <li>• Distasteful assessment of remarriage prospects in some instances in wrongful death actions.</li> </ul> <p>Reasons for retention of the Oafa rule:</p> <ul style="list-style-type: none"> <li>• Finality in litigation;</li> <li>• Court congestion due to an increase in litigation which means extra costs to the community;</li> <li>• Compensation neurosis, i.e. where physical symptoms are minor and are soon healed, but the victims continue to complain of pain and disability for which no organic cause can be detected due to the possibility of recovering compensation (a lump sum payment might help if paid quickly);</li> <li>• Snooping/surveillance by agents of the defendant seeking evidence of the plaintiff's recovery or other material chance (if periodic payments can be terminated or reduced on this basis);</li> <li>• Plaintiffs usually prefer a lump sum over periodic payments and there has been little use of the provisions in WA, SA and NSW that permit orders for periodic payments;</li> <li>• Settlements; and</li> <li>• Certainty for insurers.</li> </ul>
	-	ADSA and Slater and Gordon pre-submission (Mar 2015)	Yes.
	-	Griffith Law School Students' pre-submission (undated)	<p>Yes.</p> <p>The biggest disadvantage of the Oafa rule is the uncertainty in ascertaining the exact future needs of a victim. Asbestos victims are often initially diagnosed with a mild disease that progressively becomes more severe. Calculating an appropriate amount of compensation at the initial stage to cover the future possibility of a more serious disease developing is difficult and may lead to under-compensation.</p> <p>The Oafa rule involves considerable speculation and potential inaccuracy about things such as life expectancy, care needs of the injured person and future risk of a complication occurred related to the initial injury.</p> <p>The medical nature of an ARC makes it difficult to calculate damages because different diseases are associated with different levels of exposure and latency.</p>

2. If such reform is recommended, the form of the proposed regime for award further damages, including but not limited to identifying:			
(a) the circumstances in which a court is to be authorised to award further damages, including whether such a power –	VIC	<i>Asbestos Diseases Compensation Act 2008</i> (Vic)	Allows only one subsequent award of damages for another ARC.
	NSW	<i>Dust Diseases Tribunal Rules</i>	Rule 5(8)(c) states that only one application for further damages may be made in respect of each dust-related condition specified in the order for the award of provisional damages.
		NSW LRC, <i>Provisional Damages</i> , Report 78 (Sep 1996)	<b>Recommendation 5</b> - One application for further damages should be permitted, subject to the judge granting a further right to the plaintiff to return on the occurrence of further specified deterioration arising from the same injury.
(i) should be available in all personal injury claims or should be confined to claims of a particular class, such as claims relating to the contraction of an asbestos related disease;	VIC	<i>Asbestos Diseases Compensation Act 2008</i> (Vic)	Allows for the awarding of provisional damages for an “asbestos-related condition” which is defined to mean asbestosis, asbestos-induced carcinoma, asbestos-related pleural diseases and mesothelioma (s 3).
	NSW	<i>Dust Diseases Tribunal Act 1989</i> (NSW)	Allows for the awarding of provisional damages for a “dust-related condition”, which is defined to include, <u>amongst other things</u> , asbestosis, asbestos-induced carcinoma, asbestos-related pleural diseases and mesothelioma (s 3 and Sch 1).
		<i>Dust Diseases Tribunal Rules</i> (NSW)	Rule 5(4) states that an order for an award of provisional damages must specify the dust-related condition in respect of which an award of further damages may be made. In the statement of claim, the plaintiff must specify the condition(s) in respect of which the plaintiff claims provisional damages and in respect of which the plaintiff seeks an order that further damages may be claimed (rule 5(6)).  Rule 5(5) states that an award of provisional damages may be made in respect of more than one dust-related condition.
	NSW LRC, <i>Provisional Damages</i> , Report 78 (Sep 1996)		<b>Recommendation 3</b> - Provisional damages should extend to all instances of personal injury.
	SA	<i>Dust Diseases Act 2005</i> (SA)	Allows for the awarding of provisional damages for a “dust disease” which is defined to include, <u>amongst other things</u> , asbestosis, asbestos-induced carcinoma, asbestos-related pleural diseases and mesothelioma (s 3).
	TAS	<i>Civil Liability Act 2002</i> (Tas)	Allows for the awarding of provisional damages for “dust-related disease” which is defined to include, <u>amongst other things</u> , asbestosis, asbestos-induced carcinoma, asbestos-related pleural diseases and mesothelioma (s 8B(2)).
	-	ADSA and Slater and Gordon pre-submission (Mar 2015)	Provisional damages are necessary, as a minimum, for asbestos disease sufferers due to the unique nature of ARC (i.e. long latency periods between exposure and diagnosis and exposure to asbestos increases a person’s risk to contracting multiple, but separate, ARC). The traditional common law approach is unjust for asbestos disease victims given the peculiar nature of ARC.  The unfairness has been recognised in a number of jurisdictions (SA, VIC, NSW, TAS, UK) which have already made statutory changes to all for provisional damages in recognition of the fact that a person with an ARC may develop a different, more serious disease at a later date.  Provisional damages are also appropriate for any injured person where there is a risk that their medical condition will deteriorate significantly in future.
	-	Second Reading Speech, Hon Michael Mischin, Attorney General (20/2/14)	There is no logical reason why the Bill is restricted to asbestos cases when they could be applied to those afflicted by other illnesses. There may be a case for confining it to ARC for pragmatic or public policy reasons but these reasons are unclear.

(ii) should be available whenever a different or more serious injury or disease develops or only where the potential for the development of a different or more serious injury or disease was expressly identified at the time of the initial judgment;	UK	<i>Senior Courts Act 1981</i> (UK), formerly the <i>Supreme Court Act 1981</i> (UK)	In an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.  Provision may be made by the court rules to enable the court to award the injured person: <ul style="list-style-type: none"> <li>• damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and</li> <li>• further damages at a future date if he develops the disease or suffers the deterioration.</li> </ul>
		<i>Civil Procedure Rules 1998</i> (UK)	According to rule 41.2(2), an order for an award of provisional damages: <ul style="list-style-type: none"> <li>• must specify the disease or type of deterioration in respect of which an application may be made at a future date; and</li> <li>• may be made in respect of more than one disease or type of deterioration.</li> </ul>
	VIC	<i>Asbestos Diseases Compensation Act 2008</i> (Vic)	If it is proved or admitted in an action for damages for an ARC that the injured person may in the future develop another ARC, wholly or partly as a result of the act or omission giving rise to the cause of action, the court may: <ul style="list-style-type: none"> <li>• award damages in the first instance for the ARC on the assumption that the injured person will <u>not</u> develop another ARC; and</li> <li>• award damages at a future date if the injured person develops another ARC.</li> </ul>
	NSW	<i>Dust Diseases Tribunal Act 1989</i> (NSW)	If it is proved or admitted to be a chance that at some definite or indefinite time in the future a person who is suffering from a dust-related condition ( <b>DRC</b> ) will as a result of the breach of duty giving rise to the cause of action, develop another DRC, the Tribunal may: <ul style="list-style-type: none"> <li>• award damages assessed on the assumption that the injured person will <u>not</u> develop another DRC; and</li> <li>• award further damages at a future date if the injured person develops another DRC.</li> </ul>
		<i>Dust Diseases Tribunal Rules</i> (NSW)	Rule 5(3) allows the DDT to award provisional damages on such terms as the DDT thinks just if the plaintiff has pleaded a claim for provisional damages in the proceedings.
		NSW LRC, <i>Provisional Damages</i> , Report 78 (Sep 1996)	The award of damages should be final, subject to the judge granting a further right to the plaintiff to return on the occurrence of further specified deterioration arising from the same injury.
	SA	<i>Dust Diseases Act 2005</i> (SA)	If it is proved or admitted in a dust disease ( <b>DD</b> ) action that the injured person may, at some time in the future, develop another DD, wholly or partly as a result of the breach of duty giving rise to the cause of action, the court may: <ul style="list-style-type: none"> <li>• award damages in the first instance for the DD assessed on the assumption that the injured person will <u>not</u> develop another DD; and</li> <li>• award damages at a future date if the injured person develops another DD.</li> </ul>
	TAS	<i>Civil Liability Act 2002</i> (Tas)	If it is proved or admitted in an action for damages in respect of a dust-related disease ( <b>DRD</b> ) of a person that the person may, at some definite or indefinite time in the future develop another DRD wholly or partly as a result of the act or omission giving rise to the cause of action, the court may: <ul style="list-style-type: none"> <li>• award damages in the first instance for the first disease on the assumption that the injured person will <u>not</u> develop another DRD; and</li> <li>• award damages at a future date if the person develops another DRD.</li> </ul>
	-	ADSA and Slater and Gordon pre-submission (Mar 2015)	A second award of damages should be available <u>whenever</u> a different or more serious injury or disease develops and <u>not only</u> when the potential for this development is expressly identified at the time of initial judgment.

(b) the manner in which an award of further damages is to be approached by a court, including:	VIC	<i>Asbestos Diseases Compensation Act 2008</i> (Vic)	<p>If it is proved or admitted in an action for damages for an ARC that the injured person may in the future develop another ARC, wholly or partly as a result of the act or omission giving rise to the cause of action, the court may:</p> <ul style="list-style-type: none"> <li>award damages in the first instance for the ARC on the assumption that the injured person will not develop another ARC; and</li> <li>award damages at a future date if the injured person develops another ARC.</li> </ul> <p>A court must have regard to the legal costs incurred for the initial action when assessing the amount to be awarded as legal costs in a subsequent action for ARC (to ensure that legal costs awarded in the subsequent action are not in respect of work undertaken for the purpose of the initial action). There is a list of factors to consider (e.g. work undertaken to identify the defendants or the circumstances of exposure to asbestos).</p>
(i) whether the entirety of the damages the subject of the initial judgment should be assessed afresh or only a head or heads of the damages further assessed;	NSW	<i>Allianz Australia Insurance Ltd v McGrath</i> [2011] NSWCA 153	Section 11A makes no provision for reopening the first award, i.e. for a fresh assessment. The further award should not be made in total disregard of the first award. However, it does not follow that there must be a reassessment of the whole of the dust-related loss suffered.
(ii) how the damages the subject of the initial judgment are to be taken into account;	VIC	<i>Asbestos Diseases Compensation Act 2008</i> (Vic)	A court may have regard to the payment of provisional damages when assessing damages to be awarded in a subsequent action for another ARC (to ensure there is no duplication of damages): s 6.
	NSW	<i>Dust Diseases Tribunal Act 1989</i> (NSW)	Pursuant to s 25B(1), issues of a general nature determined in proceedings before the Tribunal (including proceedings on an appeal from the Tribunal) may not be relitigated or reargued in other proceedings before the Tribunal without the leave of the Tribunal, whether or not the proceedings are between the same parties.
	TAS	<i>Civil Liability Act 2002</i> (TAS)	Section 28 states that, in determining damages for non-economic loss, a court may refer to earlier decisions of that or other courts for the purpose of establishing the appropriate award in the proceedings.
	SA	<i>Dust Diseases Act 2005</i> (SA)	In accordance with the special rules of evidence and procedure in s 8, the Court may admit evidence admitted in an earlier dust disease action against the same defendant (including in a dust disease action brought in a court of the Commonwealth or another State or Territory): s 8(3)(a). In addition, if a finding of fact has been made in a dust disease action by a court of South Australia, the Commonwealth or another State or Territory, and the finding is, in the Court's opinion, of relevance to a dust disease action before the Court, it may admit the finding into evidence and indicate to the parties that it proposes to make a corresponding finding in the case presently before the Court unless the party who would be adversely affected satisfies the Court that such a finding is inappropriate to the circumstances of the present case: s 8(4).
	NSW	<i>Allianz Australia Insurance Ltd v McGrath</i> [2011] NSWCA 153	<p>In order to avoid double compensation, it was necessary for the DDT to determine, as best it could, whether any amount had been allowed in the first award for future pain and suffering and how allowance should be made for that amount in assessing pain and suffering resulting from the subsequent condition. The further award should not be made in total disregard of the first award. However, it does not follow that there must be a reassessment of the whole of the dust-related loss suffered.</p> <p>In some cases (e.g. <i>McGrath v Allianz Australia Insurance Ltd</i>), the judge making the second award can <u>reduce general damages</u> otherwise available for the second condition by the amount of the first award <u>attributable to the period of overlap</u>.</p>
	-	ADSA and Slater and Gordon pre-submission (Mar 2015)	John Gordon of Counsel: The court should determine the effect of the second disease (almost always a malignant condition) on the earning capacity of the plaintiff and then have regard to the earlier award to determine if it has already compensated the plaintiff for loss of capacity and, if so, to what extent. If it has, then the award should be reduced accordingly. If it has not, then no reduction should be made.
-	Second Reading Speech, Hon Michael Mischin, Attorney General (20/2/14)	The bill in its current form gives no guidance as to how the court is to approach a second award of damages in respect of provisional damages – it merely permits the court to “have regard” to the damages previously awarded.	

(iii) in circumstances where the initial judgment was entered by consent or where heads of the damages awarded had been agreed between the parties;	-	ADSA and Slater and Gordon pre-submission (Mar 2015)	<p>There is no difficulty in the case of negotiated settlements. Where the heads of damages are agreed in the earlier settlement, all parties are bound by the agreement and the second assessment proceeds on the basis of the agreed figures as if they were heads of damages calculated by the court. This can be specifically recited in the terms of settlement and/or specified by the court making the order for preservation of the right to further damages.</p> <p>Where there is a lump sum judgment, there will generally be some evidence of the amounts claimed for special damages leaving the general damages readily calculable in the later assessment. The onus would remain on the plaintiff seeking the second award to adduce that material in evidence and demonstrate the matters compensated and the extent to which they had already been compensated so as to justify the further award. The practitioners involved in this area are familiar with the way such claims are compromised and compensated and are usually able to readily agree what was compensated in the earlier claim and the extent.</p>
	NSW	<i>Dust Diseases Tribunal Rules</i>	Rule 5(7) states that offers of compromise may be expressed to be an offer to agree to the making of an award of provisional damages and an offer as to the amount of those damages. Where the plaintiff accepts such an offer, they must apply to the Tribunal for an order in accordance with rule 5(4), as soon as practicable.
(c) whether there should be any time limit for bringing an application for further damages;	WA	<i>Limitation Act 2005 (WA)</i>	<p>As the law currently stands in WA, an action for damages relating to a personal injury or an action under the <i>Fatal Accidents Act 1959</i> (WA) cannot be commenced if 3 years have elapsed since the cause of action accrued or the death (s 14).</p> <p>A cause of action attributable to the inhalation of asbestos accrues when the person has knowledge of the relevant facts (s 56).</p> <p>Courts may extend the limitation period if satisfied that, when the limitation period expired, a person to whom the cause of action accrues was not aware of the physical cause of the death or injury, was not aware that the death or injury was attributable to the conduct of a person or had been unable to establish that person's identity (s 39).</p>
	NSW	<i>Dust Diseases Tribunal Act 1989 (NSW)</i>	Proceedings can be brought in relation to dust-related conditions <u>at any time</u> (s 12A).
		NSW LRC, <i>Provisional Damages</i> , Report 78 (Sep 1996)	<b>Recommendation 6</b> - the court may specify the period within which a plaintiff may apply under an award of provisional damages.
	VIC	<i>Limitation of Actions Act 1958 (Vic)</i>	<p>Section 5(1A) provides that an action for damages in respect of personal injuries consisting of a disease may be brought <u>not more than 3 years</u> from, and the cause of action shall be taken to have accrued on, <u>the date on which the person first knows</u>:</p> <ul style="list-style-type: none"> <li>• he has suffered those personal injuries; and</li> <li>• those personal injuries were caused by the act or omission of some person.</li> </ul> <p>The limitation period can be extended in certain circumstances (which includes a consideration of the duration of any disability of the plaintiff arising on or after the date of the accrual of the cause of action) under s 23A.</p> <p><b>Note</b> – Part IIA in relation to personal injury actions does not apply to actions for damages in respect of an injury that is a dust-related condition within the meaning of the Administration and Probate Act 1958 (Vic).</p>
	SA	<i>Limitation of Actions Act 1936 (SA)</i>	<p>Section 36(1a) provides that, in the case of a personal injury that remains latent for some time after its cause, the <u>3 year limitation period</u> begins to run <u>after the injury first came to the person's knowledge</u>.</p> <p>The limitation period can be extended in certain circumstances under ss 48 and 49.</p>
	TAS	<i>Limitation Act 1974 (Tas)</i>	<p>Section 5A provides that, in an action for damages in respect of personal injuries, the period of limitation is the earlier of:</p> <ul style="list-style-type: none"> <li>• <u>3 years</u> commencing on the "<u>date of discoverability</u>" which is defined in s 2(1) to mean the date when the plaintiff knew or ought to have known that the personal injury or death had occurred, was attributable to the conduct of the defendant and was sufficiently significant to warrant bringing proceedings; and</li> <li>• <u>12 years</u> commencing on the date of the act or omission which it is alleged resulted in the personal injury or death.</li> </ul> <p>The 12 year overarching period can be extended to 3 years commencing on the date of discoverability in certain circumstances under s 5A(5).</p>

	UK	<i>Civil Procedure Rules 1998 (UK)</i>	<p>According to rule 41.2(2), an order for an award of provisional damages:</p> <ul style="list-style-type: none"> <li>• must specify the period within which an application may be made at a future date in respect of a specified disease or type of deterioration; and</li> <li>• may be made in respect of more than one disease or type of deterioration and may, in respect of each disease or type of deterioration, specify a different period within which a subsequent application may be made.</li> </ul> <p>The claimant may make more than one application to extend the period specified in the order: rule 41.2(3).</p> <p>According to rule 41.3(1), the claimant may not make an application for further damages after the end of the period specified under rule 41.2(2) or such period as extended by the court. In addition, only one application for further damages may be made in respect of each disease or type of deterioration specified in the order for the award of provisional damages: rule 41.3(2).</p>
	-	ADSA and Slater and Gordon pre-submission (Mar 2015)	There should be no time limit for the bringing of an application for further damages given asbestos victims are dealing with latent injuries. The Limitation Act 2005 will still apply because the claimant must bring the second claim within 3 years of the second diagnosis. No issue of prejudice arises as the defendant will have the materials from the original claim available and, on notice of the potential for a later claim, will have preserved the materials needed to defend it.
	-	Second Reading Speech, Hon Michael Mischin, Attorney General (20/2/14)	We should turn our minds to whether a line should be drawn 10, 20, 30, 40, 50 or 100 years into the future and whether it ought to apply to claims by the estate.
(d) whether, generally or (in view of section 4(2a) of the Law Reform (Miscellaneous Provisions) Act 1941 <sup>1</sup> ) in the case of actions for latent injury attributable to the inhalation of asbestos, it should be open to the estate of a deceased victim to seek from a court an award of further damages which could have been sought from the victim during his or her lifetime.	NSW	<i>Dust Diseases Tribunal Act 1989 (NSW)</i>	Section 12B allows the estate of a person whose death has been caused by a dust-related condition to recover damages for the person's pain or suffering, any bodily or mental harm or for curtailment of the person's expectation of life, <u>provided proceedings commenced by the person were pending before the Tribunal at the person's death.</u>
		<i>Workers' Compensation (Dust Diseases) Act 1942 (NSW)</i>	Allows the Workers Compensation (Dust Diseases) Authority to award compensation to dependents from the Workers' Compensation (Dust Diseases) Fund.
		NSW LRC, <i>Provisional Damages</i> , Report 78 (Sep 1996)	<b>Recommendation 7</b> - the plaintiff's right to apply under an award of provisional damages terminates on the plaintiff's death.
	VIC	<i>Administration and Probate Act 1958 (Vic)</i>	Section 29(2A) allows the estate of a person who had died due to a dust-related condition and <u>had commenced proceedings in respect of that condition prior to their death (and which were pending at the time of death)</u> to recover damages for that person's pain or suffering, bodily or mental harm and curtailment of that person's expectation of life.
	ACT	<i>Civil Law (Wrongs) Act 2002 (ACT)</i>	Where a cause of action survives the death of a person for the benefit of their estate, s 16(4) allows the estate to recover damages for the person's pain or suffering, any bodily or mental harm suffered by the person, loss of the person's expectation of life, or the person's loss of capacity to earn or loss of future probable earnings if: <ul style="list-style-type: none"> <li>• the cause of action related to a personal injury resulting from an asbestos-related disease;</li> <li>• the person gave the respondent a written notice of claim under s 51 before their death; and</li> <li>• either the person died as a result of the asbestos-related disease or the asbestos-related disease was a contributing factor to their death.</li> </ul>

1 Where a cause of action survives the death of a person for the benefit of their estate, the damages recoverable may include damages for pain or suffering, bodily or mental harm and curtailment of their expectation of life if:

- the death resulted from a latent injury that is attributable to the inhalation of asbestos which has been caused by the act or omission giving rise to the cause of action; and
- proceedings in respect to the cause of action had been instituted by that person before his or her death and were pending at the time of death.

	SA	<i>Survival of Causes of Action Act 1940 (SA)</i>	Where a cause of action survives for the benefit of the estate of a deceased person, s 3(2) allows the estate to recover damages for pain and suffering, bodily and mental harm, curtailment of expectation of life and exemplary damages if the person commenced an action for damages in respect of a dust-related condition and dies as a result of that condition.
	QLD	<i>Succession Act 1981 (QLD)</i>	Where a cause of action survives for the benefit of the estate of a deceased person, s 66(2A) allows the estate to recover damages for pain and suffering, any bodily or mental harm or for curtailment of expectation of life if: <ul style="list-style-type: none"> <li>• the cause of action related to personal injury resulting from a dust-related condition;</li> <li>• the deceased commenced a proceeding in relation to the cause of action before they died; and</li> <li>• the deceased died as a result of the dust-related condition or the dust-related condition was a contributing factor to their death.</li> </ul>
	WA	<i>Fatal Accidents Act 1959 (WA)</i> "Fatal Accidents Report", Project No 66, WA LRC (1978)	Allows "relatives" (as defined) of a person who dies due to a wrongful act, neglect or default, to maintain an action and recover damages for medical and funeral expenses incurred, in addition to "such damages" as the court thinks, proportioned to the injury resulting from the death to the parties for whom the action is brought. Although there are no express limitations in the legislation, the latter has been interpreted by the Courts to mean damages for loss of economic or material advantages which the deceased would have given the person had they have lived (i.e. not non-economic loss such as grief or the loss of companionship or love). In certain circumstances, is not necessary for the deceased to have commenced the action before the limitation period expired (i.e. they were not aware of the physical cause of the injury, they were not aware that it was attributable to the conduct of another person or they were unable to establish that person's identity).  The normal method of assessment of damages by the courts in WA is to assess the financial advantages that the dependents of the deceased were receiving at the time of death and then multiply it by the joint span of the deceased's prospective working life and the claimants' dependency. A percentage is then deducted for contingencies such as ill health, unemployment of the wage earner or re-marriage in the case of a dependent widow. The gains to the dependent resulting from the deceased's death are also deducted (i.e. they only receive damages for the difference between their financial loss and their financial gain).
	-	ADSA and Slater and Gordon pre-submission (Mar 2015)	It should be open to the estate of a deceased victim to seek an award of further damages which could have been sought from the victim during their lifetime. Reform should occur to allow for the estate to make a claim for general damages and the loss of expectation of life <u>in circumstances where an action has not been commenced</u> in the victim's lifetime. The disease may not be diagnosed until after death or the victim may so rapidly deteriorate that they are too unwell to seek legal advice during their lifetime. This reform can be achieved by removing the requirement in the Law Reform (Miscellaneous Provisions (Asbestos Disease Act) Act 2002 (WA) that proceedings be instituted before death and were pending at the time of death.
	-	Second Reading Speech, Hon Michael Mischin, Attorney General (20/2/14)	We should turn our minds to whether a line should be drawn 10, 20, 30, 40, 50 or 100 years into the future and whether it ought to apply to claims by the estate.

## 2. Damages for the value of services provided by the plaintiff to others

Issue	Jurisdiction	Document	Summary
<p>1. Whether, where a personal injury prevents a plaintiff from providing gratuitous services, domestic or otherwise, to another person, the damages recoverable by the plaintiff should include a specific head of damages calculated by reference to the value of those services.</p>	<p>HCA</p>	<p><i>CSR Limited v Eddy</i> [2005] 226 CLR 1</p>	<p>The HCA overruled <i>Sullivan v Gordon</i> and held that a person who is rendered unable to provide gratuitous personal domestic services for another because of a personal injury cannot recover as damages an amount calculated by reference to the commercial value of those services. However, loss or impairment of the amenity constituted by capacity to assist others <u>may be compensated as part of general damages</u>.</p> <p>The legal basis for the damages awarded in <i>Griffiths v Kerkemeyer</i> (1977) for an amount equivalent to the commercial cost of nursing and domestic services which had been provided in the past and would be provided in the future by family or friends <u>to</u> the plaintiff was distinguished.</p> <p>The correct course is to have the problem examined by an agency of law reform and dealt with by the legislature if it thinks fit.</p> <p><b>Summary of policy arguments against:</b></p> <ul style="list-style-type: none"> <li>• The loss can be compensated as part of general damages.</li> <li>• Can result in disproportionately large awards, in circumstances where there is no guarantee that the care would have continued, compared to the sums payable under traditional heads of loss.</li> <li>• Anomalous from the usual rule that financial loss is recoverable as special damages and non-financial loss is recoverable as undifferentiated general damages. The effect of <i>Sullivan v Gordon</i> is that it separates off one aspect of the post-injury diminution in the plaintiff's capacity from the global award of general damages which is compensated as a specific head of special damages. There is no other instance where the diminished capacity of an injured plaintiff is compensated by special damages except for <i>Griffiths v Kerkemeyer</i> damages.</li> <li>• The substantive issue is how the damages for impairment of capacity are to be assessed as it is difficult to evaluate the "need" of the plaintiff to care for others (cf <i>Griffiths v Kerkemeyer</i> damages). How far is it a loss to the plaintiff and how far is it a loss to the recipient of the services?</li> <li>• In substance, it is the family which indirectly benefits from the award of compensation for the loss. However, the law of tort concentrates on compensating injured plaintiffs, not as a means of avoiding loss to their families. The common law gave only limited direct avenues of recovery to those who have lost the benefit of an injured plaintiff's services (which are now sometimes seen as antique): the husband's action per quod consortium amisit; the employer's action per quod servitium amisit; and the tors of seduction, enticement and harbouring.</li> <li>• To prohibit recovery (subject to very limited exceptions) by the former recipients of the commercial value of the services, while permitting recovery by the provider of that value, would be anomalous.</li> <li>• How far does the <i>Sullivan v Gordon</i> principle go? For example, the loss of capacity to care for close family members, any family members, any members of the plaintiff's household, friends, neighbours, hospital patients, old people or destitute people? Only to dependent members (and if so, what is dependency?) or all members? Should it apply beyond domestic services to the wide range of educative services healthy parents supply their children of an academic, sporting or cultural kind? Does the test turn on a legal duty to provide services or on a moral duty to do so, or on what services the plaintiff might reasonably have been expected to perform if there had been no injury or on what services were or might have been expected to have been rendered before the injury or on a mere practice of having provided services? Should the same damages be payable to an injured homemaker who did little housework and fed the family on fast food as to an injured homemaker who spent all day working in the home?</li> <li>• As increasing numbers of people live to great ages, creating wider need for care, the question of how far defendants who have tortiously injured the carers of those people should be liable becomes both an important question and a question on which the opinions of citizens may differ sharply.</li> </ul>

		<p><b>Summary of policy arguments for:</b></p> <ul style="list-style-type: none"> <li>• The loss of or impairment to a plaintiff’s capacity to provide services to others is capable of evaluation by reference to the market value of the services, therefore it is a compensable form of damage.</li> <li>• Appropriate compensation cannot be found by relying only on recovery for loss of amenities as part of general damages because, commonly, supply of the services does not generate the pleasurable feelings often connected with amenities which have been lost.</li> <li>• If the work is not done, the health and safety of families will suffer, and if compensation is refused, the injured plaintiff’s family will suffer hardship.</li> <li>• The wrongdoer may be advantaged at the expense of the plaintiff or their gratuitous helper.</li> <li>• There are policy reasons which favour placing economic value on the domestic contribution of a spouse to their family and treating the loss or diminution of the capacity to make that contribution as the spouse’s loss.</li> </ul>	
	NZ	-	<p>NZ does not appear to provide a statutory entitlement to <i>Sullivan v Gordon</i> damages.</p> <p>The <i>Accident Compensation Act 2001</i> (NZ) provides a statutory compensation scheme for “personal injury by accident” which includes “employment-related disease or infection”, amongst a range of other things such as “medical misadventure”. Where cover exists under the Act, actions for common law damages in tort are barred. This follows a Royal Commission report into personal injury law in NZ in which it was recommended that the common law should be replaced by a statutory scheme.</p> <p>Originally, lump sums for pain and suffering and loss of amenity were payable but they were abolished in 1992 and replaced by an “independence allowance” which sought to compensate for expenses incurred because of impaired amenity. However, this was abolished in 2001 (although it appears that some people are still entitled to receive it) and lump sums were restored. These compensate for permanent impairment, including physical impairment and mental injury caused by physical injury or sexual abuse, but not for pain and suffering. There is a minimum impairment threshold of 10%. The amount payable is calibrated so that more seriously injured claimants receive proportionately more than less seriously injured claimants.</p>
	NSW	<p><i>Sullivan v Gordon</i> (1999) NSWLR 319 (overruled by <i>CSR Limited v Eddy</i> [2005] 226 CLR 1)</p>	<p>The NSWCA held that the accident caused need of a disabled plaintiff that is compensable is not confined to self-care, so that a person who has lost the capacity to care for a child or children is entitled to be compensated on the same basis as a traditional <i>Griffiths v Kerkemeyer</i> claim. There are several policy reasons for this:</p> <ul style="list-style-type: none"> <li>• The exclusion of services performed for others ignores the true subject matter of the compensated loss which is the plaintiff’s accident-created need, regardless of whether or not it is productive of financial loss. To draw the distinction only serves to discriminate against those who devote themselves to the care of others within the family household (usually women) to the benefit of the wrongdoer.</li> <li>• Acknowledgement that a mother’s interrupted capacity to make her usual contributions to a household is compensable involves the law’s belated recognition of the economic value of such work.</li> </ul> <p>Mason P noted that it would be necessary to determine the extent and duration of the domestic services that would have been performed by a plaintiff had he or she not been injured. A court will have to make informed hypothetical predictions as to how long a plaintiff uninjured would have cared for another member of his or her household. For a dependent child, the answer would usually be for the period of dependency subject to an allowance for the prospect that the care of the child might have passed to others in any event.</p>
		<p><i>Civil Liability Act 2002</i> (NSW)</p>	<p>Section 15B provides for damages for <u>any</u> loss of the claimant’s capacity to provide gratuitous domestic services to their dependents. <b>Note</b> – this section commenced 20/6/2006 and is excluded from the carve out in s 3B(1)(b) of claims under s 11 of the <i>Dust Diseases Tribunal Act 1989</i> (NSW).</p>

	<p><i>Phillips v Amaca Pty Ltd</i> [2014] NSWDDT 2</p> <p><i>Amaca Pty Ltd v Phillips</i> [2014] NSWCA 249</p>	<p>The plaintiff had mesothelioma and brought a claim in the DDT for which he was awarded over \$780K. A component of this award included damages under s 15B for loss of the plaintiff's capacity to provide care in the future for his wife who suffered from Alzheimer's dementia and various other comorbidities. The s 15B damages were awarded by reference to the number of hours that the plaintiff would, but for his illness, have spent caring for his wife in the future, having regard to her life expectancy of 2.5 years. A 15% discount was applied for vicissitudes on the basis that the plaintiff's wife would have had nursing home care before she died, even if the plaintiff had not become ill.</p>
	<p>(re Dawson) <i>Novek v Amaca Pty Limited</i> [2008] NSWDDT 12 (12 May 2008)</p> <p><i>Amaca Pty Ltd v Novek</i> [2009] NSWCA 50 (17 March 2009)</p>	<p>The trial judge at the DDT awarded \$193,307 in damages under s 15B for the original plaintiff's loss of capacity to care for her grandchildren following her death due to mesothelioma. This was upheld on appeal.</p> <p>The original plaintiff became ill in December 2006 and died in January 2008. Damages were awarded from 2008 up to 2020 when one of the grandchildren turned 16.</p> <p>In the assessment of general damages, the trial judge did not make an allowance for the effects upon the original plaintiff of her lost capacity to care for her grandchildren.</p> <p>The original plaintiff had commenced proceedings before she died which were then continued by her Estate.</p> <p>The NSWCA dismissed the appellant's arguments that the grandchildren were not dependents, the services were not provided to the grandchildren and the need for the services was unreasonable. Held that:</p> <ul style="list-style-type: none"> <li>• the period of time over which the original plaintiff provided care to the children, the frequency with which it was provided and the extensive nature of the care she provided were such that it was legally open to the judge to conclude that her grandchildren were dependent on her;</li> <li>• there is no legal reason why some particular action could not count as the providing of service to more than one person. The fact that several members of the household benefit provides no reason for concluding that it is erroneous in law to say that the person who performed such a service provided a service to one of those household members.<sup>7</sup></li> </ul>
	<p><i>State of NSW v Perez</i> [2013] NSWCA 149 (3 June 2013)</p> <p><i>Perez v State of NSW</i> [2013] NSWDDT 7 (25 July 2013)</p>	<p>The trial judge awarded over \$1.3m to the plaintiff of which a little less than \$1m was awarded under s 15B for domestic services provided to his wife (who suffered a number of serious heart conditions and was unable to drive a car or do heavy lifting) and grandchildren (e.g. looking after them when their parents were at work, putting them to bed, helping with homework, taking them to extracurricular activities etc). The amount was overturned on appeal then remitted to the DDT for re-calculation. A total of \$612,934.08 was awarded (with a little over \$200K for services provided individually, or jointly with his wife, to his grandchildren). A discount of 15% was applied to account for the possibility of a change to the factual scenario, e.g. if both parents were to change their working pattern.</p> <p>Damages under s 15B were calculated from the date when the plaintiff's mesothelioma first manifested itself until he reached the age of 75 (another 6 years at the time of judgment) because, although he was expected to live until 80 years old, it was improbable that he would be able to provide the domestic care past 75 years old notwithstanding his disease.</p> <p>Held that there is a clear intention in the legislation that a "need" must be proved and it must be proved that the need for the hours claimed is reasonable in all the circumstances.</p> <p>NSWCA stated that although "dependents" is limited to family members, the entitlement is not limited to a case where the injured person is either morally or legally responsible to provide such services.</p>
	<p><i>Dionisatos v Acrow Formwork &amp; Scaffolding Pty Ltd</i> [2015] NSWCA 281</p>	<p>Plaintiff with mesothelioma commenced proceedings before his death and were continued thereafter by his estate. The trial judge awarded over \$490K in damages to the estate, including over \$147K under s 15B for the loss of the plaintiff's capacity to provide gratuitous services to his wife (who suffered dementia and other illnesses) for 13 – 24 hours per day. This was after the trial judge deducted over \$200K which was the value of compensation awarded by the Dust Diseases Board to the wife as a spouse "partially dependent" on her husband for support.</p> <p>The damages awarded under s 15B were overturned on appeal and remitted to the DDT for re-calculation. It was held that the trial judge had erroneously made the deduction of \$200K because such compensation was awarded to the wife, not the estate, and was not the "same loss".<sup>5</sup></p>

	TAS	<i>Civil Liability Act 2002 (Tas)</i>	Section 28BA provides for damages for the loss of capacity to provide gratuitous services to another person. <b>Note</b> – this section commenced 1/3/2014.
		Second Reading Speech	The Government has decided to recognise that the loss of ability to gratuitously care for another is a significant loss that should be statutorily recognised.
	SA	<i>Dust Diseases Act 2005 (SA)</i>	Section 9(3) provides that, despite any other Act or law, the Court must, when determining damages in a dust disease action, compensate, as a separate head of damage, any loss or impairment of the injured person's capacity to perform domestic services for another person (s9(3)). <b>Note</b> – this subsection is intended to restore the effect of <i>Sullivan v Gordon</i> .
		<i>Abel v Amaca Pty Ltd Under NSW External Administrators (Formerly James Hardie &amp; Coy Pty Ltd)</i> [2010] SADC 98	Held that damages under s 9(3) were not available for the furniture that the plaintiff could no longer make in pursuing his interest in woodwork. It was held that the provision of furniture to enhance the amenity of the plaintiff's household and those of his children cannot be regarded as a domestic service under the Act.
	ACT	<i>Civil Law (Wrongs) Act 2002 (ACT)</i>	Section 100 provides for damages for loss of capacity to perform domestic services.
		<i>Pasfield v Ugarkovich</i> [2014] ACTSC 10	The plaintiff claimed damages for personal injury arising from a motor vehicle collision. She married and had two children after the collision. Although there was no specific claim under s 100 in the plaintiff's Statement of Claim, the Statement of Particulars claimed as a disability her restricted ability to perform household domestic duties involving cleaning, shopping, cooking, vacuuming and caring for her young daughters. It was held that this was a separate claim to the claim under the heading " <i>Griffith v Kerkemeyer</i> ".  It was held that claims of this kind are inherently vague, general and not suited to precise calculation. For the past, \$10K plus interest was awarded and, for the future, a further \$10K was awarded.
		<i>Becker v Queensland Investment Corporation and Bovis Lend Lease Pty Ltd</i> [2009] ACTSC 134	<i>Griffiths v Kerkemeyer</i> type damages awarded under s 100. This section therefore appears to apply in respect of both types of damages.
	VIC	<i>Wrongs Act 1958 (Vic)</i>	Section 28ID sets out limitations on damages for loss of capacity to provide gratuitous care but does not create a statutory entitlement to such damages. Actions for damages in respect of an injury that is a "dust-related condition" within the meaning of the <i>Administration and Probate Act 1958 (Vic)</i> (i.e. asbestosis, asbestos induced carcinoma, asbestos related pleural diseases and mesothelioma) are <u>excluded</u> from the limitations by s 28IF(2)(a).  Note – ss 28ID to 28IF were inserted in 2003, prior to <i>CSR Limited v Eddy</i> [2005]. <i>The Wrongs Amendment Bill 2015</i> proposes to amend these sections.

		<p><i>Second Reading, Wrongs Amendment Bill 2015 (Vic)</i></p>	<p>The Bill was introduced to the Legislative Assembly on 16 September 2015 and debate was adjourned to 30 September 2015.</p> <p>The Bill implements most of the recommendations made by the Victorian Competition and Efficiency Commission in its report, <i>Adjusting the Balance – Inquiry into Aspects of the Wrongs Act 1958</i>, making it easier for certain types of claimants to access compensation for their injuries while not unduly affecting the availability of insurance at affordable premiums.</p> <p>The Bill will promote the protection of families and children as it re-establishes the right to claim damages for loss of capacity to care for others, which will benefit families where the caregiver is injured and unable to provide care to his or her dependents.</p> <p>In 2002 and 2003, significant reforms were made to Victoria’s personal injuries laws as part of a nationwide tort law reform project in the wake of the collapse of HIH Insurance in 2001. The reforms were designed to restrict some common law rights to compensation for negligence in order to reduce insurers’ liability for damages, with the aim of relieving pressure on insurance premiums and ensuring the availability of insurance. While there is evidence to suggest that the tort law reform project was successful in reducing insurance premiums, there are concerns that the reforms have disproportionately affected the rights of claimants to access damages and some deserving claimants have been denied compensation.</p> <p>The Bill will benefit injured parents and carers by reinstating a limited entitlement to damages for the loss of capacity to care for dependents (Sullivan v Gordon damages). Reinstating this head of damages recognises the value of the work that is performed by parents and carers in the home, and the significant financial stress that can be placed on families as a result of the injury or death of a parent or caregiver.</p>
		<p><i>Explanatory Memorandum, Wrongs Amendment Bill 2015 (Vic)</i></p>	<p>Section 28B will be amended to insert an expanded definition of “dependents” to include any unborn children (including those derived by adoption or otherwise).</p> <p>Section 28ID will be amended to provide a new statutory entitlement to damages for a claimant for any loss of their capacity to provide gratuitous care to the claimant’s dependents, but only in limited circumstances (which are comparable to those set out in s 15B of the <i>Civil Liability Act 2002</i> (NSW) and are intended to provide the court with criteria as to the circumstances in which damages for loss of capacity to provide gratuitous care may be awarded). The VCEC Report recommended that Victoria enact a statutory entitlement to this specific head of damages and, in doing so, allow claimants with the greatest need access to damages.</p> <p>Section 28IF will be amended to the effect that the limitations in s 28ID will <u>not</u> apply to actions for damages in respect of dust-related conditions.</p>

		<p><i>Adjusting the Balance – Inquiry into Aspects of the Wrongs Act 1958</i>, Victorian Competition and Efficiency Commission (Feb, 2014)</p>	<p>See section 6.2 of the Report.</p> <p>Section 28ID does not provide a statutory entitlement to damages for loss of capacity to care for others. This potentially leaves claimants under-compensated for their losses. A number of jurisdictions – NSW, QLD, SA and the ACT – have enacted statutory provisions to partially restore the common law right to damages for loss of capacity to care for others. This reflects the view of the HCA in <i>CSR Ltd v Eddy</i> that the legislature, rather than the courts, should determine whether and in what circumstances these damages should be awarded.</p> <p>The NSW approach provides an example of how a limited entitlement to damages for loss of capacity to care for others could be implemented in the Wrongs Act. The NSW reforms were designed to ensure that damages are payable in the cases of greatest need, such as in the cases where the claimant was providing significant care for dependents with a physical or mental incapacity.</p> <p>The VCEC considers that providing a limited entitlement to compensation for the loss of capacity to care for others will not have an effect on incentives to invest in safety or the price and/or availability of insurance. Evidence from other jurisdictions suggests that it is unlikely that many claims will include this head of damages.</p> <p>Providing an entitlement to damages for the loss of capacity to care for others would address a potential inequity in that persons injured through no fault of their own would be entitled for the loss of their ability to care for family members and others.</p> <p>According to the second reading speech for the Bill that introduced ss 28ID and 28IE, the purposes of limiting the circumstances in which an award of damages may be made is to limit the number of claims for loss of capacity to care for others. The purpose of limiting the level of damages that may be awarded is to prevent excessive awards of damages for these types of claims.</p> <p>The VCEC considers that it is reasonable to conclude that the original intention of the reforms was to limit, but not completely deny, the availability of this type of damages at common law.</p> <p>There is a prima facie equity case to provide a limited entitlement to damages for loss of capacity to care for others, given the original intention of the tort law changes was to limit, but not completely deny, access to this type of damages. The NSW approach will allow the claimants with the greatest need to access damages, while ensuring restrictions are in place to avoid frivolous or speculative claims.</p> <p>According to the LIV, abolition of this head of damages represents a defacto discrimination against some of the most vulnerable members of our community – those who dedicate themselves to their own detriment (loss of wages and free time) to care for the child and disabled persons in the community.</p> <p>The LIV cited anecdotal feedback from NSW practitioners that claims for this head of damages were not common in the public liability and medical indemnity areas and that a flood of claims has not been observed. However, modelling by the Victorian Managed Insurance Authority on the impact on public sector medical indemnity premiums suggested that introducing a statutory entitlement to <i>Sullivan v Gordon</i> damages could be in 5% – 10%. The Insurance Council of Australia submitted that it is not possible to establish a reasonable cost estimate given uncertainties over the specific wording of the legislation and the judicial interpretation of the wording and the limited availability of historical data about this head of damage given it was only established in 1999, limited in 2002-03 and abolished by the HCA in 2005.</p> <p>The VCEC also obtained data from the NSW Self Insurance Corporation (regarding health liability claims) and the Queensland Government Insurance Fund (regarding motor vehicle insurance claims) on the number and value of damages paid for loss of capacity to care for others. The available data suggests very few claims include provision for this head of damages. If a similar impact was observed in Victoria, the VCEC estimates a maximum increase of claims costs of up to \$4.1 m. Given these findings, the VCEC considers this option is likely to improve equity but without an unduly adverse impact on insurance premiums.</p> <p>See section 2 of the report regarding the tort law reform in the early 2000s and insurance markets.</p>
--	--	--	---

	QLD	<i>Civil Liability Act 2003 (Qld)</i>	<p>Section 59A provides for damages for any loss of capacity to provide gratuitous domestic services.</p> <p>The Act <b>does not generally apply</b> to actions for damages in respect of an injury that is a “dust-related condition” (i.e. asbestosis, asbestos induced carcinoma, asbestos related pleural diseases and mesothelioma) according to s 5(1)(c). However, the Act <b>does apply</b> for deciding awards of s 59A damages relating to dust-related condition according to s 5(3).</p> <p><b>Note</b> – s 59A was inserted in 2010, after <i>CSR Limited v Eddy</i> [2005].</p>
	-	Introduction and First Reading Speech, Hon Kate Doust (31/10/13)	<p>Yes.</p> <p>In many cases, a person with an ARC will be providing care for other members of their family. As a result of their illness, they would need to engage others to provide those services. Before the HCA decision in <i>CSR Limited v Eddy</i>, courts in WA have applied <i>Sullivan v Gordon</i>. SA, VIC, QLD and NSW have legislated to reinstate <i>Sullivan v Gordon</i> damages.</p>
	-	ADSA and Slater and Gordon pre-submission (Mar 2015)	<p>Yes.</p> <p>Following the HCA decision in <i>CSR Limited v Eddy</i>, these damages should be reinstated in line with SA, NSW, VIC, TAS and QLD.</p>
	-	Second Reading Speech, Hon Michael Mischin, Attorney General (20/2/14)	<p>Policy implications flowing from the retrospective imposition of an additional head of damages, when none existed in the past and which were not foreseen by the defendants or their insurers, have not been looked at.</p> <p>For drafting consistency, it would be more compatible for the provisions to be included in a bill to amend the <i>Law Reform (Miscellaneous Provisions) Act 1941</i> or the <i>Civil Liability Act</i> rather than a stand-alone piece of legislation.</p> <p>A plaintiff’s loss of the satisfaction of performing gratuitous services is taken into account in assessing the amount of general damages.</p> <p>In <i>CSR Limited v Eddy</i>, the HCA was particularly concerned at the anomaly created by the provider of the service being able to claim for the loss of services they are providing but the recipients of those services being unable to claim for their loss. The HCA was also particularly concerned about the difficulty of defining the limits of any <i>Sullivan v Gordon</i> damages and of assessing an appropriate award.</p>
2. If the inclusion in an award of such a head of damages is recommended:			
(a) whether such a head of damages should be awarded in all personal injury claims or should be confined to claims of a particular class, such as claims relating to the contraction of an asbestos related disease;	NSW	<i>Civil Liability Act 2002 (NSW)</i>	Section 15B applies to all personal injury claims and is not limited to dust-related conditions.
	SA	<i>Dust Diseases Act 2005 (SA)</i>	Applies to “dust disease action” only (s9(3)).
	TAS	<i>Civil Liability Act 2002 (Tas)</i>	<p>Section 28BA applies to “personal injuries” which is defined to include pre-natal injury, impairment of a person’s physical or mental condition and disease (s 3). However, the Act does not apply to civil liability relating to (s 3B(1)):</p> <ul style="list-style-type: none"> <li>• an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct; or</li> <li>• an award of damages for personal injury or death where the injury or death concerned resulted from smoking or other use of tobacco products.</li> </ul>
	ACT	<i>Civil Law (Wrongs) Act 2002 (ACT)</i>	<p>Section 100 applies to an injury suffered because of a “wrong” which is defined to mean an act or omission that gives rise to a liability in tort or amounts to a breach of a contractual duty of care that is concurrent and coextensive with a duty of care in tort (s 100(3)).</p> <p><b>Note</b> – damages recoverable for the benefit of a dead person’s estate do not include damages under s 100 for loss of capacity to perform domestic services (s 16(3)(c)).</p>

	VIC	<i>Wrongs Act 1958</i> (Vic)	If the <i>Wrongs Amendment Bill 2015</i> is passed, s 281D(1) will create a new entitlement to “personal injury damages” for loss of capacity to provide gratuitous care to dependents. “Injury” is defined in s 28B to mean “personal or bodily injury” including pre-natal injury, psychological or psychiatric injury, disease and aggravation, acceleration or recurrence of an injury or disease.
	QLD	<i>Civil Liability Act 2003</i> (Qld)	Section 59A applies in relation to an award of “personal injury damages”. “Personal injury” is defined to mean fatal injury, pre-natal injury, psychological or psychiatric injury and disease (Schedule 2) and includes a “dust related condition”: s 5(3).
	-	ADSA and Slater and Gordon pre-submission (Mar 2015)	<i>Sullivan v Gordon</i> damages should be available in all personal injury claims where the injury prevents the plaintiff from providing gratuitous personal or domestic services for another (unless specifically excluded by another Act).
	-	Second Reading Speech, Hon Michael Mischin, Attorney General (20/2/14)	There is no logical reason why the Bill is restricted to asbestos cases when they could be applied to those afflicted by other illnesses. There may be a case for confining it to ARC for pragmatic or public policy reasons but these reasons are unclear.
(b) the criteria that ought to be applied in the assessment of such a head of damages including, but not limited to:	NSW	<i>Civil Liability Act 2002</i> (NSW)	<p>Damages may be awarded if (s 15B(2)):</p> <ul style="list-style-type: none"> <li>the claimant provided the services to the dependents before their injury;</li> <li>the dependents were not (or will not be) capable of performing the services themselves due to their age or physical or mental incapacity;</li> <li>there is a reasonable expectation that, but for the injury, the claimant would have provided the services for at least 6 hours per week and for a period of at least 6 consecutive months; and</li> <li>there will be a need for the services to be provided for those hours per week and that consecutive period of time and that need is reasonable in the circumstances.</li> </ul> <p>A limit on the amount of damages that may be awarded is also imposed (s 15B(4)).</p> <p>Damages may not be awarded if the claimant could recover damages for gratuitous attendant care services to the claimant which also resulted in the claimant’s dependents being provided with the domestic services that the claimant lost the capacity to provide (s 15B(10)).</p>
	TAS	<i>Civil Liability Act 2002</i> (Tas)	<p>Damages may be awarded if (s 28BA(2)):</p> <ul style="list-style-type: none"> <li>the claimant was, before the loss of capacity occurred, providing the services to the other person for more than 6 hours per week and for more than 6 consecutive months and it was necessary for the services to be provided to the other person; or</li> <li>the other person was, before the injury occurred, an unborn child of the person; and</li> <li>the other person would have been (if born before the injury in the case of an unborn child) entitled to recover for loss of the claimant’s services if the claimant had been killed rather than injured;</li> <li>there is a reasonable expectation that, but for the loss of capacity, the claimant would have provided those services to the other person, after the injury, for more than 6 hours per week and more than 6 consecutive months; and</li> <li>the other person will need the services for more than 6 hours per week and more than 6 consecutive months and the need is reasonable in the circumstances.</li> </ul> <p>A limit on the amount of damages that may be awarded is also imposed (s 28BA(3)).</p>

	ACT	<i>Civil Law (Wrongs) Act 2002 (ACT)</i>	<p>Damages may be awarded if (s 100(1)):</p> <ul style="list-style-type: none"> <li>the injured person's capacity to perform domestic services has been impaired or lost; and</li> <li>the injured person might reasonably have been expected to perform those services for his or her household if they had not been injured.</li> </ul> <p>It does not matter if (s 100(2)):</p> <ul style="list-style-type: none"> <li>the injured person performed the services for the benefit of other members of the household or solely for his or her own benefit;</li> <li>the injured person was not paid to perform the services;</li> <li>the injured person has not been, and will not be, obliged to pay someone else to perform the services; or</li> </ul> <p>the services have been, or are likely to be, performed (gratuitously or otherwise) by other people (whether members of the household or not).</p>
	VIC	<i>Wrongs Act 1958 (Vic)</i>	<p>If the <i>Wrongs Amendment Bill 2015</i> is passed, the limitations in the new s 28ID will apply to personal injuries, excluding dust-related conditions and injuries resulting from smoking, other use of tobacco products or exposure to tobacco smoke according to the new s 28IF(2).</p> <p>Under the new s 28ID, for an injury other than a dust-related condition, damages may only be awarded if:</p> <ul style="list-style-type: none"> <li>the claimant provided care to the dependents before the time that the liability in respect of which the claim is made arose;</li> <li>the claimant's dependents were not, or will not be, capable of providing the care themselves because of their age or their physical or mental incapacity;</li> <li>there is a reasonable expectation that, but for the injury, the gratuitous care would have been provided to the claimant's dependents for at least 6 hours per week and for at least 6 consecutive months; and</li> <li>there will be a need for the care to be provided for those hours per week and that consecutive period of time and that need is reasonable in all the circumstances.</li> </ul> <p>A limit on the amount of damages that may be awarded is also imposed (s 28IE).</p>
	QLD	<i>Civil Liability Act 2003 (Qld)</i>	<p>For a personal injury, damages may be awarded if (s 59A(2)):</p> <ul style="list-style-type: none"> <li>either the injured person died as a result of their injuries, or, general damages are assessed at the amount prescribed under s 58 (for loss of consortium or loss of servitium) or more;</li> <li>at the "relevant time" (which is defined in s 59A(5) as when the relevant injury happened or, if the symptoms of the relevant injury were not immediately apparent when it happened, when the nature and extent of the injury becomes known), the "recipient" was a person who resided at the injured person's usual residence, or, an unborn child;</li> <li>before the relevant time, the injured person provided the services to the recipient, or, would have provided services to the recipient had the recipient been born;</li> <li>the recipient was, or will be, incapable of performing the services personally because of their age or physical/mental incapacity;</li> <li>there is a reasonable expectation that, if not for the relevant injury, the injured person would have provided the services to the recipient for at least 6 hours a week and for a period of at least 6 months; and</li> <li>there will be a need for the services for at least 6 hours a week and for a period of at least 6 months and the need is reasonable in all the circumstances.</li> </ul>

	-	ADSA and Slater and Gordon pre-submission (Mar 2015)	Courts have, before <i>CSR Limited v Eddy</i> and after, been able to appropriately quantify <i>Sullivan v Gordon</i> damages and limit the damages apportioned to the loss. However, the following factors may be legislated to prescribe scope and threshold (which are similar to the criteria in NSW, VIC and QLD):  (a) the services must be provided to a dependent (as defined); (b) the services must be gratuitous, i.e. no payment; (c) the services must be provided before the time of liability arose; (d) the dependents must not be capable of performing the services themselves due to their age, physical or mental incapacity; (e) there must be reasonable expectation that, but for the injury, the claimant would have provided the services for at least 6 hours per week for at least 6 months; (f) there must be a need for the services to be provided for those hours per week and that need, in addition to the consecutive period of time, must be reasonable.
	-	Second Reading Speech, Hon Michael Mischin, Attorney General (8/5/14)	Consideration needs to be given to the "discount rate"* (fixed at 6% for personal injury claims) to this head of damages.  * The reduction of expected total future losses and expenses to calculate their present value (i.e. to take into account income received from investing damages for future economic loss awarded as a lump sum).
(i) the character of the services which should attract compensation;	TAS	<i>Civil Liability Act 2002</i> (Tas)	"Gratuitous services" is defined to mean services of a domestic nature or services relating to nursing or attendance provided to a person for which that person does not pay or is not liable to pay (s 3).
	ACT	<i>Civil Law (Wrongs) Act 2002</i> (ACT)	"Domestic services" which is not defined by s 100(2) state that it does not matter: <ul style="list-style-type: none"><li>• whether the injured person performed the services for the benefit of other members of the household or solely for his or her own benefit;</li><li>• that the injured person was not paid to perform the services;</li><li>• that the injured person has not been, and will not be, obliged to pay someone else to perform the services; or</li><li>• that the services have been, or are likely to be, performed (gratuitously or otherwise) by other people (whether members of the household or not).</li></ul>
	SA	<i>Dust Diseases Act 2005</i> (SA)	"Domestic services" but not defined (s 9(3)).
	NSW	<i>Civil Liability Act 2002</i> (NSW)	"Gratuitous domestic services" is defined to mean services of a domestic nature for which the person providing the service has not been paid or is not liable to be paid (s 15B(1)).
	VIC	<i>Wrongs Act 1958</i> (Vic)	"Gratuitous care" but not defined.
	QLD	<i>Civil Liability Act 2003</i> (Qld)	"Gratuitous domestic services" is defined to mean services of a domestic nature for which there has been, and will be, no payment or liability to pay.
(ii) the character of the relationship between the plaintiff and the recipients of the services which the plaintiff is prevented from providing;	TAS	<i>Civil Liability Act 2002</i> (Tas)	"Another person" is not defined (s 28BA).
	SA	<i>Dust Diseases Act 2005</i> (SA)	"Another person" is not defined (s 9(3)).
	NSW	<i>Civil Liability Act 2002</i> (NSW)	"Dependents" is defined to include a spouse, de facto partner, child, grandchild, sibling, uncle, aunt, niece, nephew, parent or grandparent, any other person who is a member of the claimant's household and any unborn child of the claimant (s 15B(1)).
	ACT	<i>Civil Law (Wrongs) Act 2002</i> (ACT)	Domestic services reasonably expected to be performed "for his or her household", but not defined (s 100(1)). It does not matter whether the injured person performed the domestic services for the benefit of other members of the household or solely for his or her own benefit (s 100(2)(a)).

	VIC	<i>Wrongs Act 1958 (Vic)</i>	If the <i>Wrongs Amendment Bill 2015</i> is passed, the definition of “dependents” in s 28B will be amended to mean any persons who are wholly, mainly or in part dependent on the claimant at the time that the liability in respect of which the claim is made arises and any unborn children of the claimant (including unborn children derived by adoption or otherwise), at the time that the liability in respect of which the claim is made arises and who are born after that time.
	QLD	<i>Civil Liability Act 2003 (Qld)</i>	“Recipient” was a person who resided at the injured person’s usual residence, or, an unborn child of the injured person: (s 59A(2)(b).
(iii) whether regard should be had to the likelihood that the services would have been provided by the plaintiff;	NSW	<i>Civil Liability Act 2002 (NSW)</i>	Damages may be awarded if, amongst other things (s 15B(2)): <ul style="list-style-type: none"> <li>• the claimant provided the services to the dependents before the time that the liability in respect of which the claim is made arose;</li> <li>• there is a reasonable expectation that, but for the injury, the claimant would have provided the services for at least 6 hours per week for a period of at least 6 consecutive months; and</li> <li>• there will be a need for the services to be provided for those hours per week and that consecutive period of time and that need is reasonable in the circumstances.</li> </ul>
	TAS	<i>Civil Liability Act 2002 (Tas)</i>	Damages may be awarded if, amongst other things (s 28BA(2)): <ul style="list-style-type: none"> <li>• the claimant was, before the loss of capacity occurred, providing the services to the other person for more than 6 hours per week and for more than 6 consecutive months and it was necessary for the services to be provided to the other person; or</li> <li>• there is a reasonable expectation that, but for the loss of capacity, the claimant would have provided those services to the other person, after the injury, for more than 6 hours per week and more than 6 consecutive months; and</li> <li>• the other person will need the services for more than 6 hours per week and more than 6 consecutive months and the need is reasonable in the circumstances.</li> </ul>
	ACT	<i>Civil Law (Wrongs) Act 2002 (ACT)</i>	Damages may be awarded in relation to domestic services that the injured person “might reasonably have been expected to perform” for his or her household if they had not been injured (s 100(1)).
	VIC	<i>Wrongs Act 1958 (Vic)</i>	If the <i>Wrongs Amendment Bill 2015</i> is passed, damages may only be awarded under the new s 28ID if: <ul style="list-style-type: none"> <li>• the claimant provided care to the dependents before the time that the liability in respect of which the claim is made arose;</li> <li>• the claimant’s dependents were not, or will not be, capable of providing the care themselves because of their age or their physical or mental incapacity;</li> <li>• there is a reasonable expectation that, but for the injury, the gratuitous care would have been provided to the claimant’s dependents for at least 6 hours per week and for at least 6 consecutive months; and</li> <li>• there will be a need for the care to be provided for those hours per week and that consecutive period of time and that need is reasonable in all the circumstances.</li> </ul>
	QLD	<i>Civil Liability Act 2003 (Qld)</i>	For a personal injury other than a dust-related condition, damages may be awarded if (s 59A(2)): <ul style="list-style-type: none"> <li>• before the injury, the injured person provided the services to the recipient (or would have provided the services if the recipient was then an unborn child);</li> <li>• there is a reasonable expectation that, if not for the relevant injury, the injured person would have provided the services to the recipient for at least 6 hours a week and for a period of at least 6 months; and</li> <li>• there will be a need for the services for at least 6 hours a week and for a period of at least 6 months and the need is reasonable in all the circumstances.</li> </ul>

(iv) whether damages should be awarded only where expenditure has been incurred in consequence of the plaintiff being prevented from providing a particular service;	-	ADSA and Slater and Gordon pre-submission (Mar 2015)	No. Damages should not be awarded only where expenditure has been incurred given the domestic and familiar nature of services provided.
(c) whether such damages should be awarded only in respect of services which the plaintiff was prevented from providing during his or her lifetime or whether, in the case of injury or disease resulting in death, damages should be awarded for the 'lost years', i.e. for the years in which the services might have been provided after the plaintiff's actual death until the date to which he or she was expected to have lived had the injury or disease not occurred.	NSW	<i>Civil Liability Act 2002</i> (NSW)	Section 15B(2) provides that damages can be awarded for "any" loss of the claimant's capacity to provide gratuitous domestic services. <b>Note</b> – clause 15B(6) refers to the legal representative of a deceased claimant.
		(re Dawson) <i>Novek v Amaca Pty Limited</i> [2008] NSWDDT 12 (12 May 2008)	Yes – the original plaintiff died in January 2008. Damages were awarded under s 15B from 2008 until 2020 when one of her grandchildren reached the age of 16 because it was found that she would have continued to care for her grandchildren during this time, but for her illness. No discounts were made for the vicissitudes of life.
		<i>Perez v State of NSW</i> [2013] NSWDDT 7 (25 July 2013)	No – damages were awarded up to the age of 75 because it was improbable that the plaintiff would continue providing domestic care to his grandchildren until his expected death at the age of 80.
	SA	<i>Dust Diseases Act 2005</i> (SA)	Possible given skeletal nature of clause s 9(3), i.e. no restrictions imposed?
	TAS	<i>Civil Liability Act 2002</i> (Tas)	Unclear.
	ACT	<i>Civil Law (Wrongs) Act 2002</i> (ACT)	<b>Note</b> – damages recoverable for the benefit of a dead person's estate do not include damages under s 100 for loss of capacity to perform domestic services (s 16(3)(c)).
	QLD	<i>Civil Liability Act 2003</i> (Qld)	Allowed because s 59A provides for "any" loss of the person's capacity to provide gratuitous domestic services?
	WA	<i>Fatal Accidents Act 1959</i> (WA) "Fatal Accidents Report", Project No 66, WA LRC (1978)	Allows "relatives" (as defined) of a person who dies due to a wrongful act, neglect or default, to maintain an action and recover damages for medical and funeral expenses incurred, in addition to "such damages" as the court thinks, proportioned to the injury resulting from the death to the parties for whom the action is brought. Although there are no express limitations in the legislation, the latter has been interpreted by the Courts to mean damages for loss of economic or material advantages which the deceased would have given the person had they have lived (i.e. not non-economic loss such as grief or the loss of companionship or love). In certain circumstances, is not necessary for the deceased to have commenced the action before the limitation period expired (i.e. they were not aware of the physical cause of the injury, they were not aware that it was attributable to the conduct of another person or they were unable to establish that person's identity).  The normal method of assessment of damages by the courts in WA is to assess the financial advantages that the dependents of the deceased were receiving at the time of death and then multiply it by the joint span of the deceased's prospective working life and the claimants' dependency. A percentage is then deducted for contingencies such as ill health, unemployment of the wage earner or re-marriage in the case of a dependent widow. The gains to the dependent resulting from the deceased's death are also deducted (i.e. they only receive damages for the difference between their financial loss and their financial gain).
HCA	<i>CSR Limited v Eddy</i> [2005] 226 CLR 1	The HCA held at [69] that, since the Australian common law does not recognise <i>Sullivan v Gordon</i> recovery in relation to the period before the plaintiff's death, it does not do so thereafter either.	
	-	ADSA and Slater and Gordon pre-submission (Mar 2015)	Yes. <i>Sullivan v Gordon</i> damages should be awarded for the "lost years" after the plaintiff's death. These types of damages are already claimable by the surviving dependent in estate matters under the Law Reform (Miscellaneous Provisions) Act 1941 (for losses between onset of injury and death) and the Fatal Accidents Act 1959 (for loss of expectation of future services after death). If Courts are limited to making an award for services the plaintiff was prevented from providing during their lifetime, it would leave a position where a claim would be worth more if made by a dependent after death.



LAW REFORM COMMISSION  
*of*  
WESTERN AUSTRALIA