

Limitation and Notice of Actions

Terms of Reference

In 1972 the Commission was asked to examine and report on the law relating to the limitation and notice of civil actions, and incidental matters.

Background of Reference

The law of limitation of actions deals with the rules governing the period of time within which a person must commence civil proceedings. In Western Australia, these periods of time vary, depending upon the cause of action.¹ The *Limitation Act 1935* (WA) ("the Act") is the major source of law on this topic. All common law jurisdictions have rules prescribing the period within which civil actions must be commenced. The reasons for having limitation periods are:

- (a) to protect defendants from claims relating to incidents which occurred many years before and about which they, and their witnesses, may have little recollection or no longer have records;
- (b) the public interest in having disputes resolved as quickly as possible and as close in point of time to the events upon which they are based so that recollections of witnesses are as clear as possible; and
- (c) to enable persons to arrange their affairs on the basis that a claim can no longer be made against them after a certain time.

The Western Australian Parliament passed the Act in 1935, but in no sense did this represent any reform of the law. The intention behind it was simply to consolidate the statutory limitation provisions in force at that time.

Nature and Extent of Consultation

The Commission engaged Mr Nicholas Mullany to prepare a research paper to inform the Commission of relevant issues and assist in the preparation of a discussion paper for general distribution. The research paper and a draft version of the discussion paper were circulated to, and commented upon by the Law Society of Western Australia, the Hon Justice P L Seaman of the Supreme Court of Western Australia and Mr J F Young from the Western Australian Crown Law Department. In February 1992, the Commission issued the finalised discussion paper inviting submissions from interested parties.

Submissions were received from the Law Reform Commission of British Columbia, the Law Reform Committee of South Australia, the Law Society of Western Australia, the Western Australian Aids Council and a number of legal practitioners and members of the public. The final report was delayed due to the vacation of office of two Commissioners which prevented the necessary quorum endorsement of the report. The report was revised and published following the appointment of new Commissioners in 1997.²

Recommendations

The Commission's primary recommendations included that:

- The Act be repealed and replaced by an entirely new Act which adopts a uniform approach to all causes of action.
- All claims (with some minor exceptions) should be subject to two limitation periods: a "discovery period" and an "ultimate period".

¹ See the list of limitation periods contained in *Causes of Action and Time Limitations* (1985), a seminar presented by the Law Society of Western Australia.

² Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Project No 36(II) (1997).

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- All claims should be time-barred upon expiry of either the discovery period or the ultimate period,³ subject to a judicial discretion to permit the action to proceed in exceptional cases.
- The discovery period should expire if the claimant does not commence proceedings within three years after the date on which the plaintiff first knew, or ought to have known that:
 - (a) The injury in respect of which he or she brings the proceedings had occurred;
 - (b) The injury was attributable to the conduct of the defendant; and
 - (c) Assuming liability on the part of the defendant, the injury warrants the commencement of proceedings.
- The discovery period should replace the existing rules on the limitation period running from the time of accrual of the action.⁴
- All claims should be subject to an ultimate limitation period that would expire if the claimant does not commence proceedings 15 years after the claim arose.

In sexual abuse and latent injury cases, a plaintiff's claim is vulnerable to defeat, irrespective of implementation of the above reforms. For this reason the Commission recommended that:

- The legislation provide for a very narrow discretionary power that enables the court to disregard either the discovery period or the ultimate period in appropriate cases.
- In the exercise of its discretion the court may take all the circumstances of the case into account, including factors such as:
 - (a) The lengths and reasons for the delay on the part of the plaintiff;
 - (b) The extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;
 - (c) The nature of the plaintiff's injury; and
 - (d) The position of the defendant, including the extent to which the defendant could have been expected to be aware that claims might arise long after the acts or omissions in question.

The Commission also made a wide range of consequential recommendations that covered such matters as the onus of proving limitation periods, common law actions, equitable claims, actions relating to land and survival of actions in cases of wrongful death. The consequential recommendations essentially have the effect of bringing specialised areas of law into line with the Commission's major recommendations. Two of the more significant of those recommendations involve the retrospective operation of the new Act and limitation periods for actions against the Crown and local government authorities.

The Commission made three recommendations in relation to the retrospective operation of the Act:

- In cases where the cause of action has accrued at the time the new Act comes into force, the action should be regarded as having been brought within time if it complies with the requirements of either the old or the new law.

³ If the running time for the bringing of actions was to be regulated only by the discovery period, then defendants could remain vulnerable to a claim for a potentially unlimited length of time. See, eg, *Duke v Royalstar* [2001] WASCA 273. (Unreported, 7 September 2001), where the Full Court concluded that there is no limitation period in relation to a claim for specific performance. This was the view of the Commission in its report at para 13.12. In this case the vacuum in the Act was filled by resort to the doctrine of laches and the application of general principles of prejudice and delay.

⁴ This recommendation is based on the *Limitations Act 1996* (Alberta). The Commission recommended that the proposed Western Australian Act should adopt a definition of "injury" in broadly similar terms to the Alberta Act, which provides that "injury" means personal injury, property damage, economic loss, non-performance of an obligation or, in the absence of any of these, the breach of a duty. The Commission recommended that the definition should make clear when the discovery period will begin to run in cases where there is more than one potential injury. It was further recommended that "personal injury" should include all cases of trespass to the person, and that "breach of duty" should include trespass to land or goods, and conversion or detention of goods.

- In respect of causes of action for personal injury, the provisions of the new Act should apply whether or not the action was barred by the provisions of the previous law, but in all other cases, the Act should not operate to revive a statute barred cause of action.
- The new Act should not apply retrospectively to cases that have already been resolved, either by a court judgment or by settlement.

With respect to actions against the Crown, s 6 of the *Crown Suits Act 1947* (WA) provides that no right of action lies against the Crown unless the plaintiff gives notice in writing to the Crown Solicitor within three months or as soon as practicable (whichever is the longer) and within one year of the day on which the cause of action accrued. Similarly, s 47A of the *Limitation Act 1935* (WA) provides that a one-year limitation period applies for actions against public authorities. There is no practical difference between the wording of the two provisions, they simply have application to different defendants.

The Commission noted that Western Australia was alone in retaining special limitation and notice provisions for the Crown and public authorities. Accordingly, the Commission recommended that the special limitation period and notice requirements in s 6 of the *Crown Suits Act 1947* should be abolished and rules that apply in actions against the Crown and local authorities should be the same as those that apply in actions against all defendants. The host of detailed rules with which a plaintiff must comply before a writ can be served only apply to government agencies (no private company or individual must be given such notice before a writ is served) and as such, the failure to give notice has become cause for a great deal of litigation. This dimension of unfairness and denial of justice to certain litigants created by the present regime has been noted by Parliament.⁵

Legislative or Other Action Undertaken

In 1983 the Act was amended to allow asbestosis and mesothelioma sufferers to avoid the six year limitation period for industrial diseases with long latency periods. These amendments were made in response to the Commission's report on Part I of this project⁶

There has been no substantive legislative action to date in respect of Part II.

Currency of Recommendations

The recommendations remain current.

Action Required

Implementation of the Commission's comprehensive recommendations will require that the Act be repealed and replaced.

Priority – High

Although Western Australia's approach to reform in this area has been dilatory, it is now in the enviable position of being able to learn from the experience of other jurisdictions in the drafting of legislation to implement these important reforms.⁷

⁵ Western Australia, *Parliamentary Debates*, Legislative Assembly, 30 April 1997 (Ms A McTiernan, Opposition Member for Armadale).

⁶ Law Reform Commission of Western Australia, *Limitation and Notice of Actions: Latent Disease and Injury*, Project No 36(I) (1982).

⁷ See Queensland Law Reform Commission *Review of the Limitation of Actions Act 1974* Report No 53 (1998), which contains a comparative table showing how the existing law would be changed by the implementation of the Commission's recommendations, and New Zealand Law Reform Commission, *Limitation of Civil Actions*, Preliminary Paper, Report No 39 (2000), which contains a

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Most common law jurisdictions have adopted modern statutes based on the reformed 1939 English legislation. The Western Australian enactment remains a verbatim consolidation of provisions from a range of previous English statutes dating from 1623 to 1878. The following difficulties attend this:

- (a) the archaic drafting style;
- (b) the use of obsolete legal concepts and the perpetuation of out-of-date distinctions;⁸ and
- (c) the failure to reflect modern legal distinctions in the law of obligations.

Implementation of the Commission's recommendations would eliminate the maze of distinctions that currently govern the law of limitation in Western Australia, and would simplify the law so that all actions have the same limitation period. The recommendations regarding the defined "discovery period" and judicial discretion would provide a more just regime for latent injury, sexual abuse victims⁹ and other such plaintiffs whose claims are presently barred.

comparative summary of the current legislative position in a number of common law jurisdictions. See also Law Commission for England and Wales, *Item 2 of the Seventh Programme of Law Reform: Limitation of Actions*, Report No 270 (2001), for a recent and comprehensive review of the law in Great Britain including a draft Limitation Bill with explanatory notes.

⁸ See, eg, *State Government Insurance Commission v Teal* (1990) 2 WAR 105 where Commissioner Williams QC concluded that 'the reasoning process necessary to reach a conclusion to the question whether s 38 (1)(e)(i) applies, involving consideration of forms of action abolished more than a century ago, highlights the need for a thoroughgoing review of the *Limitation Act 1935*'.

⁹ See A Beck 'Limitation of Sexual Abuse Claims' (1999) *New Zealand Law Journal* 329 for an analysis of the approach of the New Zealand Court of Appeal to sexual abuse cases under the *Limitation Act 1950* (NZ); see also J Mosher 'Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest' (1994) 44(2) *Toronto Law Journal* 169.