STANDING COMMITTEE ON LEGISLATION

LIMITATION BILL 2005 AND LIMITATION LEGISLATION AMENDMENT AND REPEAL BILL 2005

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
ON FRIDAY, 2 SEPTEMBER 2005

SESSION 5

Members

Hon Graham Giffard (Chairman)
Hon Giz Watson (Deputy Chairman)
Hon Ken Baston
Hon Peter Collier
Hon Sally Talbot

Hearing commenced at 2.04 pm

YOUNG, MR JOHN
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The CHAIRMAN: Good afternoon. I am the chairman of the committee, as you have probably heard a couple of times today, and on behalf of the committee I welcome you and thank you for attending today's proceedings to assist the committee with its inquiry. You will have seen a document entitled "Information for Witnesses". Have you read and signed the document?

Mr Young: Yes, I have.

The CHAIRMAN: The discussions today are public and are being recorded, and a transcript will be provided to you. Please note that until such time as the transcript of your public evidence is finalised, the transcript should not be made public. I advise you that premature publication of the transcript or inaccurate disclosure of public evidence may constitute a contempt of Parliament and may mean that material published or disclosed is not subject to parliamentary privilege. If you wish to make a confidential statement, you can ask the committee to consider hearing your statement in private. If the committee agrees, the public will be asked to leave the room before we continue. You will have heard the four witnesses today. We have some issues that we have identified in the bill and the debates and in responding to the document that was sent to us by you. We thought that the best way to proceed would be to invite you to respond to the issues that have been identified so far today. In the time that is left, we will endeavour to ask the questions that we have prepared for you. I invite you to talk to us about anything you think arises from what you have heard today.

Mr Young: Certainly. There may be some difficulty picking through those but I have noted them. Perhaps I could just make an opening observation. I have been involved in limitation law, sometimes reluctantly, for a long, long time. Certainly the current act is undeniably in need of replacement. As to what scheme you implement to replace it, the issue is extraordinarily complex, both technically and, in many ways more importantly from your perspective, in policy terms. The discussion paper released in May 2002, I think, deals with some of the fundamentals of the different approaches that can be adopted. The approach ultimately adopted in the limitation bill tries, as any limitation bill has to do, to balance fairness and the desirability of ensuring that someone who is wronged can have that wrong remedied, against the desirability of certainty and finality. The difficulties that are inevitably associated with the lapse of time have really been attempted to be resolved by a scheme that basically tries to have the accrual date - ie, the date from which time runs - made as certain and as objectively identifiable as possible to achieve certainty at that level, and then to have provisions for extensions by the court in so far as possible fairly defined circumstances, again to give certainty and as much guidance as possible to the courts. There has been reference a few times to the desirability of perhaps having some broader discretions given to the courts in some provisions. The bill currently has tried as far as possible, and is designed, to minimise the uncertainty and the discretion, the view being that many of the discretionary considerations are ultimately policy ones as to whether in a particular case there should be an extension and in another case there should not, and that that decision as far as possible should lie with Parliament rather than with the courts. That starting point has obviously got considerable relevance to how one responds to some of the comments that have been made.

Perhaps I can just run through my notes as far as possible and just pick up some of the issues that were raised. The first three people who were present raised issues. I think some of it was

retrospectivity and a concern to remedy wrongs which they might have felt they had suffered in the past and for which they have been unable to obtain a remedy because of the lapse of limitation periods. This bill fundamentally is not retrospective. That is for the reason, I think consistently with most pieces of legislation, that people generally ordered their affairs, paid their insurance premiums and put in place record retention arrangements, all based on the previous legislation. That legislation was very strong in saying what was the limitation period, and in almost no circumstances, apart from those relating to children, was there the potential for extension. The current bill has several retrospective provisions. Effectively, the provision dealing with the time when a cause of action becomes manifest is clause 54. It is our view that the previous legislation was anomalous regarding someone who suffered a disease from inhalation of dust or whatever. Although the limitation period would not run from when the disease was suffered, as distinct from when the original incident that caused it occurred - that is, the time ran from when the disease occurred - the time could run from when a change in the condition of a person's lungs began, for example, of which nobody would have been aware. Clause 54 has been introduced for the future and the past to deal with those circumstances in the past whereby someone's time would have already accrued so that under the ordinary principles they would have fallen within the current legislation. In those circumstances, although time has accrued, if the person is not aware of the injury or it has not become manifest by the time this new statute comes into force, this new law will apply to them.

Clause 54 refers to two events. That has been mentioned a few times in the hearing today. The first is the earlier of the two events, and the second is when the first symptom manifests itself. That could be a physical or a psychiatric injury that manifests in some kind of odd behaviour. I believe that clause was improved upon by including the second issue. That deals with a circumstance whereby someone has become aware of a personal injury. We are dealing with a situation in which someone has had an X-ray that has shown up a change in someone's lung or whatever. Clause 54(1) deals with the circumstance in paragraph (b) in which there has been a symptom or other manifestation of the injury. It also deals, through paragraph (a), with a situation in which a person was not aware of the personal injury but happened to discover it. That could be an earlier time. The circumstance does not arise whereby a person would become aware of the personal injury but there was no manifestation of it.

Clause 54 must be considered in tandem with the other extension provisions. With regard to personal injury claims - much of the focus of the hearing this morning has been on that - clause 54 gives an accrual commencement and then there are the various provisions for either suspension in the case of children or mentally disabled in some circumstances, or extension, of which the fraud and impropriety provision addresses all proceedings. In the circumstances in which a person did not know about the injury, there is both the general provision dealing with all claims and the very specific asbestos diseases claim. The anomaly of the specific provision dealing with asbestos claims has been mentioned a few times. In the end, clause 55 is an anomalous provision. The original bill that was proposed simply had a general provision akin to clause 54, although I do not think it was as well drafted as the current provision. That clause was intended to cover all circumstances, including a particular latent injury, which it is designed to give comfort to. That is reflected in the discussion paper to which I have referred. It was felt that it was undesirable to have a separate provision regarding asbestos injuries and that the interests of all asbestos disease victims would be adequately met by a clause 54-type provision. Discussions were held with the Western Australian Asbestos Disease Society and so on.

It is fair to say that there was a concern that although on the face of it there did not seem to be any practical difference between the present clause 55, which is reflecting what was in the legislation introduced back in 1983, and the proposals; nevertheless, there was at the very least a theoretical difference. Asbestos-related diseases are dealt with differently in some other legislation. The Law Reform (Miscellaneous Provisions) Act has a very specific provision dealing with the retention of

damages claims for personal injury with regard to asbestos disease sufferers, and there is particular reference to asbestos disease in some of the exemptions in the Civil Liability Act. In the end, clause 55 was introduced to reflect the status quo and the special status that had been given to asbestos diseases in a number of pieces of legislation. I do not think it can be rationalised conceptually. It is a historical statement that although it would not normally be included, there was a desire to not have the perception of asbestos disease sufferers' circumstances being worse under the new regime than the regime that had governed their claims previously.

[2.20 pm]

That is essentially the rationale. It cannot be rationalised in commonsense terms but just in terms of compassion for victims; there was a desire to avoid their situation being perceived as worsening. In the end, there are some differences between clauses 54 and 55. Clause 55 in some ways does not fit conceptually neatly with the rest of the bill. It has accrual, depending on a number of factors, some of which are very similar to clause 54 and other extension provisions. A number of those are the sorts of factors which, elsewhere, are put into the extension provisions. Instead of having a set and clear accrual date and the provision for extension by convincing the court of various things, those factors otherwise found elsewhere are incorporated in clause 55 - knowledge of the identity of the defendant, the cause of injury and so on. It does not fit neatly, but that is not to say that it does not work. However, if one were to expand the accrual approach for other latent diseases, we would have to start looking carefully at some of the other provisions in the bill to see how they interact with the extension provisions. The provision exists for someone to apply for extension if they were not aware of the cause of the disease or the identity of a person who might have been responsible. Those sorts of things are found in clause 55. I think it would be undesirable, given the general structure of the bill, to seek to extend clause 55 to cover other circumstances without having a very close look at how the other provisions would interact. I think to change those would require a revisiting of the extension provisions to prevent an overlap that does exist in the asbestos diseases provisions. At the end of the day, it can be rationalised simply because of its history.

I have already made mention of the proposals to expand a number of provisions. Clause 37, which has been referred to, relates to fraud and improper conduct. As I indicated, it deals with all proceedings and is not confined to personal injury claims. It must be emphasised that that provision deals with fraud or improper conduct that was a contributor to a person not commencing proceedings. We are not talking about a provision that allows extensions where there has been fraud or improper conduct. This clause deals with fraud or improper conduct that contributed to the proceedings not commencing. That was an issue that was raised this morning. If someone has deliberately destroyed records so as to prevent someone being able to bring proceedings because they do not know the background, if they put pressure on someone, threaten them with certain conduct if they commence proceedings, influence them through their particular relationship or whatever, clause 37 is the one that can be turned to at any time.

Mention was made of the three-year period. I emphasise that we are not talking about three years from when a previous time has expired. That three years runs from when the action ought reasonably to have been commenced. Effectively, we are talking about when someone has discovered that they have the possibility of an entitlement, or perhaps when the undue influence or threats have ceased and the person is in a position to make his or her own decision. That is ultimately a very broad provision that says that when the fraud or improper conduct, a broad term itself, has been discovered or comes to an end, a person has three years from that time to bring proceedings.

Hon GIZ WATSON: Dr Handford also mentioned mistakes. He was referring to fraud or mistakes. Would improper conduct include mistakes?

Mr Young: No, it would not ordinarily. The bill in its present form does not allow extensions of time for mistakes per se. At the moment, it reflects a policy decision to allow extensions where

fraud or improper conduct has resulted in proceedings not being brought. Generally we are talking about contracts and those sorts of circumstances and a person has six years or longer - maybe 12 years, depending on the circumstances. However, it does not extend it for that.

Hon GIZ WATSON: Can you envisage a circumstance in which, for example, a department can claim that what it did was not improper conduct but a mistake, even though that still means that documents or whatever were not available to the defendant?

Mr Young: That certainly would be possible, although there we are talking about completely honest conduct. That is where the policy decision has to be made. It is a policy one. We have a limitation period that sets time. In what circumstances do we allow those to be extended? Clause 37 states that if a defendant has in any way acted inappropriately or been fraudulent, or if there has been improper conduct - that is left deliberately to the courts to work out depending on the circumstances - then someone can apply to extend. It could apply if the defendant is completely innocent and there has been some kind of mistake - it is hard to think of a mistake under ordinary principles that might justify an extension. However, this bill states that that will not be sufficient. If we are talking about a personal injury claim - a mistake might be picked up in the circumstances of children or other circumstances - extensions can be sought under clause 38, but it will not be a mistake per se. That is also reflected in the difficult clause 26, which states that if there is an action in equity that will not attract the limitation period that would apply at common law, then in determining the accrual for the commencement of proceedings, equitable principles are applied. Again, that does not deal with a mistake situation. That is a policy decision ultimately. The law of mistake is a big issue in contracts and the like. Ultimately, it was felt that the preference in such a fundamental issue, particularly in the contractual context, was as far as possible to retain the status quo.

[2.30 pm]

The current Limitation Act applies limitation periods to common law proceedings; they apply to some limited classes of equitable actions. It does not otherwise have limitation periods for equitable remedies but, as you are aware, equity itself applies the common law statutory limitation periods to equitable ones which, in practical terms, give the same result as common law proceedings. This bill imposes limits on equitable actions, which is consistent with the Law Reform Commission's recommendation that there be other caveats and qualifications. Clause 26 addresses a consequence that was pointed out that if we applied the new bill to equitable causes of action, we would necessarily, under statute, be also applying all the accrual rules applicable to equitable causes of action. What clause 26 does is to say that we will keep the same law as in the 1935 act for equitable causes of action that are analogous because, under the current law, they are subject to the same time limits. We have modified all the common law time limits and made those the same for equity; otherwise, where equity does not impose time limits, this bill will impose them, but it will allow the equitable rules for accrual to apply. If there is an action for rescission to set aside a contract or arrangement that might have been entered into because of some undue influence by one person over someone else, there is no comparable common law action because a person sues for damages. He does not apply to set aside the proceedings at common law. Rather than applying the approach we would have were it not for clause 26 of asking when did the action accrue - which happens when the person suffers some kind of detriment, which might have been at the time of the arrangement or when he suffered a loss - we will apply the old equitable principle whereby the time will run either from the relationship giving rise to the undue influence coming to an end or from when the particular conduct has been discovered. Clause 26 is, in fact, in its own way, a powerful provision. The bill does not take that further and expand the law of mistake and deal with that situation. It is not a circumstance of an anomaly or a mistake in the bill; it is simply a policy decision as to whether, in cases of mistake, time should run from when the mistake is discovered, whether for equitable reasons or with common law actions in the bill itself. It does not do that. It

sets a whole lot of other parameters. It says that, currently, this is one of those scenarios where time should be determined on ordinary principles.

There was mention made by Mr Burgess of the paper given by Mr Geoffrey Hancy. An issue arose about the meaning of "personal injury". Firstly, it was said that disability is not defined. I am quite content with that; I think it is a very difficult concept to define. It is far better to be left to be determined by ordinary principles.

The CHAIRMAN: Which clause was he referring to?

Hon GIZ WATSON: Clause 3.

Mr Young: Yes. That is correct. The term "personal injury" included mental disability and it was said that there was not specific reference there to psychiatric illness. I would just point out that the definition in its current form states that a mental disability is a disability suffered by a person. Examples are then given, which include a psychiatric condition but not a psychiatric illness, the effect of which is that a person is not able to make reasonable judgments and so on. I would have thought that that was sufficient. We are looking at the effect on a person's behaviour. The reference to intellectual disability and psychiatric condition is something that I would have thought would have been covered and is very similar to a psychiatric illness. In the end, it is just a matter of which words you use. I do not have a difficulty with the current ones.

Hon GIZ WATSON: Would it be problematic if we added after "psychiatric condition" the words "or illness"?

Mr Young: Psychiatric illness is the one that was suggested. It would not cause a problem but the more words you use makes it start to sound like they have different meanings. These are plainly just included by way of example. I do not know the difference between "illness" and "condition". A person could have a psychiatric illness which, at the particular time, does not have any bearing upon the ability to make reasonable judgments. They are just examples. I do not think it would improve it. To use both terms would very marginally complicate it. It is not something I feel strongly on.

Clause 43 has been mentioned. It is titled "Further matters for court's consideration on extension applications". This, of course, has to be seen against the background of the extension provisions. As you are well aware, we have a number of circumstances in which applications for extension can be made. The general approach will be to have the general criteria for extension satisfied. If they are, the court will then determine whether to exercise its discretion to grant the extension sought. It will look at a whole range of factors. Clause 43 says that you can look at whatever factors you think are appropriate but there are two things you must, on any view, have regard to. The first is whether a trial of an action, given the delay, will mean that it cannot be a fair trial. It uses the term "unacceptably diminish the prospects of a fair trial". In other words, if someone has met all the criteria but the court looks at it and says that, by reason of the absence or the disappearance or deaths of witnesses and so on that there simply cannot be a fair trial at this stage whatever the apparent merits of the applicant's claim, the application for extension should be refused. The second mirrors that in some ways. It says that in addition to looking at whether a fair trial is impossible, it should be asked whether the prejudice to the defendant caused by the trial is so significant, effectively, that a trial should not be held. They are the two critical provisions. One assumes, inevitably, that there will be prejudice to a plaintiff who is refused an application. I do not see how there ever would not be, unless perhaps it was a claim with such small prospects of success that the plaintiff would be done a favour by leave not being granted, but that would usually be for the plaintiff to decide. Clause 43 is just isolating those two elements as matters that the court must have regard to. It does not reduce any other factors the court must have regard to, but it does give those two a special status.

[2.40 pm]

Hon GIZ WATSON: I am not a lawyer, but I would have thought that if it was not limited to just those two, it should make some mention that it is not limited to just those two, otherwise you would read it that the two things it must have regard to are (a) and (b), and it does not necessarily need to have regard to anything else.

Mr Young: I can certainly understand your reason for thinking that. Certainly as a lawyer construing the statute, that would not be the result; that is, from just reading the provisions in the discretion, and then going to clause 43, which says the court is to have regard to those two matters. If there was a concern that there might be some ambiguity in it, or there might be a perception that it was far stricter than that, I certainly would not have a difficulty with an amendment that made that clear. All I can say is that from a legal perspective it does not have that result, but I can understand that perception; and perceptions can obviously be very important.

Hon GIZ WATSON: The Law Society mentions at this point that possibly there could be an amendment to include provision for the interests of justice. Do you have a response to that?

Mr Young: To me that is absolutely fundamentally implied when a court makes its decision. It has discretions throughout this bill, and that must always be what drives it. I do not think it would add anything to it. I can understand the need for clarification, perhaps, in clause 43 by saying "in addition to any other factors, the court must look at these two", but I do not think there is any need to say "interests of justice", because it is a fundamental manner of operation in the courts. That is what will happen in any event. I do not believe it will improve it. The more factors we mention, the greater the chance of something else either being missed or by implication being given a lesser status. These two factors were just chosen as matters a court had to have regard to. Otherwise, a court can look at precisely what it wishes.

Of course, these are all factors that apply only when the court says to a person, "You will not get leave". If a person applies and meets the criteria, the court can either grant leave or refuse leave. The court cannot say, "You have not met the criteria, but I am going to, in the interests of justice, allow you to do it in any event". I sense that some of the comments today are concerned not so much about this residual discretion once the criteria have been met, but with asking whether there should be some broader criteria that have to be met before the extension can be given. I emphasise that clause 43 is dealing with a person who has met the criteria. The court has a general discretion still to say no, but it must look at those two things. Once it has looked at them, it does not even say what it has to do once it has addressed them.

Mention was made of the phrase "self-induced prejudice"; namely, a person or entity that destroys its documents, with a view to saying, "Oh well; we are prejudiced now". In that circumstance, all clause 43 says is that a court is to have regard to whether extending time will significantly prejudice the defendant, and must have regard to whether the delay would significantly diminish the prospect of a fair trial. If there had been a deliberate destruction of documents, it would be hard to say that it was the delay that was diminishing the prospects. It would have been the destruction of the documents that would have been the key factor. The destruction of documents would certainly - I assume - significantly prejudice the defendant, although if it had destroyed all those, I would have a strong suspicion that in fact the destruction was going the other way and it was destroying documents that were not in its interests. However, in any event, the court would have regard to that, and then still make its decision. It is not confining the court. It is just saying that whatever else it may do, it must look at these two things. That also goes to the issue of what factors the court must look at. This is doing no more than saying that the court must look at these factors. It is not saying what should happen after that. By implication, obviously, the court is going to attach significance to them, but it has to look at all those things in their factual context.

While I am on the discretions, clause 37 provides that the court may extend time in cases of fraud or improper conduct. That does make it broader. Any broad discretion like that will have a fundamental impact on the way this bill operates. Some of the states have very broad discretions;

they leave it to the court. Other states - sometimes there is confusion with people analysing those - say the court will grant leave if it thinks it just, but then say "provided the following criteria are met"; so they just do it backwards, and at the end of the day the criteria are very limited in any event.

It has been suggested that with children, or perhaps with the mentally disabled, there might be an advantage in having a broader ability to extend time, perhaps with a general discretion in the courts. Again, the structure of the bill is to achieve certainty. It contains provisions regarding manifestation, so it does away with a lot of the difficulties there. It then contains provisions for extension. It says in the case of people in a close relationship - which would typically, but not necessarily, be the sexual abuse one - that children have until they reach the age of 25, so from the year they turn 18 they would have another seven years in which to bring proceedings, and then, on top of that, the court also has the ability to extend time in the circumstances specified in clause 38. Clause 38(3) is the critical provision in this context. A person will have a further three years from when he or she ought to have been aware of any of the circumstances outlined in paragraphs (a), (b) or (c). If the person was not aware of the cause of the injury - perhaps the person had suffered mental harm because of sexual abuse as a child - the time would not start to run, because of clause 54, until some symptom had manifested itself or the person became aware of that. Therefore, if the person behaved strangely and it was diagnosed, the time would start to run from that time. In fact, even if the person just behaved strangely and it was not diagnosed, the time would still start to run from that time. Ordinarily a person in that circumstance - the person should have reached adulthood by that stage, of course - would have the three years.

[2.50 pm]

If the abuse occurred in a relevant relationship, they would, on any view, still have until age 25. After that, you would come to clause 38 and see, if they were still at that stage out of time, whether an extension was appropriate, and that would apply if they could establish that when the limitation period expired, they were not aware of the cause of injury. In other words, by way of an example, if they said, "I became aware that I had psychiatric symptoms, but I didn't know what had caused them. I've now seen a psychiatrist" - or whomever - "who has explained to me the reasons for it, and I've now associated my current psychiatric problems with that treatment", you would say that the person was not aware at the expiration time of the physical cause of the injury, so, subject to their establishing those things, they would get their extension; similarly, if they were not aware of the cause or they were not aware that the injury was attributable to the conduct of a person. I would imagine those two would go together in the sexual abuse or other abuse circumstance, but it is another limb to that. Of course, the third limb, paragraph (c), is just dealing with the circumstance of being unable to establish the person's identity. Therefore, they might be aware of abuse but unable to work out who was the person who caused it.

I might mention that those threefold branches of clause 38(3) are designed to actually deal with a range of circumstances. Perhaps I can give an example of its operation, and that would be perhaps someone suffering harm by reason of, say, drums of chemicals being dumped and buried on their land at some stage in the distant past. Perhaps through drinking water or simply through being present, they become ill, and simply cannot work out the reasons for that. Time will run from when the symptoms became manifest, but they will be able to seek an extension under clause 38(3) on the basis that they were not aware of the physical cause of injury; in other words, they did not know that it had been caused by chemicals. They perhaps might have become aware that it was caused by chemicals in the water because it was analysed. They would come to paragraph (b): they did not realise that that cause was attributable to someone's conduct; that someone had actually buried the drums on their land. Thirdly, still they would be able to get an extension if, having established that it was caused by chemicals and that it had been left there by a person, they simply did not know and could not find out from reasonable inquiry the name of the person who put them there. Essentially, that is the reason for those threefold tests. In many circumstances, a number of these tests will

overlap, but that is designed to pick up on that not necessarily extreme situation, but certainly one that one can foresee.

Perhaps that picks up on issues like the Kimberley chemicals, which have been referred to, whereby people had symptoms a long time afterwards but were unable to determine the cause. They perhaps got together and had discussions, and finally appreciated that the cause may have been the use of pesticides or insecticides going back a long way. Again, the limitation period would accrue when they had the symptoms, but clause 38(3) would then come into operation, and they would be able to get an extension for three years after they became aware of all those three factors. Until they at least had an arguable case and became aware that their symptoms were arguably attributable to the insecticide, the time would not run for their extension application. That is the scheme's intended operation. I guess I just want to emphasise that they all operate together, so we have to be careful. If we change one and increase a discretion at one end, that will have an impact on the other two stages of operation.

Hon PETER COLLIER: Would you clarify that? Does clause 38(3)(b) also cover sexual abuse?

Mr Young: Factually, it plainly could. If we are talking about the psychiatric symptoms from that down the track -

Hon PETER COLLIER: Yes.

Mr Young: Yes, because that will fall within injury. It could be paragraph (a) or (b): the physical cause of the death or injury. Injury would be the psychiatric harm that they might not suffer for some years later.

Hon PETER COLLIER: It might be suppressed or something.

Mr Young: Yes, that is right - whether suppressed or not. Accrual would occur when symptoms occur, but this provision would apply and allow an extension from when they became aware of those three things. If they had symptoms and could not relate them back to the conduct - sexual assault or whatever it was that occurred a long time before - the intention of this provision is to allow an extension from that time, on the basis that that is an injury like any other physical injury. All these provisions are dealing with personal injury, so that term, in turn, picks up mental disabilities.

Reference was made to clause 15, and the references to "menace" and "wounding". I am not an expert in menace, although I would imagine that what was the old tort of menace is now picked up in the tort of assault. I think Professor Handford's observations about assault and wounding being able to be dispensed with are probably quite appropriate.

The CHAIRMAN: Menace and wounding?

Mr Young: Yes, menace and wounding. Perhaps I will just have a quick look, and look at the menace one in particular. However, my feeling is that it is probably a quite fair observation that they can be dispensed with. I think some of those issues were included out of caution, but they probably are anachronistic references now.

The CHAIRMAN: He was talking about menace and wounding.

Mr Young: Yes, that is right. There were several observations about tax, and Professor Handford did properly refer to the fact that those provisions really just simply reflect the provisions as they exist in our current act. There was a concern to avoid any change in those provisions. They were carefully drafted then to deal with a quite technically difficult area of recovery of taxes, when perhaps they had been improperly claimed, particularly in the context of interaction between state and commonwealth laws. I think we would have to think very carefully before modifying any of those provisions.

[3.00 pm]

The CHAIRMAN: That is 27?

Mr Young: Yes, 27, that is correct.

The CHAIRMAN: Are you saying to us that conceptually you do not have a problem with doing it; just be very careful if you do?

Mr Young: I think it is a case of I would be reluctant to do it. The provisions are, for practical purposes, identical with what is in the current act. I recollect reading that Law Society submission and not being convinced that there was a need for change. In any event, you would have to look at it very carefully because I know they were drafted very carefully to deal with very particular issues. I do not believe there is a problem there, and, yes, just be very careful about any change. In those sorts of areas, although the Limitation Bill obviously contains enormous modifications to the previous law, in areas like that, just as with "mistake", the approach was taken to, as far as possible, still preserve the status quo on the basis that you were trying to avoid as far as possible substantive changes that might flow from the procedural changes of the limitations provisions. Limitations are generally procedural, but they can obviously have quite substantive effects. Modifying tax could be one of those.

In the issue of mistake and equitable provisions, again, the same approach was generally adopted. If the rationale for change was not clear and the change might have significant implications substantively, we should basically leave it as it is and have those matters perhaps dealt with another day in a Law Reform Commission referral, or whatever.

Reference was made to clause 45 and the confirmation provisions. Dr Handford raised the fact that the clause was not compatible with a recommendation of the Law Reform Commission. All I can say there is, and Dr Handford himself observed, that that really reflects a New South Wales provision and I am not aware of any complication at all in its operation.

With reference to clause 35, when does a relationship cease? Obviously there can be difficulty factually in perhaps determining in particular cases when a relationship with a person in a close relationship comes to an end. There is frequently a problem in law, obviously, of making factual determinations like that.

The CHAIRMAN: What clause is that one?

Mr Young: That is clause 35. That is the one that extends time in the case of someone who is under a mental disability and wants to commence proceedings against a person, basically, who was the person's guardian, if you like. So, again, it frequently will pick up the kind of circumstance of maybe the sexual abuse, or whatever, just as the child provisions have something similar; although they have until age 25. It is not even an extension provision; this extends it automatically or subject to a 30-year long stop. It says that if inappropriate conduct by your guardian occurs today, and the relationship - that is, the guardian relationship - does not come to an end for another 10 years, you will have nearly 12 years after that to bring proceedings, subject always to the condition that you cannot sue after 30 years from when the inappropriate conduct occurred. I can certainly see circumstances in which there might be problems in determining when a close relationship ends, but generally if you are talking about a guardian, you would normally be talking about the situation in which guardianship orders are removed, or whatever. That is going to be fairly clear. Clause 35(4) has the definition of "person in a close relationship". One is a guardian. It is generally fairly easy to determine when any such relationship of that nature comes to an end. The second bit was where the relationship is such that it was in the circumstances reasonable for the person not to commence action. It is a little bit harder to determine that, but I think generally it is preferable, even with some uncertainty, to have that provision there.

The CHAIRMAN: Just to clarify, you did talk about a difficulty in identifying when the relationship ceases.

Mr Young: There can be, because if the person in a close relationship is a guardian, it is easy to determine when that comes to an end ordinarily, because there is generally an appointment of the guardian and that appointment is removed. The second definition maybe becomes a bit harder, and relates to a person whose relationship is such that it is in the circumstances reasonable for the affected person or even the guardian to not commence action. This deals with the circumstance in which it might be a close relative, even with the guardian, and you say that there are very strong reasons for both the person under the mental disability and for the guardian not to bring proceedings. However, in those circumstances you would have to determine when the relationship with that relative ceases, and that can perhaps be a bit of a hard one to determine.

The CHAIRMAN: That is precisely what has been put to us.

Mr Young: I do not know how you improve on it. I think it does just become a factual decision to be made; that is, to ask when that relationship came to an end such that in practical terms it was reasonable for time to start to run.

I suppose the other issue was the appropriateness of six years rather than three years for personal injury claims. The discussion paper originally proposed in 2002 a six-year limitation period; in other words, the same period as we have now but with extensions and so on. It was really the Ipp report that pressed for three years and, as part of all that, the civil liability pressures for reform, and nearly all the other states have got a three-year period. A decision was made as part of, if you like, all those civil liability reforms to bring the period back to three years as being seen to be a fair one in civil liability terms. However, at the end of the day there is no rationale why it is six or three, save for the fact that in the vast majority of cases people know when they have been injured, and three years just seemed to be an appropriate time and, more importantly, consistent with what is happening in other states, which can have its own implications for insurance premiums and the like when you put that together with the extension provisions. While that three years is, of course, shorter than the six years, which governs a lot of other claims, we also have provisions in the bill that are unique extension provisions for personal injury claims. At the end of the day, it is a balancing exercise by saying you have cut down the prime period from six to three, but that is balanced by a number of extension and suspension provisions that ultimately lead to a fairer result for both plaintiffs and defendants.

[3.10 pm]

Hon GIZ WATSON: Although that three drops it below the normal statute of limitations safeguard - if you build a house it is about six years. This is putting it below that.

Mr Young: It is bringing it below that.

Hon GIZ WATSON: I thought that in terms of significance to the plaintiff, it is similar. Your house may fall down, but a personal injury claim carries the same sort of weight or significance.

Mr Young: I do not want to go into straight policy discussion with this. You will recall that the manifestation provisions are unique to personal injury claims. A lot of the extension provisions are unique to those. Ultimately, the policy is that, if someone is injured, you encourage them to try to bring their proceedings as quickly as possible. It is fair to say that the community is probably reasonably educated about their ability to bring personal injury claims and they are more readily aware of those rights than they may be in some other circumstance of a longer period. Ultimately, the rationale is uniformity. All the other states have three years and it is thought desirable from that practical perspective to, as far as possible, bring it into line with them. I may have missed some other comments but these are the ones I picked up from a quick look through my notes.

The CHAIRMAN: We do have some other questions.

Hon SALLY TALBOT: May I raise a couple of points that were raised this morning that have not been covered?

The CHAIRMAN: Before we go to the document that members have, if there are questions members have that are not raised necessarily by this document, we will go to them first.

Hon SALLY TALBOT: Could you address yourself to the comments that were made about the general provision of the arrangements for people under 18? We heard Dr Handford talk about the limitation periods not commencing until they reach the age of 18. I do not see that as a policy issue. I would like to hear what you have to say about that within the limits of what we are talking about. Could you talk about the apparent anomaly that was drawn to the committee's attention about 15, 16 and 17-year-olds?

Mr Young: I was not sure what the reference was there. What the scheme says is that children with a guardian until they are 15 have six years; so it is shorter than what we have under the Limitation Act 1935, which is until they are 24, and then it has several other protections with that. If proceedings were not brought, they can get an extension if they can show it was quite unreasonable for the parent or guardian not to have brought proceedings. Then it cuts down to three years. I think Dr Handford said that after that the child at 18 would have six years again. The clauses contain a provision to the effect that if this three years is shorter than they would have under other provisions of the bill, then the longer provisions apply. There were two issues. One was why has the 16-year-old got a shorter period than the 10-year-old. It is more a case that the children have been given three years but when they are extra young they are given a bit more - in other words, the children with a guardian are put in the same position as an adult but with protections, but this bill says in the case of younger children up to 15 they will have six years instead of three. That is the policy issue.

The other issue was Dr Handford's comment that he could see an anomaly when they turn 18 and they had a longer period again.

Hon SALLY TALBOT: I understood him to say that if you were 14 years 11 months you would have six years.

Mr Young: Yes.

Hon SALLY TALBOT: If you were 18 you would have six years, but if you were 17 years 11 months you would only have three years.

Mr Young: From 15, you have until 21, and that period gradually gets shorter - in other words, you start on the day you turn 15 and, like with anyone younger than you, you have six years. As you get older that period gets shorter, because you always have until 21. So the person who is 15 years and a day will have a day less than the six years until he is 18 and hits three again. I do not see where an anomaly arises. Every child has got three years minimum, but if he is below a certain age he has the extra time.

Hon SALLY TALBOT: How long does the 18-year-old have?

Mr Young: He will have three years until age 21. The 15-year-old also will have that same period. Basically that is the period where the six years initially gradually reduces to three as you get older.

Hon SALLY TALBOT: I see, it is a commensurate reduction between 15 to 18, back down to the three years at 18.

Mr Young: You have until 21. Whether you are injured at age 16 or 17 you still have -

Hon SALLY TALBOT: So it collapses back to the age. When you are 18 you have three years until you are 21.

Mr Young: That is right.

Hon PETER COLLIER: I understand the confusion there.

Hon SALLY TALBOT: I have got there now. I have a couple of other points to raise, but not about that.

The CHAIRMAN: If they have arisen out of this morning's proceedings that are contained here, then I invite the member to raise them.

Hon SALLY TALBOT: It is a minor point. In clauses 54 and 55, is there a reason why there seems to be a difference in the terminology? In clause 54(1)(a) we have "not insignificant" and in clause 55(2)(a) we have "significant". Do they mean the same thing?

Mr Young: No. Clause 54 is reflecting the common law position that your time ordinarily accrues from when you sustain a not insignificant injury. If you get a cut finger, that is not counted; it is too minimal. It is a matter of degree as to how far you go before you say the time starts to run. The term "significant injury", in a lot of cases, would mean it would be a long way down the track before time -

Hon SALLY TALBOT: Then significant is more significant that not insignificant?

Mr Young: Absolutely.

Hon SALLY TALBOT: Is that a point that is generally accepted?

[3.20 pm]

Mr Young: The reason is simply that clause 55 is picking up almost verbatim the provisions that were put in in 1983. Ordinarily, it would not be drafted in that way now, but that is an example of the differences. However, we must remember that the not insignificant injury is really talking about the accrual; that is, time will accrue from when you have a not insignificant injury. It gets away from the very minor cut, but you do not want to use a significant test because how do you determine that? The significant injury in clause 55 deals only with the knowledge that the person has sustained a significant injury. Of course, in the asbestos context, that is usually what we are talking about. They are just saying that there may be some minor changes in pleura, but if you have got to the stage of asbestosis or mesothelioma, you have a significant injury in any event.

Hon SALLY TALBOT: I want to go back to the previous point I raised. I understood what you said but I need you to confirm it specifically. Professor Handford spoke about whether such things as the financial circumstances of the parents would be one of the categories that would be considered under - do you know the clause I am referring to?

Mr Young: Yes.

Hon SALLY TALBOT: I understood you to imply that that would be a legitimate ground for seeking an extension. Can you confirm that? I am referring to Professor Handford's list on page 7 of his submission.

Mr Young: I have not seen those submissions. It will be two clauses. I am just trying to remember which provision it is.

Hon GIZ WATSON: It is clause 40, is it not?

Mr Young: Yes; that is right.

Hon GIZ WATSON: It states in part in subclause (3) -

> . . . it was unreasonable for a guardian of the plaintiff not to commence the action . . .

Mr Young: I had not addressed that particular issue before. The clause says that the court must be satisfied in the circumstances that it was unreasonable for a guardian to not commence the action within the limitation period for the action. If the parent had very limited financial circumstances, that would be taken into account. However, you might have a situation in which the court would say that because the parent had such poor financial circumstances, it was reasonable for them to not have brought proceedings. You could have a situation in which it might be perceived to operate unfairly; that is, because of their financial circumstances, it was perfectly appropriate and

reasonable for them to not have brought an action, in which case the person who had been in their care would not be able to get an extension.

Hon GIZ WATSON: It cuts both ways.

Mr Young: Yes. It is an interesting observation.

The CHAIRMAN: For your information, we have about 10 minutes before we need to wrap things up, so we will proceed to the questions that we have discussed among ourselves. One question relates to retrospectivity. You said that clause 54 is one area that has a retrospective effect.

Mr Young: Yes.

The CHAIRMAN: Are you talking about that provision and its effect in terms of the effect of retrospectivity with this bill?

Mr Young: That one is retrospective. There is also an element of retrospectivity with the childbirth provisions in clause 7. It is not worded in terms of a typical retrospective provision but it operates in that way. Clause 7, assuming it is implemented, would have the effect that if a child was born today and there was some difficulty with the birth or arising from the birth that meant that there was a claim against, say, a doctor, then instead of the 24 years that exist under the current provisions, the person would have the lesser of that 24-year period or six years from when this bill comes into operation. In other words, despite the fact that the cause of action would have accrued under the old legislation, and you would usually say that that legislation applied, the person will have only six years from the date of the new act.

The CHAIRMAN: Once it comes into effect.

Mr Young: Yes. Ordinarily, the old act would apply. If someone suffered a childbirth injury prior to the Limitation Bill becoming law, you would say that the old law would apply and that the person would have 24 years in which to bring proceedings. This says that if the bill comes into operation, subject to the extensions and so on already there - I will leave those aside - the provision will operate retrospectively to the extent that it will cut down the rights of children who suffered harm in the past. The current provision says that it is six years for a child who had a parent. If someone suffered a childbirth injury 22 years ago, he would still have two years after the bill comes into operation in which to bring an action. If it occurred 10 years ago, a person would have 16 years altogether - the 10 years plus a further six years - so he would not have the full 24 years. That is subject to the extensions and other provisions about infants. They still apply and can be resorted to, so to that extent it is a bit of a compromise because of the very real claim about claims against obstetricians and so on. It is a little unusual. The retrospectivity is not apparent when one reads the clause, but it has that effect.

The CHAIRMAN: Just taking you to clause 6, which relates to the more general provision for personal injury actions and refers to clauses 54 and 55, the Law Society submitted that clause 6 appeared to revive a cause of action that might have expired. Is that correct?

Mr Young: That is the retrospective effect that it has. What this does is to say that in those very limited circumstances in which someone's cause of action under the old legislation has expired because they did not even know they had an injury, the accrual for them will occur in accordance with clause 54. Clause 55 is no big deal, because the law is much the same. Clause 54 says to them that their cause of action should be regarded as having accrued when they became aware of the disability or the first symptom appeared. It really gets rid of the gross anomaly of their time expiring, even in the past, before they even had awareness of a problem. Section 54 operates for the future, but it also deals with that limited class of past anomalies.
[3.30 pm]

The CHAIRMAN: In relation to clause 26, as it is read in conjunction with clauses 3 and 12 and the limitation periods for equitable claims, your letter to us on 30 August indicates that the

Limitation Bill preserves the status quo. The committee understands that the Limitation Bill proposes fixed limitation periods for all equitable claims. The Law Society argues that there is presently no limitation period on actions relating to breaches of trust and has reservations about this imposition. Do you have any comment on that?

Mr Young: Only to say that all claims, apart from some prerogative writs, are subject to limitation periods under this bill. Any kind of proceeding that can be brought has now got that. That will apply for six years, unless there is provision otherwise, but there are quite a few provisions dealing specifically with trustees and the rest of it, but basically you can say they are a six-year period. Clause 26 is relevant because it says that in those circumstances where there is no analogous common law limitation period, then your six years, or whatever the other period might be, will run on equitable principles, which frequently will be from discovery of the fraud or whatever, or from the circumstance of undue influence, which perhaps has stopped you suing a fiduciary because it is a relative or the person has overborne you. The status quo there is simply referring to the fact that to that degree we have reflected the law as it was before this bill might come into operation, partially on the basis of saying that to the extent that we want to change those principles, they will need a much more careful examination. It was seen as undesirable that we would conceivably be going backwards on equitable principles, so clause 26, in conjunction with others, was intended to simply say that the old equitable principles in relation to accrual will apply. Having said that, any claim that was to be lodged, whether a common law or an equity, will be the subject of a limitation period or subject to that ability to extend time in case of fraud or improper conduct. One of the reasons for clause 26 was that it was first thought that the fraud or improper conduct extension provision would be broad enough to cover most circumstances, but it was put to us, and accepted, that there could be undue influence or whatever that could not properly, in legal terms, be described as improper conduct. It might have been quite proper conduct that nevertheless in legal terms amounted to undue influence simply because of the person's position, and there was also a concern about the fact that the extension talked about the improper conduct by the defendant, whereas in equity there might well have been circumstances in which the improper conduct was by a third party, which resulted in that. It was felt that if we included clause 26, we could basically bring all these principles in. It would be very, very difficult to try in the statute, given the nature of equity, to isolate all those different circumstances that had been developed over a long time. We thought the choice was either to have no limitation periods for equity and let all equity principles look after themselves - that was felt undesirable - or put them in place and then deal with the anomaly that was created through an imposition of limitation periods on equity, relying upon statutory accruals, which were different from equitable accruals. That is not an easy concept, so I am not explaining it that clearly, but that is how they are intended to operate.

The CHAIRMAN: Mr Young, we have run out of time today. What we would propose to do is two things: to give you the transcript as soon as we are able and ask you to have a look at it as soon as you can and get it back to us; and, secondly, as soon as we are able to we will dispatch to you in writing the remaining questions that we have and ask you to address those in writing to us as soon as possible.

Mr Young: Certainly.

The CHAIRMAN: We will be doing that as soon as we can in the next couple of days. As I think you are aware, we have a reasonably short time frame to report back to the Council.

Mr Young: Yes. You have a short limitation period!

The CHAIRMAN: That is it. There is no appeal to any higher authority. Thank you for your evidence today.

Hearing concluded at 3.37 pm