

Limitation and Notice of Actions: Latent Disease and Injury

Terms of Reference

In June 1982 the Commission was asked to examine and report on the law relating to the limitation and notice of actions as it applies to civil actions brought by or in respect of persons who contract a disease or suffer an injury that remains latent for a significant period of time.

Background of Reference

The reference arose as a result of community concern that sufficient legal recourse be available to persons suffering asbestos-related diseases. It followed a spate of diagnoses of individuals who had resided in Wittenoom and other asbestos mining areas in Western Australia. The Attorney-General requested that the Commission give urgent consideration to the issue of latent personal injury and disease in the context of limitation of actions. The Commission had already received a general reference to review the law relating to limitation and notice of civil actions, referred in 1972. Because of the urgency of this new reference, the Commission decided to split the reference into two parts, assigning latent injury and disease to Part I and the broader reference to Part II.

Taking legal action for latent personal injury becomes a problem when statutory limitation periods have run before the plaintiff becomes aware that he or she has suffered an actionable injury. For example, a sufferer of a lung disease who was not diagnosed until many years after the act of damage had first occurred was not in a position to take a common law action because of the operation of restrictive limitation periods. In 1964, in the case of *Cartledge & Others v Jopling & Sons Ltd*,¹ the House of Lords held that a person's cause of action runs from the time the injury occurred, not from the time that it became manifest. As a result the *Limitation Act 1963* (UK) was amended to make provision for the running of the limitation period to be postponed in certain cases. Following that lead, equivalent Acts in Australian jurisdictions were amended to allow the extension of the limitation period on various grounds. The Western Australian Act was not amended in this regard.

Nature and Extent of Consultation

The urgency of the project made it impossible for the Commission to follow its usual procedure of issuing a working paper and inviting public comment before finalising its report. Nevertheless, in order to secure as much comment as possible, the Commission placed an advertisement in *The West Australian* calling for submissions from members of the public, and also requested submissions from a number of individuals and organisations with a special interest or expertise in the area. The Commission further distributed a draft of the report to these individuals and organisations for urgent comment.

The Commission received preliminary submissions from organisations and individuals, including the Asbestos Disease Society (WA), the Trades and Labor Council of Western Australia and the State Government Insurance Commission. Seven comments on the draft report were received, including comments from Sir Francis Burt (the then Chief Justice of Western Australia), Judge DC Heenan (as he then was) in his capacity as Chairman of Judges in the District Court, Judge GT Sadlier, and the Motor Vehicle Insurance Trust.

In preparing its final report, the Commission had regard to limitation legislation in New South Wales, Queensland, Victoria, South Australia, Tasmania and the United Kingdom. The Commission delivered its final report in October 1982.²

¹ [1963] AC 758.

² Law Reform Commission of Western Australia, *Limitation and Notice of Actions: Latent Disease and Injury*, Project No 36(I) (1982).

Recommendations

The Commission recommended that the limitation period for all personal injury claims should continue to be six years (with certain exceptions) but that this period should not apply where it was unjust that it should do so.

The Commission recommended that this question be determined by the court in light of all the circumstances of the case, including:

- The reasons why the plaintiff did not commence the action within the statutory period, including, where applicable, that there was a significant period of time after the cause of action accrued during which the plaintiff neither knew nor ought reasonably to have known that he or she had suffered the injury giving rise to the cause of action.
- The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he or she may have received.
- The extent to which the plaintiff acted promptly and reasonably once he or she knew that the alleged act or omission of the defendant might be capable at that time of giving rise to an action for damages.
- The conduct of the defendant after the cause of action accrued relevant to the commencement of proceedings by the plaintiff.
- The extent to which the defendant may be prejudiced in defending the action, other than relying on a defence of limitation, if the limitation period does not apply.
- Alternative remedies available to the plaintiff if the limitation period applies.
- The duration of any disability of the plaintiff whether arising before or after the cause of action accrued.

The Commission further recommended that in making a determination that the limitation period does not apply, the court may impose such conditions as it deems necessary. Other consequential recommendations as to transitional and procedural matters were also made.³

Legislative or Other Action Undertaken

The *Limitation Act 1935* (WA) ("the Act") was amended by the insertion of s 38A⁴ to cater for "a latent injury that is attributable to the inhalation of asbestos". Consequential amendments were also made to s 6 of the *Crown Suits Act 1947* (WA), s 7 of the *Fatal Accidents Act 1959* (WA) and s 4 of the *Law Reform (Miscellaneous Provisions) Act 1941* (WA).

Currency of Recommendations

The 1983 amending Act was narrow in light of the Commission's recommendations. Western Australia is the only Australian jurisdiction that has limited its equivalent legislation to a particular kind of latent disease. The general discussion paper prepared in 1992 by the Commission on limitation periods contains strong argument for further reform in this area.⁵

To the extent that the 1983 amending Act did not implement the wider reforms recommended by the Commission, the recommendations remain current.

³ Ibid paras 4.36–4.53.

⁴ Inserted by the *Acts Amendment (Asbestos Related Diseases) Act 1983* (WA).

⁵ Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Discussion Paper, Project No 36(II) (1992).

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Action Required

Ideally, the Act should be repealed and replaced with one that addresses the broader recommendations for reform of this difficult area of law. Such recommendations for reform are dealt with exhaustively in the Commission's final report on the general limitation and notice of actions reference published in 1997.⁶

However amendments to the current Act in terms of the above recommendations could be fast-tracked through Parliament when the straightforward nature of the reforms is considered in light of the factors supporting the priority assessment below.

Priority – High

This priority assessment is based upon the following:

- (a) the logical inconsistency and lack of policy basis in protecting the position of a certain category of litigants with a particular type of loss;
- (b) to ensure that the quality of administration justice is maintained; and
- (c) the need to achieve uniformity with other jurisdictions.

There is a competing consideration, the “flood of litigation” argument. However this has not been the experience of other jurisdictions where there has been no discernible increase in the rate of litigation.⁷ It is not the case that extensions of time will be as of right, but rather they will be at the discretion of the court. The proposed reform will benefit persons other than those who suffer a latent disease or injury, and it will be possible for a court to disregard the limitation period in any personal injury case, provided it considers it just to do so.

⁶ Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Project No 36(II) (1997).

⁷ Western Australia, *Parliamentary Debates*, Legislative Assembly, 30 April 1997 (Ms A McTiernan, Opposition Member for Armadale).