REPORT 1

STANDING COMMITTEE ON LEGISLATION

LIMITATION BILL 2005 AND LIMITATION LEGISLATION AMENDMENT AND REPEAL BILL 2005

Presented by Hon Graham Giffard MLC (Chairman)

September 2005
STANDING COMMITTEE ON LEGISLATION

Date first appointed: August 17 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“4. Legislation Committee

4.1 A Legislation Committee is established.

4.2 The Committee consists of 5 members.

4.3 The functions of the Committee are to consider and report on any Bill referred by the House or under SO 125A.

4.4 Unless otherwise ordered -

(a) the policy of a Bill referred under subclause 4.3 may be considered by the Committee but only to the extent that the Committee is satisfied the provisions of the Bill, as referred, are consistent with that policy and that the legislative intent can be given practical effect;

(b) any amendment recommended by the Committee must be consistent with the policy of a Bill.

4.5 In this order “policy of a Bill” is its scope and purpose ascertained from the Bill’s provisions, but reference may be had to any document or statement or other information that may assist in clarifying the intended legislative effect or construing the application or interpretation of any provision.”

Members as at the time of this inquiry:

Hon Graham Giffard MLC (Chairman)         Hon Peter Collier MLC

Hon Giz Watson MLC (Deputy Chairman)       Hon Sally Talbot MLC

Hon Ken Baston MLC

Staff as at the time of this inquiry:

David Driscoll, Senior Committee Clerk       Denise Wong, Advisory Officer (Legal)

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222
Website: http://www.parliament.wa.gov.au
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## ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>2004 Bills</td>
<td>Limitation Bill 2004 and Limitation Legislation Amendment and Repeal Bill 2004</td>
</tr>
<tr>
<td>2005 Bills</td>
<td>Limitation Bill 2005 and Limitation Legislation Amendment and Repeal Bill 2005</td>
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<tr>
<td>ADS</td>
<td>Asbestos Diseases Society</td>
</tr>
<tr>
<td>ALA</td>
<td>Australian Lawyers Alliance</td>
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<tr>
<td>Bill</td>
<td>Limitation Bill 2005</td>
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<tr>
<td>CLR</td>
<td>Commonwealth Law Reports</td>
</tr>
<tr>
<td>Committee</td>
<td>Standing Committee on Legislation</td>
</tr>
<tr>
<td>Current Act</td>
<td>Limitation Act 1935</td>
</tr>
<tr>
<td>General Personal</td>
<td>A cause of action in personal injury (other than those relating to latent injury attributed to the inhalation of asbestos)</td>
</tr>
<tr>
<td>Injury Action</td>
<td>The Law Society of Western Australia</td>
</tr>
<tr>
<td>Previous Committee</td>
<td>Former Standing Committee on Legislation (2001 to 2005)</td>
</tr>
<tr>
<td>QB</td>
<td>Queen’s Bench</td>
</tr>
<tr>
<td>SASC</td>
<td>South Australian Supreme Court (unreported judgments)</td>
</tr>
<tr>
<td>Subcommittee</td>
<td>Subcommittee comprised of Hon Peter Foss MLC as the Convenor and Hon Bill Stretch MLC appointed to assist the former Standing Committee on Legislation (2001 to 2005) with the inquiry into the Limitation Bill 2004 and Limitation Legislation Amendment and Repeal Bill 2004</td>
</tr>
<tr>
<td>SSO</td>
<td>State Solicitor’s Office</td>
</tr>
<tr>
<td>VR</td>
<td>Victorian Reports</td>
</tr>
<tr>
<td>VSC</td>
<td>Victorian Supreme Court (unreported judgments)</td>
</tr>
<tr>
<td>VSCA</td>
<td>Victorian Supreme Court, Court of Appeal (unreported judgments)</td>
</tr>
<tr>
<td>WALRC</td>
<td>Western Australian Law Reform Commission</td>
</tr>
</tbody>
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CHAPTER 1
INTRODUCTION

REFERENCE

1.1 On August 23 2005, the Limitation Bill 2005 (Bill) and Limitation Legislation Amendment and Repeal Bill 2005 (2005 Bills) were referred by the Legislative Council to the Standing Committee on Legislation (Committee) with a reporting deadline of September 15 2005.\(^1\)

BACKGROUND

1.2 Earlier versions of the 2005 Bills were originally introduced into the Parliament as the Limitation Bill 2004 and Limitation Legislation Amendment and Repeal Bill 2004 (2004 Bills). The 2004 Bills were referred by the Legislative Council to the former Standing Committee on Legislation (2001 to 2005) (Previous Committee) on November 24 2004.

1.3 On November 26 2004, the Legislative Council instructed the Previous Committee to report on the Limitation Bill 2004 before the adjournment of the Legislative Council that day for the purpose of debating the possibility of splitting the bill. The Previous Committee reported by tabling a copy of the Limitation Bill 2004 on November 26 2004. On December 1 2004, the Legislative Council again referred the Limitation Bill 2004 in its original form to the Previous Committee.

1.4 The Previous Committee appointed a subcommittee, comprised of Hon Peter Foss MLC as the Convenor and Hon Bill Stretch MLC, to assist the Previous Committee with the inquiry (Subcommittee).

1.5 The Subcommittee sought written submissions from the general public by advertising in *The West Australian* newspaper on December 4 2004 and placing details of the inquiry on the parliamentary website (www.parliament.wa.gov.au). Based on the subject matter of the 2004 Bills, the Subcommittee also wrote to a number of stakeholders seeking their views on the bills. A list of those stakeholders is attached as Appendix 1.

1.6 Before the inquiry could be further progressed by the Subcommittee, the 36th Parliament prorogued on January 23 2005, effectively ceasing the inquiry.

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\(^1\) Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, August 23 2005, pp4323-4327.
PROCEDURE

1.7 As the 2005 Bills are very similar to the 2004 Bills, and given the short reporting timeframe available to it, the Committee decided to contact each of the individuals and organisations that provided submissions in relation to the 2004 Bills to:

- advise them of the referral of the 2005 Bills;
- advise them that the 2005 Bills are different from the 2004 Bills; and
- confirm whether they were happy for the Committee to consider their previous submission or whether they would prefer to submit additional information or a replacement submission.

1.8 Each of the submitters indicated that they wished for the Committee to consider the submission that they had provided to the Subcommittee in relation to the 2004 Bills. The Committee decided to accept all of those previous submissions for the purposes of this inquiry. A list of the submissions received by the Subcommittee in relation to the 2004 Bills comprises a part of Appendix 2 (these submissions are highlighted in bold).

1.9 A number of the submitters also provided the Committee with either additional information or a revised version of their submission. A list of the additional information and revised submissions received by the Committee in relation to the 2005 Bills comprises the rest of Appendix 2.

1.10 The Committee wrote to the Attorney General on August 24 2005 seeking details of, and explanations for:

- the differences between the 2004 Bills and the 2005 Bills; and
- any proposals to table amendments to the 2005 Bills.

1.11 A response from the State Solicitor’s Office (SSO), the instructing department for the 2005 Bills and the 2004 Bills, is attached as Appendix 3.²

1.12 The Committee held public hearings on September 2 2005 with the following people:

- Ms Colleen Wann;
- Mr Andrew Hobday and Mr John Button;
- Mr Greg Burgess, Western Australian Branch President, Australian Lawyers Alliance (ALA);

² Letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, August 30 2005.
• Dr Peter Handford, Professor, Law School, University of Western Australia, representing The Law Society of Western Australia (The Law Society); and

• Mr John Young, Deputy State Solicitor, SSO (a copy of the transcript of this hearing is attached as Appendix 4).

1.13 On September 5 2005, the Committee provided the SSO with a list of the questions that were not able to be canvassed with its representative in the time available at the public hearings. A copy of the list of questions is attached to this Report as Appendix 5. The SSO’s response, dated September 7 2005, is set out in Appendix 6.

1.14 The Committee thanks the individuals and organisations that provided evidence and information as part of the inquiry.

SCOPE OF THE REPORT

1.15 Due to the time constraints placed on the Committee, it resolved to limit its inquiry into the 2005 Bills to the consideration only of the issues raised in the referral debate and the submissions. Again due to time constraints, the Committee has not formed a concluded view on all issues raised and it has referred to relevant evidence to assist with debate in the Legislative Council. The Committee recommends that these matters be fully debated.
CHAPTER 2
LIMITATION BILL 2005

SUPPLEMENTARY NOTICE PAPER NO 6 ISSUE NO 1

2.1 The Committee is aware that this Supplementary Notice Paper indicates that the Parliamentary Secretary to the Attorney General proposes to move amendments to clauses 4, 14, 33, 36, 37, 39, 40 and 41, and insert a new clause 8 into the Bill.

2.2 The Supplementary Notice Paper is attached as Appendix 7. Appendix 8 contains a copy of the affected clauses with the proposed amendments marked. For an explanation of the effect of the proposed amendments, the Committee refers to pages 5 to 6 of Appendix 3 under the heading of “Proposed amendments to the 2005 Bills”.

2.3 Given the restricted amount of time available to the Committee, it has not had the opportunity to consider fully the effect of the proposed amendments.

CLAUSE 3 - INTERPRETATION

Definition of ‘Tax’

2.4 The definition of ‘tax’ in clause 3 of the Bill “includes a fee, charge or other impost” and is identical to the definition of the word in section 37A of the Limitation Act 1935 (Current Act).

2.5 The Law Society submitted that the words ‘imposed by a government agency’ should be added to the definition as it was concerned that the term would “potentially apply to amounts not commonly considered to be taxes, such as licensing and registration fees.” The definition of ‘tax’ has implications for clause 27 of the Bill (Tax mistakenly paid - 12 months or as provided under other Act).

2.6 In response to the submission, the SSO indicated that:

There was a concern to avoid any change in those provisions. They were carefully drafted then [that is, when they were inserted in 1997] to deal with a quite technically difficult area of recovery of taxes,

Note that Supplementary Notice Paper No 6 Issue No 1 contains an error at amendment number 8/36, which affects clause 36 of the Limitation Bill 2005. The amendment should read: “Page 20, line 5” but it incorrectly refers to “line 6”. In Appendix 8, clause 36 of the Limitation Bill 2005 has been marked according to the apparent intent of the amendment; that is, by deleting “Subject to subsection (2)” from page 20, line 5 of the Limitation Bill 2005.

Letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, August 30 2005.

Submission No 4A from The Law Society of Western Australia, December 20 2004 (revised in 2005), p2.
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.\textsuperscript{6}

2.7 The Committee’s research indicates that the precursor to the current definition of ‘tax’ was first inserted into the Current Act on August 29 1978\textsuperscript{7}. The then section 37A referred to “any tax, fee, charge, or other impost”.

2.8 The purpose of inserting the previous section 37A was to limit, to 12 months, the recovery of tax paid under an Act that was subsequently found to be invalid on the basis that the Act was beyond the legislative competence of the State.\textsuperscript{8} The Second Reading Speech for that amendment indicates that the section in principle followed similar legislation introduced by Victoria and New South Wales in the early 1960s “as a guard against the consequences of constitutional attacks on the fiscal laws of those States”.\textsuperscript{9}

2.9 The current 37A replaced the previous 37A and assigns the following definition to ‘tax’:

“tax” includes fee, charge or other impost.

2.10 The Second Reading Speech for this later amendment explains that the section was inserted to first, confirm the effect of its predecessor, and second, “to apply the same 12 month limitation period to actions for the recovery of payments of taxes made pursuant to a mistake of fact or law.”\textsuperscript{10} These changes were made in all Australian jurisdictions as agreed at a meeting of Solicitors General of the Commonwealth, States and the Northern Territory.\textsuperscript{11}

2.11 The Committee is satisfied with the explanation offered by the SSO.

\textsuperscript{6} Appendix 4 - Mr John Young, Deputy State Solicitor, State Solicitor’s Office, Transcript of Evidence, September 2 2005, p8.
\textsuperscript{7} Section 37A as inserted by section 2 of the Limitation Act Amendment Act 1978.
\textsuperscript{8} Hon GC MacKinnon MLC, Leader of the House, Western Australia, Legislative Council, Parliamentary Debates (Hansard), August 8 1978, p2054. See also Western Australian Law Reform Commission, Limitation and Notice of Actions, 1997, p395 (http://www.lrc.justice.wa.gov.au/publication/summaries/P36(II).PDF, (viewed on September 9 2005)).
\textsuperscript{9} Hon GC MacKinnon MLC, Leader of the House, Western Australia, Legislative Council, Parliamentary Debates (Hansard), August 8 1978, pp2054-2055.
\textsuperscript{10} Hon Max Evans MLC, Minister for Finance, Western Australia, Legislative Council, Parliamentary Debates (Hansard), May 1 1997, p2097.
Definition of ‘Mental Disability’

2.12 The ALA submitted that the term ‘personal injury’ in clause 3 of the Bill requires closer scrutiny. It currently incorporates the term ‘mental disability’, but there is no definition of ‘disability’ in the Bill. The ALA also queried whether the term ‘mental disability’ would include a psychiatric illness. The Committee notes that the definition of ‘mental disability’ does not refer to ‘illnesses’ but provides examples of mental disability, such as a ‘psychiatric condition’, ‘an acquired brain injury’ or ‘dementia’:

an effect of which is that the person is unable to make reasonable judgments in respect of matters relating to the person or the person’s property.

2.13 The SSO contended that the most important aspect of the definition of mental disability is the effect that it has on a person’s ability to make reasonable judgments. In its view, adding the words ‘psychiatric illness’ would not improve the definition and “would very marginally complicate it”.

2.14 The Committee is satisfied with the explanation offered by the SSO.

CLauses 4, 5, 6 and 7

Transition from the Limitation Bill 2004 to the Limitation Bill 2005

2.15 These clauses of the Bill previously appeared in the Limitation Bill 2004 as clause 4. During the referral debate, Hon Simon O’Brien MLC was keen to know whether the redrafting of the previous clause 4 was “elegantly expressed”.

2.16 Clause 4 of the Limitation Bill 2004 read as follows:

4. Application of Act

(1) In this section —

“commencement day” means the day on which this Act comes into operation.

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12 Submission No 6A from the Australian Lawyers Alliance, submitted on September 2 2005, p8 and Attachment 1, p3; Submission No 6B from the Australian Lawyers Alliance, September 7 2005, p2; and Mr Greg Burgess, Western Australian Branch President, Australian Lawyers Alliance, Transcript of Evidence, September 2 2005, p5.

13 Clause 3(1) of the Limitation Bill 2005.

14 Appendix 4 - Mr John Young, Deputy State Solicitor, State Solicitor’s Office, Transcript of Evidence, September 2 2005, p5.

15 Western Australia, Legislative Council, Parliamentary Debates (Hansard), August 23 2005, p4324.
(2) Subject to subsection (5), the limitation periods provided for under this Act apply only to causes of action that accrue on or after commencement day.

(3) Section 50 or 53, as is relevant to the case, applies to ascertain when a cause of action relating to a personal injury to a person accrues and if, under the relevant section, the cause of action accrues before commencement day, the applicable limitation period in that case is that which would have applied before commencement day, whether or not that period has expired.

(4) Subject to subsection (3), an action cannot be commenced after commencement day if the action could not have been commenced immediately before commencement day because of an enactment that is repealed or amended by the Limitation Legislation Amendment and Repeal Act 2004.

(5) If —

(a) before commencement day, a cause of action accrued for damages relating to a personal injury to a person;

(b) the personal injury was incurred —

(i) in the course of the person’s mother giving birth to the person; or

(ii) immediately after, and arising from, the person’s mother giving birth to the person,

whether the birth was by way of natural childbirth or a medical procedure; and

(c) an action was not commenced before commencement day.

an action on that cause of action cannot be commenced if —

(d) 6 years have elapsed since commencement day; or

(e) the limitation period that would have applied but for this subsection has expired,

and for the purposes of this Act the cause of action is to be taken as having accrued on commencement day.
(6) Subsection (5) has effect subject to Part 3 but —

(a) sections 25 and 26 do not apply; and

(b) sections 27 and 36 do not apply if the person has reached 15 years of age at commencement day.

2.17 The Committee considered the clarity of drafting in the clauses and whether the redrafting results in any substantive changes. It can confirm that:

• former clause 4(1) appears in the Bill as the definition of ‘commencement day’ in clause 3;

• former clause 4(2) appears in the Bill as clause 4;

• former clause 4(3) appears in the Bill as clause 6;

• former clause 4(4) appears in the Bill as clause 5;

• former clause 4(5)(b) appears in the Bill as clause 7(1);

• former clauses 4(5)(a), (c), (d) and (e) appear in the Bill as clause 7(2) with some significant modification to the wording;

• the last phrase in clause 4(5) appears in the Bill as clause 7(4) with some significant modification to the wording; and

• former 4(6) appears in the Bill as clause 7(3).

2.18 Much of the substance of the former clause 4 has been retained and the Committee confirms that the current drafting is clearer.

2.19 However, the Committee notes that the last phrase in former clause 4(5):

and for the purposes of this Act the cause of action is to be taken as having accrued on commencement day.

appeared to relate to all aspects of personal injury claims of people injured as children as a result of their birth. This appears to be at odds with the former clause 4(5)(a) of the Limitation Bill 2004. In clause 7(4) of the Bill however, personal injury claims arising from childbirth are only taken to accrue on commencement day for the purposes of the extension or shortening of the limitation period.

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16 This is confirmed by the State Solicitor’s Office in Appendix 3 - Letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, August 30 2005, p1. Note however that, in the event that Supplementary Notice Paper No 6 Issue No 1 is agreed to, clause 4 of the Limitation Bill 2005 will also be subject to the proposed new clause 8.
2.20 For example, an action relating to a childbirth injury that accrued in 1985 under the Current Act would continue to be treated as having accrued in 1985 under former clause 4(5)(a). The plaintiff would then have four years left in their limitation period if the Limitation Bill 2004 was enacted in 2005.

2.21 However, when the final phrase of former clause 4(5) is taken into account, the same action would be deemed to have accrued on commencement day. The plaintiff would then be entitled to another six-year limitation period from commencement day under the former clause 25. The plaintiff would thus have had a total limitation period of 26 years. This appears to be inconsistent with the intent of the Limitation Bill 2004 as indicated by the 2004 Second Reading Speech and the 2004 Clause Notes.

2.22 This apparent anomaly does not occur under clause 7 of the Bill.

**RETIROSPECTIVE EFFECT**

**Clause 6 - Personal injury actions - accrual, limitation periods**

2.23 Hon Simon O’Brien MLC indicated during the referral debate that he would like the Committee to identify elements of retrospectivity in the 2005 Bills.

2.24 ‘Retrospectivity’ means:

The operation, or purported operation, of a statute prior to the time of its enactment. Statutory provisions, particularly those imposing criminal penalties, are presumed to operate only for the future. However, an Act will operate retrospectively if parliament has made that intention unmistakably clear.

2.25 Clause 6, when read with clauses 54 and 55, has a retrospective element. While it will apply to events that will happen after the commencement day, it will also be applying the accrual test proposed under the Bill to events that occurred in the past and which would have normally been subject to the accrual test under the Current Act.

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17 Please refer to paragraphs 2.68 to 2.69 of this Report for a discussion of the maximum 24-year limitation period currently available to people injured as children.

18 Hon Nick Griffiths MLC, then Minister for Housing and Works, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, November 10 2004, pp7780-7781.


22 Please refer to paragraphs 2.116 and 2.131 of this Report for the beginning of further discussions of clauses 54 and 55 of the Limitation Bill 2005, respectively.

23 Appendix 3 - Letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, August 30 2005, p4, para6.
2.26 Personal injury actions (other than those relating to latent injury attributed to the inhalation of asbestos) currently accrue on the date that the damage occurred. For example, a cause of action for an adult person who was sexually abused in 1995, and who only later developed a psychological condition associated with that abuse in 2010, would have accrued in 1995, despite the fact that the person had no appreciation of the effects of the condition until 15 years later.

2.27 A person’s cause of action, based on clauses 6 and 54 of the Bill, would accrue when the only or earlier of the following two events occurs:

- The person becomes aware that they have sustained a ‘not insignificant’ personal injury.
- The person displays their first symptom, clinical sign or other manifestation of personal injury consistent with the person having sustained a ‘not insignificant’ personal injury.

2.28 Following the example referred to above, the person’s cause of action would accrue in 2010, provided that they had not earlier shown any signs of suffering from the psychological condition.

2.29 The Law Society observed that clause 6 appears to revive causes of action in personal injury that might have otherwise expired. The SSO confirmed that this was an intended effect of the clause:

\[\text{That is the retrospective effect that it has. What this does is to say that in those very limited circumstances in which someone’s cause of action under the old legislation has expired because they did not even know they had an injury, the accrual for them will occur in accordance with clause 54. Clause 55 is no big deal, because the law [with respect to the accrual of asbestos-related causes of action] is much the same.}\]

\[\ldots\]

\[\text{[Clause] 54 operates for the future, but it also deals with that limited class of past anomalies.}\]

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25 Submission No 4A from The Law Society of Western Australia, December 20 2004 (revised in 2005), p2.

Continuing with the example of sexual abuse referred to above, the Committee provides the following timeline of events to help illustrate how clauses 6 and 54 can operate to revive an expired cause of action in personal injury:

<table>
<thead>
<tr>
<th>Calendar Year</th>
<th>Years Before/After Commencement Day</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>-10</td>
<td>Adult person is sexually abused. Cause of action in ‘trespass to the person’ accrues at the moment of the abuse under the Current Act.</td>
</tr>
<tr>
<td>1996</td>
<td>-9</td>
<td></td>
</tr>
<tr>
<td>1997</td>
<td>-8</td>
<td></td>
</tr>
<tr>
<td>1998</td>
<td>-7</td>
<td></td>
</tr>
<tr>
<td>1999</td>
<td>-6</td>
<td>Cause of action in ‘trespass to the person’ expires under the Current Act.</td>
</tr>
<tr>
<td>2000</td>
<td>-5</td>
<td></td>
</tr>
<tr>
<td>2001</td>
<td>-4</td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td>-3</td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td>-2</td>
<td></td>
</tr>
<tr>
<td>2004</td>
<td>-1</td>
<td></td>
</tr>
<tr>
<td>2005</td>
<td>0</td>
<td>Commencement of the proposed Act.</td>
</tr>
<tr>
<td>2006</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>2007</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td>5</td>
<td>Psychological condition manifests. Cause of action in ‘trespass to the person’ accrues in this year under the proposed Act.</td>
</tr>
<tr>
<td>2011</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>2012</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>2013</td>
<td>8</td>
<td>Cause of action in ‘trespass to the person’ expires under the proposed Act.</td>
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27 “A form of trespass where a plaintiff’s rights in relation to his or her body have been infringed by the direct interference, whether intentional or negligent, of another, in the absence of lawful justification...There are three types of trespass to the person: assault, battery and false imprisonment.”: Butterworths Australian Legal Dictionary, Butterworths, Perth, 1997, p1191.


29 This cause of action currently attracts a four-year limitation period: section 38(1)(b) of the Limitation Act 1935.


Clause 7 - Special provisions for certain personal injury actions relating to childbirth

2.31 The retrospective effect of clause 7 of the Bill is clearly explained by the SSO:

*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...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.*

2.32 The Australian Medical Association submitted that the clause should be amended so that children injured as a result of childbirth must lodge their claims by either January 1 2011 (that is six years after January 1 2005, which was the anticipated commencement date of the 2004 Bills) or the time limit imposed by the Current Act, whichever is earlier. The SSO response to this suggestion is contained in Appendix 3.

2.33 The Royal Australian and New Zealand College of Obstetricians and Gynaecologists advocate a restriction on the time in which claims may be lodged by children injured during childbirth for deliveries that have already taken place but for which legal action has not yet been initiated.

2.34 The Committee notes that the limitation period may be extended under clauses 32, 34, 35, 37, 38 and 41, and in limited circumstances under clauses 31 and 40 of the Bill.

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32 Appendix 4 - Mr John Young, Deputy State Solicitor, State Solicitor’s Office, Transcript of Evidence, September 2 2005, p13. See also Appendix 3 - Letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, August 30 2005, pp1-2, para2.

33 Submission No 9A from the Australian Medical Association, August 26 2005, pp1-2.

34 Letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, August 30 2005, p2.

35 Submission No 7 from the Royal Australian and New Zealand College of Obstetricians and Gynaecologists, January 4 2005, p2.

36 Clause 7(3) of the Limitation Bill 2005.
2.35 The Committee has identified elements of retrospectivity in the Bill and finds them satisfactory.

**CLAUSE 13 - PERSONAL INJURY, *FATAL ACCIDENTS ACT 1959 ACTIONS* - 3 YEARS**

2.36 The limitation period for personal injury and *Fatal Accidents Act 1959* actions are proposed to be reduced from the current six years to three years.

**Personal Injury**

2.37 Both the ALA and the Asbestos Diseases Society (ADS) believe that the limitation period for personal injury should remain as six years. They submitted that the reduction in the limitation period would place unnecessary pressure on sufferers of asbestos-related diseases and any other injuries or diseases which take years to fully manifest until the point at which the person considers the symptoms to be ‘significant’ (in the case of an asbestos-related disease) or ‘not insignificant’ (for other types of personal injury).

2.38 Both submitters referred to the example of injured workers who will only effectively be able to commence legal proceedings claiming damages against a negligent employer if they can obtain a certificate from an approved medical specialist confirming that they have sustained at least a 15 per cent degree of impairment. It was argued that in some cases, an injured worker’s condition would not be sufficiently stable to enable an impairment assessment to be made until more than three years after the first sign of their personal injury. In such cases, it would be unlikely that the

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38 Submission No 6B from the Australian Lawyers Alliance, September 7 2005, p2; and Submission No 5 from the Asbestos Diseases Society, December 23 2004, p8.

39 Submission No 6A from the Australian Lawyers Alliance, submitted on September 2 2005, pp1-2; Mr Greg Burgess, Western Australian Branch President, Australian Lawyers Alliance, *Transcript of Evidence*, September 2 2005, p2; and Submission No 5 from the Asbestos Diseases Society, December 23 2004, p8.


41 Using the accrual test under clause 54 of the Limitation Bill 2005.

42 Submission No 5 from the Asbestos Diseases Society, December 23 2004, p8; Submission No 6A from the Australian Lawyers Alliance, submitted on September 2 2005, p2; and Mr Greg Burgess, Western Australian Branch President, Australian Lawyers Alliance, *Transcript of Evidence*, September 2 2005, p2.
person would have even consulted a legal practitioner, let alone commenced legal proceedings.

2.39 The ALA also queried whether there were any statistics showing that there is an urgent need to reduce the limitation period.

2.40 In response, the SSO indicated that:

\[\text{at the end of the day there is no rationale why it [the limitation period for personal injury] is six or three [years], save for the fact that in the vast majority of cases people know when they have been injured, and three years just seemed to be an appropriate time and, more importantly, consistent with what is happening in other states, which can have its own implications for insurance premiums and the like when you put that together with the extension provisions. While that three years is, of course, shorter than the six years, which governs a lot of other claims [that is, other than personal injury], we also have provisions in the bill that are unique extension provisions for personal injury claims.}\]

\[\text{...}\]

\[\text{You will recall that the manifestation provisions are unique to personal injury claims.}\]

2.41 The Committee notes however, the ALA’s observation that the possibility of obtaining an extension of the limitation period under clause 38(3) of the Bill may not always be effective. Taking the example referred to earlier, the injured worker whose limitation period had expired would not be able to take advantage of the provision because, at the time of expiry of the limitation period, he or she would have been aware:

- of the physical cause of their injury;

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43 The Australian Lawyers Alliance also cited the restrictions (imposed by the Civil Liability Act 2002) placed on the advertising of personal injury legal services and approaching potential clients with personal injuries as a further barrier to people commencing legal actions: see Submission No 6A from the Australian Lawyers Alliance, submitted on September 2 2005, p2 and Mr Greg Burgess, Western Australian Branch President, Australian Lawyers Alliance, Transcript of Evidence, September 2 2005, p2.

44 Submission No 6A from the Australian Lawyers Alliance, submitted on September 2 2005, p3 and Mr Greg Burgess, Western Australian Branch President, Australian Lawyers Alliance, Transcript of Evidence, September 2 2005, pp2-3.

45 Appendix 4 - Mr John Young, Deputy State Solicitor, State Solicitor’s Office, Transcript of Evidence, September 2 2005, p10.

46 Please refer to paragraphs 2.94 to 2.104 of this Report for a discussion of clause 38.
that the injury was attributable to the conduct of a person; and

- of the identity of the person to whom the injury was attributable.  

### Fatal Accidents Act 1959 Actions

2.42 Under sections 4 and 6 of the *Fatal Accidents Act 1959*, the personal representative of a deceased person has the ability to commence an action for damages relating to the death if the deceased person (but for the death) would have been entitled to maintain an action and recover damages. The Clause Notes for the Limitation Legislation Amendment and Repeal Bill 2005 explain that currently, a deceased person’s personal representative would be barred from commencing the action after the death if the limitation period for the deceased’s cause of action had expired before the death.

2.43 The Committee notes that clause 12 of the Limitation Legislation Amendment and Repeal Bill 2005 proposes to insert additional restrictions on when a claim under the *Fatal Accidents Act 1959* can be made, namely, prior to their death, the deceased person:

- was not aware of the physical cause of the injury and it was reasonable for the person not to be aware of that cause;

- was aware of the physical cause of the injury but was not aware that the injury was attributable to the conduct of a person and it was reasonable for the person not to be aware that the injury was so attributable; or

- was aware of the physical cause of the injury and that the injury was attributable to the conduct of a person but after reasonable enquiry, had been unable to establish that person’s identity.

2.44 The ADS submitted that three years from the death of an injured person is not an adequate amount of time for their personal representative to bring an action based on the deceased’s injuries. It argues that it would be difficult for a personal representative to satisfy the criteria that are sought to be introduced by clause 12 of the Limitation Legislation Amendment and Repeal Bill 2005 within the three-year time limit. It suggests that an exception should be made in that clause for asbestos-related deaths.

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48 That is, the executor or administrator of a deceased person’s estate.

49 Clause Notes for the Limitation Legislation Amendment and Repeal Bill 2005, p1.

The Committee notes that the issues raised in paragraphs 2.37 to 2.44 with respect to clause 13 essentially relate to the policy of the Bill.

**CLAUSE 15 - TRESPASS TO THE PERSON - 3 YEARS**

This clause imposes a 3-year limitation period on, amongst other things, actions of ‘menace’ and ‘wounding’. The evidence received by the Committee indicates that these causes of action are archaic, particularly the action of ‘menace’, which has been obsolete since the 14th Century. The SSO agreed that the words ‘menace’ and ‘wounding’ could be deleted from clause 15.

The Committee notes that one of the underlying policies of the Bill is to modernise limitations law in Western Australia, and as such, recommends that the actions of ‘menace’ and ‘wounding’ should be removed from clause 15.

**Recommendation 1:** The Committee recommends that clause 15 of the Limitation Bill 2005 be amended by deleting the actions of ‘menace’ and ‘wounding’. This could be effected by the following amendment:

Clause 15, page 10, lines 11 and 14 - To delete the lines.

**CLAUSE 26 - EQUITABLE ACTIONS (NOT ANALOGOUS TO OTHER ACTIONS)**

This clause states as follows:

26. **Equitable actions (not analogous to other actions)**

   (1) An equitable action cannot be commenced after the only or later of such of the following events as are applicable -

   (a) the elapse of 6 years since the cause of action accrued; or

   (b) the elapse of 3 years since time started running, on equitable principles, for the commencement of the action.

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53 Hon Sue Ellery MLC, Parliamentary Secretary to the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, June 21 2005, p2774.
(2) In this section -

“equitable action” means an action -

(a) in which the relief sought is in equity; and

(b) for which (had a limitation period not been provided for under subsection (1) or section 12) the limitation period would not be determined in equity by analogy to the limitation period for any other kind of action.

2.49 Clause 26 originated as a proposed Government amendment to the Limitation Bill 2004, appearing on a Supplementary Notice Paper on November 26 2004.\(^54\) Identical wording was later incorporated into the Bill. At the time of debating whether or not to send the Limitation Bill 2004 to the Previous Committee, that particular proposed amendment was part of the argument for referral.\(^55\)

2.50 As a threshold issue and in order to interpret clause 26, the terms ‘equity’, ‘equitable principles’ and ‘analogy’ require explanation.

**Equity**

2.51 Equity is a separate body of law which supplements, corrects and controls the rules of the common law.\(^56\) It relieves the harshness of the common law by stretching out what Lord Denning MR in *D & C Builders Ltd v Rees* called a “merciful hand”.\(^57\) In hearing claims and deciding whether to award relief, claims will often turn on questions as to whether someone has acted in good conscience or in good faith;\(^58\) this is due to the influence of equity.

**Equitable Principles**

2.52 Various ‘equitable principles’ have evolved over many years through many cases. These principles are a guide to the courts and are applied to the facts of a particular case. The principles are many and varied. By way of example, there is an equitable principle that the courts will restrain the publication of confidential information

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\(^54\) Supplementary Notice Paper No 344 Issue No 2.


\(^57\) [1966] 2 QB 617 at p624.

improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged.⁵⁹

The Doctrine of Analogy

2.53 The Current Act applies to common law causes of action. It also contains some provisions addressing particular circumstances requiring the application of equitable remedies but does not generally apply to equitable causes of action.⁶⁰ However, because historically, only common law actions had limitation periods applied, the courts began applying limitation periods to equitable causes of action. The courts did this either directly or fictionally, via the ‘doctrine of analogy’. This doctrine allows the courts to apply the statutory limitation period when an action made in equity is analogous, that is, it corresponds with, a claim which is already expressly provided for in the limitation statute.⁶¹ Put another way, where a court decides that an equitable right is so similar to a legal right to which a limitation period is applicable, then the limitation period is applied to it also.⁶²

2.54 Where the Current Act neither directly nor by analogy applies to equitable causes of action, then there are no fixed limitation periods for bringing such actions. However, according to the Western Australian Law Reform Commission (WALRC), in cases where it is not appropriate for the Limitation Act 1935 to be applied by analogy, the law of equity can reject actions in which a person has not pursued it with vigour or has acquiesced.⁶³

2.55 Clause 26 provides for limitation periods to apply to equitable causes of action which are not determined by analogy to other actions. Such equitable causes of action cannot be commenced later than six years running from accrual or three years from when time started running on equitable principles for the commencing of the action. Clause 26 does this by clearly defining an equitable action not only as one in which the relief sought lies in equity but also as an action in which the limitation period is not determined by the doctrine of analogy.

⁵⁹ Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39 at 50.

⁶⁰ Appendix 3 - Letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, August 30 2005, p2, para4.


Equitable Action of Mistake is analogous to Common Law Claims

2.56 The Law Society is of the view that, with or without clause 26, the Bill may still not cover equitable causes of action that are analogous to common law actions.\(^\text{64}\) It cites the example of relief from the consequences of ‘mistake’. In representing The Law Society, Dr Peter Handford claimed that clause 26:

\begin{quote}
takes care of cases to which the Limitation Act would not have applied in any way, either directly or by analogy...but there are some claims, like mistake, to which the limitation period would have applied by analogy. I mention cases of mistake in particular, because most of the modern statutes have a provision that deals with mistake. This bill does not seem to deal with that in any way.\(^\text{65}\) \end{quote}

(Emphasis added.)

2.57 The Committee notes that in making these comments, Dr Handford was relying on the views of one of his academic colleagues.\(^\text{66}\)

2.58 Dr Handford explains in his book, \textit{Limitation of Actions, the Australian Law}, how ‘mistake’ postpones the running of the limitation period in all jurisdictions other than Western Australia and South Australia.\(^\text{67}\) Dr Handford further explains how at common law, time in an action for money ‘had and received’ runs from the date of payment and not the discovery of a mistake. An equitable claim to recover money paid by mistake is subject to the same common law rule because the Current Act is applied by analogy.\(^\text{68}\)

2.59 The WALRC noted this feature of the cause of action of ‘mistake’ in its 1997 report on limitation and notice of actions. The WALRC described how after the fusion of law and equity:

\begin{quote}
the common law rule [of time running from the date of payment and not discovery of the mistake] continues to apply to cases formerly within the exclusive jurisdiction of courts of common law, and also to
\end{quote}

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\(^{64}\) Dr Peter Handford, Professor, Law School, University of Western Australia, representing The Law Society of Western Australia, \textit{Transcript of Evidence}, September 2 2005, p.6.

\(^{65}\) Dr Peter Handford, Professor, Law School, University of Western Australia, representing The Law Society of Western Australia, \textit{Transcript of Evidence}, September 2 2005, p.6.

\(^{66}\) Dr Peter Handford, Professor, Law School, University of Western Australia, representing The Law Society of Western Australia, \textit{Transcript of Evidence}, September 2 2005, pp6 and 11.


claims in equity if they were strictly analogous to common law claims. This remains the position in Western Australia.\(^69\)

**The Law Society of Western Australia’s View**

2.60 While The Law Society is concerned that certain equitable actions that are analogous to common law claims have not been catered for in the Bill, it is of the view that the inclusion of clause 26 in the Bill is an improvement on the Limitation Bill 2004.\(^70\) It offered the following information:

> Most of the acts in Australia are not complete in their coverage of equity, so that is how they deal with it. The exception is the ACT, which has the most modern act that contains a clause like our clause 12. It appears that the aim of the ACT act is to cover all claims. It then has special provisions on fraud and mistake that deal with most of the issues to which I referred; I am not sure that it necessarily deals with them all. I suppose that is the nearest equivalent for a model.\(^71\)

2.61 The relevant sections of the Limitation Act 1985 (ACT) are contained in Appendix 9.

**The State Solicitor’s Office’s View**

2.62 The SSO stated that “the status quo in relation to equitable claims will largely be retained”.\(^72\) It explained that clause 26 has been drafted in such a way that:

> in the case of actions for equitable relief which would not be barred...[by a limitation deadline]...by reason of there being no analogous common law remedy, a plaintiff contemplating proceedings will have the longer of six years from accrual and three years from when on equitable principles time for the commencement of the action would be regarded as having begun running.\(^73\)

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\(^70\) Dr Peter Handford, Professor, Law School, University of Western Australia, representing The Law Society of Western Australia, *Transcript of Evidence*, September 2 2005, p11.

\(^71\) Dr Peter Handford, Professor, Law School, University of Western Australia, representing The Law Society of Western Australia, *Transcript of Evidence*, September 2 2005, p11.

\(^72\) Appendix 3 - Letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, August 30 2005, p3.

\(^73\) Appendix 3 - Letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, August 30 2005, p3.
2.63 Thus, actions for mistake where damages are claimed in equity, must be brought within the six-year period (provided for under clause 12 of the Bill) but equitable remedies like rescission or rectification will be able to be brought within the later of:

- six years from the transaction; or
- three years from when the mistake is discovered.

2.64 The Committee also refers to some comments made by the SSO during the hearing:

> 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;...Rather than applying the approach [to the accrual of an equitable action] 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...we will [under clause 26] 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...It is not...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...equitable reasons or with common law actions...  

Committee Conclusion

2.65 Clause 26 covers non-analogous equitable causes of action. There is residual doubt that the Bill will cover analogous claims such as mistake.

2.66 Clause 12(2) of the Bill provides for clause 12(1) to apply a general limitation period of six years to an action in circumstances where Part 2 Division 3 of the Bill (in which clause 26 appears) does not provide for a different limitation period. Arguably, if mistake is not covered by Part 2 Division 3, then clause 12 would operate to apply the general limitation period of six years to analogous equitable causes of action.

**Clause 29 - Limitation Periods Applicable to Persons Under 15 When Cause of Action Accrues**

**Effect**

2.67 This clause would apply to a person who is under 15 years old when a cause of action accrues to that person. It would impose a limitation period of six years from the
accrual of a cause of action. The Committee notes however, that this limitation period will not apply if a longer limitation period is provided for a specific cause of action in Part 2 Division 3 of the Bill.\(^{75}\)

**Personal Injury**

2.68 Under the Current Act, a child who is injured as a result of childbirth effectively has up to 24 years in which to commence legal proceedings in relation to that injury. The maximum figure of 24 years is calculated as follows: the limitation period imposed on a personal injury claim that accrues while the child is less than 18 years of age is suspended and does not begin to run until he or she turns 18.\(^{76}\) If that injury is attributed to the process of childbirth, the child will have the benefit of the full 18 years of suspension plus the six year limitation period currently imposed for personal injury actions involving negligence.\(^{77}\)

2.69 As noted in the Second Reading Speech\(^{78}\) and the parliamentary debate on the 2004 Bills, the current situation has huge ramifications for obstetricians and gynaecologists.\(^{79}\) However, the Committee observes that any member of the community would also be exposed to legal action for up to 24 years if they injure a child under the age of 18 years under the present regime.

2.70 This clause proposes to reduce the limitation period available to injured children (under the age of 15) to six years from the date that the cause of action accrues.

2.71 Clause 29 is a principal concern to The Royal Australian and New Zealand College of Obstetricians and Gynaecologists. They support it because current indemnity costs and medico-legal concerns make it difficult to attract and retain obstetricians. They also cite the difficulties of doctors when defending claims relating to events that may have occurred up to 24 years ago. In addition, they argue that the passage of the Bill will assist in maintaining and improving outcomes for mothers and babies.\(^{80}\)

2.72 Both the ALA\(^{81}\) and The Law Society\(^{82}\) oppose this clause on the bases that:

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\(^{75}\) Clause 29(2) of the Limitation Bill 2005.

\(^{76}\) Section 40 of the Limitation Act 1935.

\(^{77}\) Section 38(1)(c)(vi) of the Limitation Act 1935.

\(^{78}\) Hon Sue Ellery MLC, Parliamentary Secretary to the Attorney General, Western Australia, Legislative Council, Parliamentary Debates (Hansard), June 21 2005, pp2776 and 2785.

\(^{79}\) See also Submission No 7 from the Royal Australian and New Zealand College of Obstetricians and Gynaecologists, January 4 2005, p1 and Submission No 9A from the Australian Medical Association, August 26 2005, p1.

\(^{80}\) Submission No 7 from the Royal Australian and New Zealand College of Obstetricians and Gynaecologists, January 4 2005, p1.

\(^{81}\) Submission No 6 from the Australian Lawyers Alliance, December 24 2004, p11.
a person should be able to reach the age of majority, that is, 18 years of age, before they are required to make their own decisions about their legal rights;

six years is too short a time for injuries sustained at birth or early childhood to manifest, be accurately diagnosed and stabilise. It is argued that the Bill will require children and/or their guardians to “make choices about litigation before the full nature and extent of the child’s injuries and consequent care needs can be reliably established”, and

a person who was injured as a child and whose limitation period has expired would then be forced (in order to obtain leave to extend the limitation period) to prove that their guardian had acted unreasonably in not commencing an action on the person’s behalf within the limitation period.

The Law Society also identified the following reasons why, in its opinion, a guardian of a child injured as a result of childbirth may delay commencing legal proceedings in relation to that injury:

- Trauma experienced by the parents, worry and the additional care needed by a sick child;
- Inability to assess the long term consequences or sequelae of an injury to an infant or young child;
- Financial circumstances of the guardian;
- Level of education of the guardian;

The Committee notes that the arguments raised in relation to clause 29 essentially relate to the policy of the Bill.

CLAUSE 30 - LIMITATION PERIODS APPLICABLE TO PERSON BETWEEN 15 AND 18 WHEN CAUSE OF ACTION ACCRUES

This clause provides that a person who is aged 15, 16 or 17 when a cause of action accrues to them must have commenced the action by the time they turn 21 years old. The Law Society suggested that the same six-year limitation period should apply to all

82 Submission No 4A from The Law Society of Western Australia, December 20 2004 (revised in 2005), pp7-8.
83 Section 5 of the Age of Majority Act 1972.
84 Submission No 6 from the Australian Lawyers Alliance, December 24 2004, p11.
85 Submission No 6 from the Australian Lawyers Alliance, December 24 2004, p12. Relevant to this issue is clause 40 of the Limitation Bill 2005. See paragraphs 2.106 to 2.109 of this Report for a discussion of that clause.
86 Submission No 4A from The Law Society of Western Australia, December 20 2004 (revised in 2005), p7.
children. United Medical Protection argued that all plaintiffs should be subject to the same limitation period of three years from the date of discovery, with a ‘long-stop’ provision of 12 years on the extension of that period.

The rationale behind the different limitation periods provided in clauses 29 and 30 was discussed during the hearings, at least in relation to actions in personal injury and trespass to the person, which attract a general three-year limitation period.

Time constraints prevented the Committee from considering this issue further.

**Clause 32 - Defendant in close relationship with person under 18 when cause of action accrues**

Clause 32 allows a plaintiff who was in a ‘close relationship’ with the defendant, and where the cause of action accrued while the plaintiff was under 18 years of age, to commence proceedings against that defendant at any time before they turn 25 years old.

The Committee notes the ALA’s observation that the Victorian and New South Wales limitation Acts allow the relevant period of limitation to run from the age of 25.

Time constraints prevented the Committee from considering this issue further.

**Clause 35 - Defendant in close relationship with person with mental disability**

This clause allows a plaintiff who suffers from a ‘mental disability’ at any time after a cause of action accrues to them, and while they are in a ‘close relationship’ with the defendant, to commence proceedings against that defendant at any time within three years of the ‘close relationship’ ceasing, up to the age of 30.

The Law Society indicates that it can envisage real difficulties in establishing when the relationship ceases, especially where there is a gradual estrangement between the parties.
The SSO acknowledged the point but suggests that a precise determination of when a ‘close relationship’ ceases would be very difficult to draft, and would depend on the facts of each case.\(^\text{92}\)

Time constraints prevented the Committee from considering this issue further.

**PART 3 DIVISION 3 - EXTENSION BY COURTS**

Part 3 Division 3 of the Bill contains provisions allowing people who apply for leave of a court to extend the limitation periods (provided for under the Bill) that are relevant to their causes of action, even where those causes of action have expired. The Committee notes that these provisions (except for clause 40 in certain cases) are also available to people injured as children as the result of the birthing process.\(^\text{93}\)

The courts are empowered under Part 3 Division 3 to award extensions only in discrete circumstances if those circumstances can be proved by the prospective plaintiff. The period of extension is also capped by the various provisions. The Committee received many submissions that opposed this regime of extension. Those submitters proposed that the courts be given a general discretion to extend time limits in any circumstances where the court considered it appropriate in the interests of justice.\(^\text{94}\)

It was noted by some submitters that most of the other Australian jurisdictions, such as New South Wales, Victoria, South Australia, Queensland, the Australian Capital Territory and the Northern Territory, and the United Kingdom have limitation statutes that allow for a general judicial discretion to extend limitation periods.\(^\text{95}\) However, it was also pointed out by The Law Society that:

\[\text{There are really no provisions, other than in South Australia and the Northern Territory, that apply to other kinds of action, it is generally a personal injury problem, and in every other case I can think of, the legislation relates to personal injury. Quite often, if the legislation states something like “a court can extend a limitation period if it is just and reasonable to do so”, there will be a list of factors that the}\]


\(^{93}\) Clause 7(3) of the Limitation Bill 2005.

\(^{94}\) Submission No 2 from Senator Andrew Murray, December 21 2004, Attachment 2, p5; Submission No 4A from The Law Society of Western Australia, December 20 2004 (revised in 2005), pp3, 8, 9, 10 and 18; Submission No 6 from the Australian Lawyers Alliance, December 24 2005, pp13, 15, 16 and 19; Submission No 6A from the Australian Lawyers Alliance, submitted on September 2 2005, pp3-5 and Attachment 1, p7; and Submission No 8 from Mr Andrew Hobday, December 29 2004, pp2-4.

\(^{95}\) For example, Submission No 6 from the Australian Lawyers Alliance, December 24 2004, pp16-17.
court can have regard to and the “interests of justice” will be in there somewhere.\textsuperscript{96}

2.88 The SSO’s response\textsuperscript{97} provides a detailed explanation as to why the Bill does not include a general discretion in the courts to extend the limitation period for a period they determine is appropriate.

2.89 The Committee notes that the arguments raised in relation to Part 3 Division 3 essentially relate to the policy of the Bill.

Clause 37 - Court may extend time to commence any kind of action in cases of fraud or improper conduct

2.90 Clause 37 provides a court with the power to grant an extension of the time limit in any cause of action if it is satisfied that the plaintiff’s failure to commence an action was attributable to the fraudulent and improper conduct of the defendant or a person for whom the defendant was vicariously liable. The extension period can be up to three years from when the action ought reasonably to have been commenced.

2.91 The ALA’s concerns regarding the practical operation of clause 37 and whether or not it is sufficient to overcome the problem of the deliberate destruction of documents by the defendant prior to the commencement of an action\textsuperscript{98} are conveyed in the Committee’s question number 2 to the SSO listed in Appendix 5 of this Report. Mr Hobday also shares the same concerns.\textsuperscript{100}

2.92 The SSO’s response 2 in Appendix 6\textsuperscript{101} indicates that clause 37 is intended to operate on a case by case basis, and would apply to the deliberate destruction of documents prior to the commencement of an action if, in the circumstances of the case, those actions amounted to an attempt to pervert the course of justice or a contempt of the court.

2.93 Time constraints prevented the Committee from considering this issue further.

\textsuperscript{96} Dr Peter Handford, Professor, Law School, University of Western Australia, representing The Law Society of Western Australia, \textit{Transcript of Evidence}, September 2 2005, p8.

\textsuperscript{97} Appendix 6 - Response 1 in letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, September 7 2005, pp1-3.

\textsuperscript{98} Submission No 6 from the Australian Lawyers Alliance, December 24 2004, p14.


\textsuperscript{100} Submission No 8 from Mr Andrew Hobday, December 29 2004, pp7-8.

\textsuperscript{101} Letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, September 7 2005, pp3-5.
Clause 38 - Court may extend time to commence actions for personal injury or under
Fatal Accidents Act 1959

2.94 Clause 38(3) provides a court with the power to grant an extension of the time limit in actions involving personal injury and claims made under the Fatal Accidents Act 1959 if it is satisfied that, at the time when the limitation period expired, the plaintiff:

(a) was not aware of the physical cause of the death or injury;
(b) was aware of the physical cause of the death or injury but was not aware that the death or injury was attributable to the conduct of a person; or
(c) was aware of the physical cause of the death or injury and that the death or injury was attributable to the conduct of a person but after reasonable enquiry, had been unable to establish that person’s identity.

2.95 Under clause 38(4), the period of extension can be up to three years from when the plaintiff knew or ought reasonably to have known of all of the three elements listed above.

Three-Year Period of Extension

2.96 The ALA initially indicated to the Committee that it would support a longer extension period. However, it later observed that the more relevant issue would be to ensure that there is no time limit placed on a person’s right to apply for the extension.

Date at which Extension Period starts to run

2.97 The ALA is also concerned that the extension period will start to run from when a person became aware, or ought reasonably to have become aware:

(a) of the physical cause of the death or injury;
(b) that the death or injury was attributable to the conduct of a person (whether a defendant or not); and
(c) of the identity of the person mentioned in paragraph (b).

2.98 The ALA submits that the factors determining when the extension period will start to run are unnecessarily restrictive.

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102 Submission No 6 from the Australian Lawyers Alliance, December 24 2004, p14
103 Submission No 6B from the Australian Lawyers Alliance, September 7 2005, p1.
104 Clause 38(4) of the Limitation Bill 2005.
The Meaning of ‘Physical Cause’

2.99 The concerns of various submitters regarding the lack of a definition for the term ‘physical cause’ are expressed in the Committee’s question number 3 to the SSO listed in Appendix 5 of this Report. Please also refer to the SSO’s response 3 in Appendix 6.

The Operation of Clause 38(3)

2.100 The concerns of the ALA with respect to the practical operation of clause 38(3), particularly in relation to injured workers suffering from a latent disease and child sexual abuse cases, are illustrated by the examples given in the Committee’s question number 7 to the SSO listed in Appendix 5 of this Report. The SSO’s response 7 is contained in Appendix 6. The issue was also discussed during the hearings.

2.101 The Committee also refers to the discussion at paragraph 2.41 of this Report.

2.102 Ms Wann provided the Committee with some of her personal experience of the current limitations regime in Western Australia. An outline of her case appears at paragraphs 2.117 to 2.121 of this Report. However, by the operation of clause 4, the provisions in the Bill do not apply to causes of action that have accrued prior to the commencement of the new regime, whether they accrued under the Current Act or the proposed Act.

Suggested Solution

2.103 Some submitters presented section 23A of the Limitation of Actions Act 1958 (Vic) as a more favourable alternative to clause 38. That clause reads as follows:

23A. Personal Injuries

(1) This section applies to any action for damages for negligence nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or

105 Submission No 6B from the Australian Lawyers Alliance, September 7 2005, pp1-2.
109 Mr Greg Burgess, Western Australian Branch President, Australian Lawyers Alliance, Transcript of Evidence, September 2 2005, pp2-3 and 6.
110 List of Remaining Questions sent to the State Solicitor’s Office, September 5 2005, p2.
112 Appendix 4 - Mr John Young, Deputy State Solicitor, State Solicitor’s Office, Transcript of Evidence, September 2 2005, pp7-8.
independently of any contract or any such provision) where
the damages claimed consist of or include damages in respect
of personal injuries to any person.

(2) Where an application is made to a court by a person claiming
to have a cause of action to which this section applies, the
court, subject to sub-section (3) and after hearing such of the
persons likely to be affected by that application as it sees fit,
may, if it decides that it is just and reasonable so to do, order
that the period within which an action on the cause of action
may be brought be extended for such period as it determines.

(3) In exercising the powers conferred on it by sub-section (2) a
court shall have regard to all the circumstances of the case
including (without derogating from the generality of the
foregoing) the following -

(a) the length of 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 extent, if any, to which the defendant had taken
   steps to make available to the plaintiff means of
   ascertaining facts which were or might be relevant to
   the cause of action of the plaintiff against the
   defendant;

(d) the duration of any disability of the plaintiff arising
   on or after the date of the accrual of the cause of
   action;

(e) the extent to which the plaintiff acted promptly and
   reasonably once he knew that the act or omission of
   the defendant, to which the injury of the plaintiff was
   attributable, might be capable at that time of giving
   rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain
   medical, legal or other expert advice and the nature
   of any such advice he may have received.

(4) The powers conferred on a court by sub-section (2) may be
exercised at any time notwithstanding -
(a) that -

(i) in the case of an action to which section 5(1A) or (1A) applies (not being an action to which section 23(1) applies), more than 3 years has expired since the cause of action accrued; and

(ii) in any other case more than 6 years has expired since the cause of action accrued; or

(b) that an action in respect of such personal injuries has been commenced.

(5) An application under this section shall be made by summons in the jurisdiction in which an action has been or is proposed to be brought and a copy of that summons shall be served on each person against whom the claimant claims to have the cause of action, provided that the Supreme Court may give leave to bring an action in any court which seems to it appropriate.

(6) Except as provided by section 27M(2), this section does not apply to an action to which Part IIA applies.

2.104 The Committee notes that section 23A of the Limitation of Actions Act 1958 (Vic) requires the court to consider factors which are very similar to those recommended by the WALRC in relation to the extension of the limitation periods.113

2.105 The Committee notes that the arguments raised in relation to clause 38 essentially relate to the policy of the Bill.

Clause 40 - Court may extend time to commence action by person under 18 when cause of action accrues, with guardian

2.106 Clause 40 applies to a situation where a person’s cause of action accrues while they are under 18 years of age and while they are under the care of a guardian, who fails to commence an action on the person’s behalf during the limitation period. The clause provides a court with the power to extend a time limit for any cause of action where it is satisfied that the guardian’s failure to commence proceedings was unreasonable in the circumstances.

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Both the ALA\textsuperscript{114} and The Law Society\textsuperscript{115} voiced reservations about clause 40. They argued that in practice, clause 40 would "pit child against parent"\textsuperscript{116} and that this may have been an unintended consequence of the provision.

The concerns of the ALA and The Law Society are expressed in the Committee’s question number 4 to the SSO listed in Appendix 5\textsuperscript{117} of this Report. The SSO’s response 4 is contained in Appendix 6.\textsuperscript{118} The issue was also discussed at the hearings.\textsuperscript{119}

It appears from the SSO’s response that the practical consequences foreshadowed by the submitters were clearly intended by the drafters of the Bill to act as an incentive for guardians to promptly commence legal proceedings on behalf of the children under their care. However, given the obscure nature of the limitations regime, the Committee queries whether clause 40 would have that proposed effect and whether guardians will generally be aware of the existence, let alone the effect, of clause 40 until an application under that clause is made by one of the children previously under their care.

Clause 43 - Further matters for court’s consideration on extension applications

The submissions made to the Committee canvassed various concerns, which are summarised in the following suggestions:

\begin{itemize}
\item The phrase ‘and is not otherwise in the interests of justice’ should be added to the end of clause 43(b),\textsuperscript{120} so that it would read as follows:
\end{itemize}

\begin{verbatim}
43. Further matters for court’s consideration on extension applications

When deciding, on an extension application, whether to extend the time for the commencement of an action, a court is to have regard to —

...
\end{verbatim}

\textsuperscript{114} Submission No 6 from the Australian Lawyers Alliance, December 24 2004, p12.
\textsuperscript{115} Submission No 4A from The Law Society of Western Australia, December 20 2004 (revised in 2005), pp7-8 in relation to this issue generally and p11 in relation to clause 40.
\textsuperscript{116} Submission No 4A from The Law Society of Western Australia, December 20 2004 (revised in 2005), p8.
\textsuperscript{117} List of Remaining Questions sent to the State Solicitor’s Office, September 5 2005, p2.
\textsuperscript{118} Letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, September 7 2005, p6.
\textsuperscript{120} Submission No 4A from The Law Society of Western Australia, December 20 2004 (revised in 2005), p12; and Dr Peter Handford, Professor, Law School, University of Western Australia, representing The Law Society of Western Australia, \textit{Transcript of Evidence}, September 2 2005, pp7-8.
(b) whether extending the time would significantly prejudice the defendant (other than by reason only of the commencement of the proposed action) and is not otherwise in the interests of justice.

- Child sexual abuse claims should be excluded from the application of clause 43 because of the unique circumstances involved in such claims; for example, the absence of witnesses and the secrecy surrounding the alleged events are what the submitters have termed ‘self-created prejudice’ on the part of the defendant. 

- Clause 43 should be deleted from the Bill because it is superfluous and amounts to an unwarranted elevation of the defendant’s rights. These concerns of the ALA with regard to clause 43 are conveyed in the Committee’s questions numbers 5 and 6 to the SSO listed in Appendix 5 to this Report. Senator Andrew Murray and the ADS shared the same concerns as the ALA. The SSO’s response to these concerns are contained in responses 5 and 6 in Appendix 6 and some discussions which took place during the hearings.

- Clause 43 should not apply to sufferers of asbestos-related diseases, since, due to the very nature of the period of latency in many of those diseases (being 30 to 50 years), all defendants in such actions would be prejudiced.

2.111 The Committee notes that, in its 1997 report on limitation and notice of actions, the WALRC made the following recommendation:

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121 Submission No 2 from Senator Andrew Murray, December 21 2004, Attachment 2, pp3-5.
122 Submission No 6B from the Australian Lawyers Alliance, September 7 2005, p2.
123 Submission No 6 from the Australian Lawyers Alliance, December 24 2005, pp14-15; Submission No 6A from the Australian Lawyers Alliance, submitted on September 2 2005, pp8-10; and Mr Greg Burgess, Western Australian Branch President, Australian Lawyers Alliance, Transcript of Evidence, September 2 2005, pp3 and 5.
124 List of Remaining Questions sent to the State Solicitor’s Office, September 5 2005, p2. Please note that the reference in question number 6 to “Taylor v Brisbane South Regional Health Authority (1996) 186 CLR 541” is an incorrect citation. The case citation should be Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541.
125 Submission No 2 from Senator Andrew Murray, December 21 2004, Attachment 2, pp4-5.
127 Letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, September 7 2005, pp6-7. Please note that the reference in paragraph 6 to “Taylor v Brisbane South Regional Health Authority (1996) 186 CLR 541” is an incorrect citation. The case citation should be Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541.
128 Appendix 4 - Mr John Young, Deputy State Solicitor, State Solicitor’s Office, Transcript of Evidence, September 2 2005, pp5-7.
The court should be able to order that...[the WALRC’s recommended limitation periods]...may be extended in the interests of justice, but should only be able to make such an order in exceptional circumstances, where the prejudice to the defendant in having to defend an action after the normal limitation period has expired, and the general public interest in finality of litigation, are outweighed by other factors.\(^{130}\)

2.112 Time constraints prevented the Committee from considering these issues further.

**Clause 45 - Meaning of Confirmation**

2.113 The Law Society’s concerns about the meaning of ‘confirmation’ in clause 45\(^{131}\) are conveyed in the Committee’s question number 8 to the SSO listed in Appendix 5\(^{132}\) to this Report. The SSO’s response 8 is contained in Appendix 6.\(^{133}\)

2.114 During the hearing with The Law Society, it was submitted to the Committee that clause 45, being based on the New South Wales legislation, is inconsistent with the WALRC’s recommendations at paragraphs 18.36 to 18.41 of its 1997 report\(^{134}\), and should be further considered.\(^{135}\) The SSO indicated that the relevant New South Wales provision on which clause 45 was modelled has not yet resulted in any problems.\(^{136}\) This is despite the fact that it has been in operation for 35 years or more.\(^{137}\)

2.115 Time constraints prevented the Committee from considering this issue further.

**Clause 54 - Personal Injury - General**

2.116 Clause 54 of the Bill determines when a cause of action in personal injury (other than those relating to latent injury attributed to the inhalation of asbestos) (General...
The accrual test proposed for General Personal Injury Actions requires the limitation period to run from the earlier of the following two events:

- When the plaintiff “becomes aware that he or she has sustained a not insignificant personal injury” (emphasis added).

- When the “first symptom, clinical sign or other manifestation of personal injury consistent with the person having sustained a not insignificant personal injury” (emphasis added).

Under the proposed accrual test, it appears as though Ms Wann’s cause of action would still have accrued soon after her 1975 operation, as she was aware that she was suffering from an “impairment of…[her]…physical condition”. However, her evidence indicates that she was not aware until 1994 that the nature and extent of her injuries were associated with the 1975 surgery.

The Committee observes that Ms Wann’s cause of action:

- is time-barred under the Current Act (the limitation period would have expired in 1981, six years after the surgery), and

- would also be time-barred under the Bill as clauses 6 and 54(1) of the Bill would operate to apply the limitation period of the Current Act (six years) from the date of accrual as determined by the Bill (soon after 1975 when Ms Wann became aware of her personal injury).
2.121 However, where similar circumstances arise after the passage of the Bill, an extension of time to commence an action may be granted by a court under clause 38(3).

2.122 Ms Wann’s personal circumstances provided the Committee with a stark illustration of both the unfairness that can result from the current limitation regime, as well as some of the concerns raised in relation to the effect of clause 54 of the Bill.

**Objective or Subjective Test for Accrual in Clause 54(1)(a)**

2.123 The ALA’s concerns regarding the subjectivity of the test for accrual under clause 54(1)(a) of the Bill are conveyed in the Committee’s question number 10 to the SSO listed in Appendix 5 of this Report. The SSO’s response 10 is contained in Appendix 6.

**Problems with the Manifestation Test for Accrual in Clause 54(1)(b)**

2.124 The ALA’s concerns regarding clause 54(1)(b) are conveyed in the Committee’s question number 9 to the SSO listed in Appendix 5 of this Report. The SSO’s response 9 is contained in Appendix 6.

**Definition of ‘Symptom’**

2.125 The Law Society suggests that the term ‘symptom’ should be defined in the Bill. The rationale behind that suggestion is expressed in the Committee’s question number 11 to the SSO listed in Appendix 5 of this Report. The SSO’s response 11 is contained in Appendix 6.

**Meaning of ‘Not Insignificant’**

2.126 A concern was raised by the Honourable David Malcolm AC, Chief Justice of Western Australia, with respect to the “awkward drafting” contained in the Bill, an
example of which is the undefined term ‘not insignificant’ in clause 54 when compared to the extensively defined term ‘significant’ in clause 55.\textsuperscript{153}

2.127 The SSO’s explanation of the term ‘not insignificant’ can be found at paragraph 12 of Appendix 6\textsuperscript{154} and in the discussion that took place at the hearings\textsuperscript{155}.

**Suggested Solution**

2.128 The ALA favoured the test for accrual provided in clause 54(1)(a) as that test is predicated on the plaintiff’s knowledge or awareness of a personal injury. It suggested that clause 54 could be amended so that it would be the later of the two tests which prevailed rather than the earlier test,\textsuperscript{156} so that a person’s awareness of their injury is of paramount importance.

2.129 Another possible solution that would allay the concerns of the ALA with respect to clause 54 is to replace it with section 5(1A) of the *Limitation of Actions Act 1958* (Vic), save that a limitation period of six years would be preferred. That provision reads as follows:

5.  

**Contracts and torts**

\ldots

(1A) An action for damages for negligence nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries consisting of a disease or disorder contracted by any person may be brought not more than 3 [the ALA suggests six] years from, and the cause of action shall be taken to have accrued on, the date on which the person first knows -

(a) that he has suffered those personal injuries; and

(b) that those personal injuries were caused by the act or omission of some person.

\textsuperscript{153} Submission No 10 from Hon David Malcolm AC, Chief Justice of Western Australia, January 12 2005, p1.

\textsuperscript{154} Letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, September 7 2005, p10.

\textsuperscript{155} Appendix 4 - Mr John Young, Deputy State Solicitor, State Solicitor’s Office, *Transcript of Evidence*, September 2 2005, p12.

\textsuperscript{156} Mr Greg Burgess, Western Australian Branch President, Australian Lawyers Alliance, *Transcript of Evidence*, September 2 2005, p6.
2.130 The Committee notes that the main arguments raised in relation to clause 54 relate to the policy of the Bill.

CLAUSE 55 - PERSONAL INJURY - ASBESTOS RELATED DISEASES

2.131 Clause 55 effectively reproduces, and maintains the tests, in sections 38A(6) to (9) of the Current Act with respect to the accrual of causes of action related to the inhalation of asbestos. The Committee notes that there was no equivalent of clause 55 in the Limitation Bill 2004, and that all forms of personal injury were subject to the same accrual tests provided for in former clause 50, which was the equivalent of clause 54 of the Bill.\footnote{Dr Peter Handford, Professor, Law School, University of Western Australia, representing The Law Society of Western Australia, \textit{Transcript of Evidence}, September 2 2005, pp8-9; and Submission No 6 from the Australian Lawyers Alliance, December 24 2004, pp8-9.}

The Concerns Raised

2.132 While none of the submissions objected to clause 55 as it relates to sufferers of asbestos-related diseases, the majority of the submissions were in favour of clause 55 being extended to cover all other forms of:

- latent disease. The Committee understands this term to mean diseases that do not produce symptoms for a long period of time; and

- diseases which progress gradually, by which the Committee means diseases that produce symptoms which may appear benign at first but gradually develop into something more significant. Silicosis was one example of a disease of gradual process that was brought to the Committee’s attention\footnote{Submission No 1 from Ms Colleen Wann, December 5 2004, (letter from Dr Peter Handford to Hon Peter Foss MLC written on behalf of Ms Colleen Wann, dated September 24 1999, p5); Dr Peter Handford, Professor, Law School, University of Western Australia, representing The Law Society of Western Australia, \textit{Transcript of Evidence}, September 2 2005, p8; Submission No 6 from the Australian Lawyers Alliance, December 24 2004, p8; Submission No 1 from Ms Colleen Wann, December 5 2004, (letter from Dr Peter Handford to Hon Peter Foss MLC written on behalf of Ms Colleen Wann, dated September 24 1999, p5); Dr Peter Handford, Professor, Law School, University of Western Australia, representing The Law Society of Western Australia, \textit{Transcript of Evidence}, September 2 2005, p8; Submission No 6 from the Australian Lawyers Alliance, December 24 2004, p8; Submission No 6A from the Australian Lawyers Alliance, submitted on September 2 2005, pp7-8; Submission No 6B from the Australian Lawyers Alliance, September 7 2005, p2; Mr Greg Burgess, Western Australian Branch President, Australian Lawyers Alliance, \textit{Transcript of Evidence}, September 2 2005, pp4 and 6-7; Submission No 8 from Mr Andrew Hobday, December 29 2004, p5; and Submission No 10 from Hon David Malcolm AC, Chief Justice of Western Australia, January 12 2005, p1.}.

2.133 As the Bill currently stands, sufferers of latent disease and diseases of gradual process (other than those attributed to the inhalation of asbestos) are subject to the accrual tests provided for in clause 54(1). The key element of the concerns raised, particularly for diseases of gradual process, is that the manifestation of the disease will precede the sufferer’s knowledge that they have a ‘not insignificant’ personal injury.
2.134 For example, if a person was suffering from infrequent headaches which he or she does not suspect is caused by an underlying disease, he or she could reasonably take no steps towards commencing legal proceedings until three years after the first occasion on which they experience one of those headaches.

2.135 Some submitters have acknowledged that sufferers of latent disease and diseases of gradual process can seek an extension of the limitation period under Part 3 of the Bill, but contend that this is not an adequate solution. They argued that instead of being able to bring an action as of right, they are first forced to overcome the hurdle of applying for leave of a court.160

2.136 However, it was submitted that the position of sufferers of latent disease and diseases of gradual process will be improved under the Bill.161

The Policy

2.137 The SSO acknowledged the concerns that have been expressed to the Committee but explained that:


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...

...

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...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

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160 Submission No 1 from Ms Colleen Wann, December 5 2004, (letter from Dr Peter Handford to Hon Peter Foss MLC written on behalf of Ms Colleen Wann, dated September 24 1999, p5); and Submission No 5 from the Asbestos Diseases Society, December 23 2004, p8. (The Committee notes that the latter submission was referring to the former clause 50 when it was first introduced into the Legislative Assembly on October 20 2004.)

161 Dr Peter Handford, Professor, Law School, University of Western Australia, representing The Law Society of Western Australia, Transcript of Evidence, September 2 2005, p9.
exist in the asbestos diseases provisions. At the end of the day, it can be rationalised simply because of its history.\textsuperscript{162}

2.138 The Committee notes that the arguments raised in relation to clause 55 essentially relate to the policy of the Bill.

**Clause 78 - Burden of Proof**

2.139 The concern raised in The Law Society’s submission\textsuperscript{163} with regard to clause 78 is conveyed in the Committee’s question number 13 to the SSO in Appendix 5\textsuperscript{164} to this Report. The SSO’s response 13 is contained in Appendix 6.\textsuperscript{165}

2.140 Time constraints prevented the Committee from considering this issue further.

\textsuperscript{162} Appendix 4 - Mr John Young, Deputy State Solicitor, State Solicitor’s Office, *Transcript of Evidence*, September 2 2005, p3.

\textsuperscript{163} Submission No 4A from The Law Society of Western Australia, December 20 2004 (revised in 2005), pp16-17.

\textsuperscript{164} List of Remaining Questions sent to the State Solicitor’s Office, September 5 2005, p4.

\textsuperscript{165} Letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, September 7 2005, pp10-11.
CHAPTER 3
LIMITATION LEGISLATION AMENDMENT AND REPEAL BILL
2005

SUPPLEMENTARY NOTICE PAPER NO 7 ISSUE NO 1

3.1 The Supplementary Notice Paper indicates that the Parliamentary Secretary to the Attorney General proposes to move amendments to clauses 4 of the Limitation Legislation Amendment and Repeal Bill 2005.

3.2 The Supplementary Notice Paper is attached as Appendix 10. Appendix 11 contains a copy of the affected clause with the proposed amendments marked. For an explanation of the effect of the proposed amendments, the Committee refers to pages 5 to 6 (particularly page 6) of Appendix 3 under the heading of “Proposed amendments to the 2005 Bills”.

3.3 Given the restricted amount of time available to the Committee, it has not had the opportunity to fully consider the effect of the proposed amendments.

CLAUSE 12 - SECTION 4 OF THE FATAL ACCIDENTS ACT 1959 AMENDED

Limitation Period of Three Years

3.4 The ADS brought the Committee’s attention to the current operation of section 4 of the Fatal Accidents Act 1959.

Entitlement of the Deceased to Maintain an Action

Proposed Restrictions

3.5 The Committee notes that clause 12 of the Limitation Legislation Amendment and Repeal Bill 2005 will add further restrictions on an executor’s ability to commence legal proceedings on behalf of a deceased person who had died as a result of an injury caused by the actions of another person (please also refer to the discussion at paragraphs 2.42 to 2.44 of this Report). The ADS submits that these added restrictions will be too difficult for the personal representatives of deceased persons to prove.

166 Letter from Mr John Young, Deputy State Solicitor, State Solicitor’s Office, August 30 2005.
Current Restrictions

3.6 Section 4 of the *Fatal Accidents Act 1959* already requires the deceased person to have been entitled to maintain an action and recover damages in respect of the injury resulting in their death. That implies that, among other things, the limitation period applicable to that cause of action must not have expired during the lifetime of the deceased person.

3.7 The ADS submitted that the current requirement should be removed from section 4 of the *Fatal Accidents Act 1959* so that even if the limitation period had expired before the death of the deceased person, this should not be a bar to the commencement of an action by that person’s executor or administrator.

3.8 The Committee notes that the ADS’s suggestion would reopen claims that are statute-barred and as such, falls outside the clearly stated scope and policy of both the 2005 Bills.\(^{169}\)

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Hon Graham Giffard MLC
Chairman

Date: September 15 2005

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APPENDIX 1

STAKEHOLDERS TO WHOM THE COMMITTEE WROTE
# APPENDIX 1

## Stakeholders to Whom the Committee Wrote

<table>
<thead>
<tr>
<th>Name</th>
<th>Organisation</th>
<th>Date</th>
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<tr>
<td>Mr Steven Heath</td>
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<td>December 2 2004</td>
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<td>Chief Magistrate</td>
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<td>Mr Ian Weldon</td>
<td>The Law Society of Western Australia</td>
<td>December 2 2004</td>
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<td>President</td>
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<td>The Hon David Malcolm AC</td>
<td>Supreme Court of Western Australia</td>
<td>December 2 2004</td>
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<td>Chief Justice of Western Australia</td>
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<td>Her Honour Judge Antoinette Kennedy</td>
<td>District Court of Western Australia</td>
<td>December 2 2004</td>
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<td>Chief Judge</td>
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<td>Mr Ian Viner AO QC</td>
<td>Western Australian Bar Association</td>
<td>December 2 2004</td>
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<td>Dr Paul Skerritt</td>
<td>Western Australian Branch, Australian Medical Association</td>
<td>December 2 2004</td>
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<td>Dr Louise Farrell</td>
<td>Royal Australian and New Zealand College of Obstetricians and Gynaecologists</td>
<td>December 2 2004</td>
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<td>Mr Stephen Southwood QC</td>
<td>Law Council of Australia</td>
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<td>Mr Daryl Cameron</td>
<td>Insurance Council of Australia Ltd</td>
<td>December 2 2004</td>
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<td>Regional Manager, Western Australia and Northern Territory</td>
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<td>Mr Robert Vojakovic AM JP</td>
<td>Asbestos Diseases Society of Australian Inc</td>
<td>December 2 2004</td>
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<td>Mr Greg Burgess</td>
<td>Australian Lawyers Alliance</td>
<td>December 2 2004</td>
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<td>December 2 2004</td>
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<td>Disability Services Commission</td>
<td>December 2 2004</td>
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<td>Dr Malcolm Stuart</td>
<td>United Medical Protection</td>
<td>December 2 2004</td>
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<tr>
<td>National Manager Medical Service</td>
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<td>Mr Wayne Martin QC</td>
<td>Francis Burt Chambers</td>
<td>December 2 2004</td>
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APPENDIX 2

WRITTEN SUBMISSIONS RECEIVED
## APPENDIX 2
### WRITTEN SUBMISSIONS RECEIVED

<table>
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<tr>
<th>No</th>
<th>Name</th>
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<tr>
<td>1*</td>
<td>Ms Colleen Wann</td>
<td>Member of the Public</td>
<td>December 5 2004</td>
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<td>2*</td>
<td>Senator Andrew Murray</td>
<td>Senator for Western Australia</td>
<td>December 21 2004</td>
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<tr>
<td>3*</td>
<td>Mr David Brown General Manager, Legal Services</td>
<td>United Medical Protection Group of Companies</td>
<td>December 20 2004</td>
</tr>
<tr>
<td>4*</td>
<td>Mr Ian Weldon President</td>
<td>The Law Society of Western Australia</td>
<td>December 20 2004</td>
</tr>
<tr>
<td>4A</td>
<td>Mr Ian Weldon President</td>
<td>The Law Society of Western Australia</td>
<td>December 20 2004 (revised in 2005)</td>
</tr>
<tr>
<td>5*</td>
<td>Mr Robert Vojakovic AM President</td>
<td>Asbestos Diseases Society</td>
<td>December 23 2004</td>
</tr>
<tr>
<td>6*</td>
<td>Mr Greg Burgess President</td>
<td>WA Branch, Australian Lawyers Alliance</td>
<td>December 24 2004</td>
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<tr>
<td>6A</td>
<td>Mr Greg Burgess President</td>
<td>WA Branch, Australian Lawyers Alliance</td>
<td>Submitted on September 2 2005</td>
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<td>6B</td>
<td>Mr Greg Burgess President</td>
<td>WA Branch, Australian Lawyers Alliance</td>
<td>September 7 2005</td>
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<td>7*</td>
<td>Dr Louise Farrell Immediate Past Chairman</td>
<td>The Royal Australian and New Zealand College of Obstetricians and Gynaecologists</td>
<td>January 4 2005</td>
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<td>8*</td>
<td>Mr Andrew Fraser Hobday</td>
<td>Member of the Public</td>
<td>December 29 2004</td>
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<td>9*</td>
<td>Dr Paul Skerritt President</td>
<td>Australian Medical Association</td>
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<td>9A</td>
<td>Dr Paul Skerritt President</td>
<td>Australian Medical Association</td>
<td>August 26 2005</td>
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<td>10*</td>
<td>The Hon David Malcolm AC Chief Justice of Western Australia</td>
<td>Supreme Court of Western Australia</td>
<td>January 12 2005</td>
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* The submissions highlighted in bold were received in relation to the Limitation Bill 2004 and Limitation Legislation Amendment and Repeal Bill 2004. The remainder of the submissions were received in relation to the Limitation Bill 2005 and Limitation Legislation Amendment and Repeal Bill 2005.
APPENDIX 3
LETTER FROM MR JOHN YOUNG DATED AUGUST 30 2005
APPENDIX 3

LETTER FROM MR JOHN YOUNG DATED AUGUST 30 2005

INQUIRY INTO LIMITATION BILL 2005 AND LIMITATION LEGISLATION
AMENDMENT AND REPEAL BILL 2005

I refer to your letter of 24 August 2005.

Comparison of the 2004 and 2005 Bills

Limitation Bill 2005

The differences between the Limitation Bill 2004 as introduced into the Legislative Council and the Limitation Bill 2005 as introduced into the Legislative Council, are in substance as follows:

1. The 2004 Bill's clause 4, which was seen as somewhat cumbersome by reason of its length, has been redrafted, without substantive change, as clauses 4, 5, 6 and 7.

2. The present clause 7, which shortens the limitation period otherwise applicable to causes of action in relation to childbirth which accrue before the Bill comes into force, has been simplified, without its meaning being changed, by the deletion of the requirement in the former clause 4(3)(c) that the "action was not commenced before commencement day". That criterion must be met in any event.

Clause 7 modifies retrospectively the limitation period governing damages claims by minors for injury sustained during or consequential upon childbirth. Under the Limitation Act 1935 (which, in the absence of an enacted clause 7 or other comparable provision, would apply to all causes of action accruing before any new legislation comes into force) an infant would have until age 24 to sue and a brain damaged person would be able to sue within 6 years of the mental disability ceasing. The effect of clause 7 is that a child injured during or in consequence of childbirth before a new legislative regime comes into force must commence proceedings within the shorter of
(a) six years (subject to any extensions) from the new Act coming into operation, and

(b) the limitation period applicable under the Limitation Act 1935.

Reference was made in the course of debate in the Legislative Council upon the motion to refer these Bills to the Standing Committee on Legislation to the position of the Australian Medical Association (WA). The AMA has proposed that time for the commencement of proceedings on behalf of infants who suffer childbirth related injury prior to the Bill's enactment be reduced from the proposed six years from enactment to a cut-off date of 1 January 2011, i.e. to six years from 1 January 2005. That proposal was not included in the proposed Bill for the reason that it was seen as anomalous that if, say, the Bill was enacted and proclaimed on 1 November 2005, a child born on that date would have until 1 November 2011 (subject to any extensions) to sue whereas a child born on 31 October 2005, the day before, would be obliged to commence proceedings (again subject to any extensions) by 1 January 2011.

3. The references in the former clauses 6, 15 and 70 (currently clauses 9, 18 and 74) to "State" were altered to "Crown" so as to remove any potential for uncertainty as to whether Crown agents not falling within the concept of the State in its narrow sense were subject to the Act and, more particularly, to adverse possession.

4. Clause 26 (which was sought to be introduced into the 2004 Bill in the Legislative Council) has been included in the 2005 Bill to, in essence, preserve the status quo in relation to the accrual of equitable actions not analogous, from a limitations perspective, with common law actions.

The existing Limitation Act 1935, while containing provisions addressing particular circumstances requiring the application of equitable principles or equitable remedies, does not apply generally to equitable actions. Nevertheless, notwithstanding the absence of directly binding limitation provisions, equity applies to equitable proceedings the statutory provisions applicable to common law proceedings if the equitable and common law proceedings are sufficiently analogous. Thus a limitation period governing a common law action will be applied to proceedings for an equitable remedy in circumstances where the Court is exercising a concurrent equitable jurisdiction to give the same relief as is available at common law or if there is a sufficient correspondence between the remedies available at common law and in equity. Otherwise, no limitation period applies, meaning that non-analogue equitable remedies can be barred only by the application of discretionary equitable principles such as laches and acquiescence. Time for the purposes of the application of those principles runs, consistently with the manner of operation of equitable principles, from when the relevant wrong is discovered or, as the case may be, from when the circumstances which operated to prevent proceedings being brought came to an end.

For example, under the current law, time for the commencement of proceedings for the recovery, at common law or in equity, of say money paid under a mistake of fact, runs from the date of the mistaken payment. However, in the case of actions for rescission and rectification, which are equitable in nature and not...
analogous to common law remedies, doctrines such as laches run not from the date of payment but from the date of discovery of the mistake. Furthermore, in relation to actions to set aside transactions entered into in circumstances of undue influence, the legal position is that there is no common law analogy to the equitable remedy so that the laches doctrine would run not from the date of the transaction but from the date when the undue influence ceased.

The \textit{Limitation Bill 2005} contains, in clause 12 (as read with the definition of "action" in clause 3(1)), a six-year limitation period for all claims, at common law or in equity, not otherwise dealt with in the Act. That six-year limitation period is subject to the accrual and extension provisions elsewhere in the Act, including the facility in clause 37 for an application to be made to Court for an extension of time for up to three years from when proceedings ought to have been brought, in the event that the failure to commence proceedings was attributable to fraudulent or improper conduct by the proposed defendant.

The "fraudulent or other improper conduct" extension test would give sufficient protection in most circumstances, but there is scope for some fact situations deserving otherwise of extension to fall outside clause 37. For example, in some limited circumstances undue influence can exist without there being impropriety. There is also the potential for the relevant fraud or impropriety to have been committed, not by the defendant, but by a third party. Furthermore, the requirement in clause 37 that the Court be satisfied, before granting an extension, that there has been fraudulent or improper conduct, does not sit technically comfortably with those circumstances where the relationship between the parties is such that, rather than the influenced party having to prove that the influence was undue, the onus lies on the defendant to prove that it was not.

Clause 26 has been drafted with the intention that in the case of actions for equitable relief which would not be barred from the date of accrual by reason of there being no analogous common law remedy, a plaintiff contemplating proceedings will have the longer of six years from accrual and three years from when on equitable principles time for the commencement of the action would be regarded as having begun running. Thus, in circumstances of mistake or undue influence, proceedings for damages, whether at common law or in equity, must be brought within six years of the action’s accrual, but equitable remedies of rescission or rectification will be able to be brought within the later of six years of the transaction or three years from when, respectively, the mistake is discovered or the plaintiff becomes free of the relevant relationship which gave rise to the undue influence. In other words, the status quo in relation to equitable claims will largely be retained, but complemented by clause 37’s specific provision for extension in the case of fraud or improper conduct of the proposed defendant.

5. Clause 43 has been redrafted (from the former clause 39) for greater clarity.

The relevant scheme of the Bill is that in defined circumstances potential litigants can apply for extensions of time where the applicable limitation period has expired. If the criteria are met, the Courts have a discretion as to whether or not to grant leave. The previous clause 39, firstly, obliged a Court, when considering the exercise of its discretion, to have regard to whether the delay would
unacceptably diminish the prospects of a fair trial and, secondly, authorised it to refuse an application if extension would significantly prejudice the proposed defendant. The new clause 43 is conceptually in that it merely obliges Courts, when considering applications, specifically to take into account (along with any other considerations thought appropriate) both the prospects of a fair trial and the extent of prejudice to the defendant. In other words, Courts may have regard to whatever considerations they think appropriate in an extension context but are obliged to have regard to those two considerations.

6. Clause 54 has been redrafted (from the former clause 50) for greater clarity.

At common law a cause of action for personal injury accrues when not insignificant injury is sustained, irrespective of whether the victim was aware that some bodily change had occurred. So, for example, a cause of action in respect of a cancer would accrue, and hence the limitation period would run, from when say a tumour began to form - even if that tumour was not detected for some time. Clause 54 is intended to address this accrual anomaly.

Clause 50 of the 2004 Bill operated so that the cause of action for a latent disease accrued not when the disease occurred but when, in some form, it manifested itself. It defined "manifestation" as "a symptom, clinical sign or other objectively determinable physical manifestation of personal injury". In response to concerns as to the meaning to be given to the words "objectively determinable physical" in that definition, the definition itself has now been removed and, instead, the criteria for accrual modified so as to incorporate directly the balance of the definition.

The criterion for latent injury accrual is now the earlier of:

(a) the victim becoming aware that he or she has sustained a not insignificant personal injury, and

(b) the appearance of "the first symptom, clinical sign or other manifestation of personal injury consistent with the person having sustained a not insignificant personal injury".

It is to be noted that clause 54 operates retrospectively (see clause 6).

7. The asbestos-related diseases provision (clause 55, formerly clause 51) has been modified, but only to reflect the fact that the amendments to the Workers' Compensation and Injury Management Act 1981 have now been proclaimed to come into effect on 14 November 2005.

8. The former clause 57, inappropriately in Division 1 of Part 4 (which deals with actions other than actions to recover land), has been relocated (as clause 72) in Division 2 of Part 4.

9. Part 5 of the Bill, which deals with the substantive effect of the expiration of limitation periods upon actions to recover land, has been modified in two respects.

Firstly, the title extinguishment provisions in the former clause 69 now apply (see clause 74) only to actions for the recovery of land, rather than to actions for the recovery of land or rent. As "rent charges" are included in the definition of "land"
in clause 3, a separate reference to "rent" (which is also defined to include "rent charge") is unnecessary.

Secondly, the potential for uncertainty where a base limitation period had expired but the potential for extension remains has been removed by specifically referring, in clauses 74 and 77, to both the base limitation period and periods of extension judicially granted.

**Limitation Legislation Amendment and Repeal Bill 2005**

The only change to the *Limitation Legislation Amendment and Repeal Bill 2005* from the 2004 Bill is to clause 2, the commencement provision. Part 9 of the Bill, which amends the *Workers’ Compensation and Injury Management Act 1981*, will come into effect on 14 November 2005, the date upon which the relevant provisions of the *Workers’ Compensation Reform Act 2004* now will operate (unless the *Limitation Bill 2005* has not by that date been enacted and come into operation, in which case Part 9 will operate from that Act's commencement).

**Proposed amendments to the 2005 Bills**

The foreshadowed amendments to the two Bills are set out in Issue No. 1 of each of Supplementary Notice Paper No. 6 and Supplementary Notice Paper No. 7, both dated 16 August 2005.

The proposed amendments to the *Limitation Bill 2005* and to the *Limitation Legislation Amendment and Repeal Bill 2005* relate solely to the limitation provisions governing defamation and are intended to implement the limitation scheme integral to the uniform defamation law, reflected in the *Model Defamation Provisions* drafted by the Parliamentary Counsel’s Committee, to which model all Australian jurisdictions have committed. The limitation provisions of the *Model Defamation Provisions* are set out in Schedule 4 to that draft Bill.

**Limitation Bill 2005 and Limitation Legislation Amendment and Repeal Bill 2005**

1. The regime in the *Limitation Bill 2004* and the *Limitation Bill 2005* (which represent a modified version of the recommendations of the *Western Australian Defamation Law: Committee Report on Reform to the Law of Defamation in Western Australia*, chaired by Wayne Martin QC) was that proceedings for defamation must, subject to the Bill's provisions elsewhere for extension and suspension, be brought within six months of the plaintiff's becoming aware of the defamatory publication or within six years of the publication itself, whichever event occurs first (clause 14). The six month period was judicially extendable, subject to the six year ultimate period, for up to 12 months from when the plaintiff discovered or ought reasonably to have discovered the defamation and the identity of the person publishing that defamation (clause 39).

The foreshadowed amendments to the *Limitation Bill 2005*, which adopt the approach in Schedule 4 of the *Model Defamation Provisions*, would introduce a regime whereby actions for defamation must be brought within one year of the defamation's publication (clause 1, subject only to a discretion in the courts to extend the time for the commencement of proceedings to three years from
publication if "it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within one year from the publication" (amended clause 39). To achieve consistency with other jurisdictions, the limitation period will not otherwise be capable of extension and the minority and mental disability provisions of the Bill will not apply to defamation actions.

2. The effect of the proposed new clause 8 of the Limitation Bill 2005 and the proposed amended clause 4 of the Limitation Legislation Amendment and Repeal Bill 2005 will be to implement the transitional limitation provision in Schedule 4 to the Model Defamation Bill. If those clauses were to be enacted, the Limitation Act 1935 (which has a two year limitation period for some categories of slander and a six year period for other defamation claims) would continue to apply to defamatory publications occurring after the Bills' commencement in circumstances where there are multiple damages claims relating to publications within a twelve month period, some occurring before and some after the commencement day, and all relating to substantially the same matter.

DEPUTY STATE SOLICITOR

30 August 2005

cc: Hon Attorney General
APPENDIX 4
MR JOHN YOUNG’S TRANSCRIPT OF EVIDENCE

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
Deputy State Solicitor, State Solicitor’s Office,
Level 14, 141 St Georges Terrace,
Perth 6000, examined:

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 impropiety 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 not to 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 signification 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 circumstances 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**
APPENDIX 5

LIST OF REMAINING QUESTIONS FOR STATE SOLICITOR’S OFFICE
APPENDIX 5
LIST OF REMAINING QUESTIONS FOR STATE SOLICITOR’S OFFICE

STANDING COMMITTEE ON LEGISLATION

LIMITATION BILL 2005 AND LIMITATION LEGISLATION AMENDMENT AND REPEAL BILL 2005

HEARING MR JOHN YOUNG, DEPUTY STATE SOLICITOR AND MS LINDA BUSH, SOLICITOR
STATE SOLICITOR’S OFFICE

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<th>Questions</th>
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<td>1. Are you able to advise the Committee why the Limitation Bill 2005 does not include a general discretion in the courts to extend the limitation period for a period they determine is appropriate? If such a general discretion was provided to the courts, what consequence would that have on the rest of the Limitation Bill 2005?</td>
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<td>2. The Australian Lawyers Alliance submits that there is case law [British American Tobacco Australia Ltd v Cowell [2003] VSCA 43 (April 28 2003)] to suggest that a deliberate programme of document destruction undertaken by a defendant does not constitute fraud or improper conduct for the purposes of limitation extension. The phrase ‘fraudulent or other improper conduct’ is not defined in the Limitation Bill 2005. With this case law in mind, does the phrase cover the deliberate destruction of evidence by the defendant?</td>
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<td>3. The Australian Lawyers Alliance submits that the term ‘physical cause’ in clause 38 of the Limitation Bill 2005 poses problems as it is not defined. It submits that there is scope for defendants to argue that the physical cause was some event that occurred long before the plaintiff ever knew that they had the disease or injury. For example, it asks whether the inhalation of asbestos or silicon would amount to ‘physical cause’ of the injury. The Asbestos Diseases Society has similar concerns.</td>
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Would you please comment on these concerns?

Would you please advise whether a definition of ‘physical cause’ could overcome these concerns?

4. Under the extension provision of clause 40 of the Limitation Bill 2005, a child who was under the care of a guardian and is out of time would need to prove that their guardian had acted unreasonably in not commencing an action within time. This has the potential to oppose a child against their guardian.

Was this an intended outcome of the clause?

What would constitute ‘unreasonable’ behaviour for a guardian?

5. The Australian Lawyers Alliance has submitted that the drafting in clause 43 of the Limitation Bill 2005 (when compared to clauses 37 and 38) is such that on an application for an extension of time, the dominant consideration guiding the court’s consideration will be the prejudice to the defendant.

Would you please comment on these concerns?

6. The Australian Lawyers Alliance also suggests that clause 43 is superfluous since at common law, prejudice must already be considered: Taylor v Brisbane South Regional Health Authority (1996) 186 CLR 541.

Was this considered when the clause was drafted?

7. Please explain how clause 38(3) of the Limitation Bill 2005 would apply to a person who was sexually abused as a child 20 years ago if:

   (a) they experienced a psychologically recognised repression of the abuse for those 20 years before finally recovering that memory?

   (b) they were aware of the abuse during that period but were emotionally unable to commence legal action until after the expiry of the limitation
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<th><strong>Legislation Committee</strong></th>
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<td><strong>period?</strong></td>
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<td>[The Committee <em>encloses</em> for you information an article by Dr Ben Mathews which discusses the types of difficulties experienced by child sexual abuse victims.]</td>
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<td>The Law Society noted that the term ‘confirmation’ in clause 45 of the Limitation Bill 2005 appears to capture <em>ex gratia</em> and without prejudice payments. If those payments will operate as an extension of a limitation period, the Law Society is concerned that those types of payments may not continue to be offered by defendants or insurers.</td>
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<td>Was the term intended to capture these types of payments?</td>
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<td>If not, would an amendment be required to clarify the intent?</td>
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<td>The Australian Lawyers Alliance has submitted that the ‘manifestation’ test in clause 54(1)(b) of the Limitation Bill 2005 leaves the way open for unjust and legalistic limitations defences. By way of example, they submit that a patient might present to a doctor with a symptom that is initially misdiagnosed. The Australian Lawyers Alliance indicates that if the symptom is later correctly diagnosed the defendant may argue that time ran from the earlier visit. Additionally, it submits that a disease of ‘gradual process’ such as psychiatric illness may be manifest long before they are diagnosed.</td>
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<td>As a solution, the Australian Lawyers Alliance suggest that the test should be when the person first knows that they have suffered the injuries and that they were caused by the act or omission of some person (as in section 5(1A) of the <em>Limitation of Actions Act 1958</em> (Vic)).</td>
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<td>Would you please comment on the concerns of the Australian Lawyers Alliance and their proposal?</td>
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<td>Remaining with clause 54 of the Limitation Bill 2005, the Australian Lawyers Alliance also suggests that the test in subclause (1)(a) should be more objective; that is, what would a reasonable person in the circumstances of the plaintiff have been aware of?</td>
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<td>In the Office’s view, is the test, as it is currently worded, a subjective or objective one?</td>
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APPENDIX 6

LETTER FROM MR JOHN YOUNG DATED SEPTEMBER 7 2005
APPENDIX 6

LETTER FROM MR JOHN YOUNG DATED SEPTEMBER 7 2005

Hon Graham Griffard MLC
Chairman
Standing Committee on Legislation
Legislative Council of Western Australia
Parliament House
PERTH WA 6000

By Facsimile: 9222 7805

Dear Sir

INQUIRY INTO THE LIMITATION BILL 2005 AND LIMITATION LEGISLATION AMENDMENT AND REPEAL BILL 2005

I refer to your letter of 5 September 2005 seeking my response to a list of questions attached to that letter.

My responses are as follows:

1. The rationale for the Limitation Bill 2005 not including a general discretion in the Courts to extend the limitation period is set out in the Limitations Law Reform Discussion Paper issued on 17 May 2002 by the Attorney General, the Hon Jim McGinty MLA.

Reference is made, in particular, to the following observations at page 6 of the Discussion Paper:

"Any limitation regime is the result of compromise - compromise between the interests of potential plaintiffs and potential defendants, and compromise of the ordinary desirability, in the interests of justice and in the overall economic interest, that claims be brought and resolved promptly. The factors relevant to where that compromise should be drawn are canvassed in some detail below.

The Government's position is that open ended limitation periods or broad discretionary mechanisms for the extension of time are not in society's best interests. Its preferred approach is for legislation, as far as is practicable, to fix limitation periods or to allow time to run from dates which can be determined objectively. In any event, Government is of the view that decisions as to whether particular classes of potential plaintiffs ought to be allowed to sue for damages years after the relevant wrong, are properly policy issues, and so decisions which on ordinary Westminster principles ought be made, not by the
Courts in the exercise of some general discretion, but by government. This is quite apart from the undesirability in any event of the inconsistency in judicial decision making inevitable in essentially subjective discretions of this nature."

Those observations are developed at pages 9-13 of the paper, with the policy arguments against a broad discretion being set out at pages 12-13 as follows:

- "It can strongly be argued that such a discretion involves in truth a policy decision which ought not be made by the Courts. It is undesirable, particularly from the perspective of maintaining respect for the judicial system, that a decision whether to allow an action to be pursued is governed substantially by subjective rather than objective factors. This is especially so in controversial cases.

- In exercising such a discretion in a particular case, a judge cannot take into account in other than a very general way such broad policy and economic issues as the increased cost of premiums associated with potentially lengthened limitation periods, the cost of records retention, and the economic and financial implications of persons and companies being unable accurately to assess their potential liabilities at any particular time.

- It cannot be assumed always to be in plaintiffs' interests to be faced, instead of with the certainty that a claim cannot be brought, with the uncertainty and expense of an application for leave to bring proceedings.

- An application for leave which involves assessment of the type and range of considerations outlined above can be a very lengthy and expensive proceeding. Whether, for example, the defendant will be prejudiced by the commencement of proceedings many years after the conduct complained of may require the hearing of a significant proportion of the defendant's (and indeed plaintiff's) evidence. In some circumstances (as in the Cubillo case referred to in Item L below), determination of the leave issue would properly have to await the substantive hearing of the action in respect of which leave is sought. All parties are faced with significant costs.

- The practical reality is that it will be much more difficult for entities of substance, such as large companies or the State or State entities, to resist applications for leave than it will individuals or other entities, so that the burden of actions which would otherwise have been time barred will fall disproportionately.

- It is not in the public interest that, by reason of prejudice to the parties being material to the discretion, an entity which keeps poor or no records, or which destroys its records, will be less likely to be sued outside ordinary limitation periods than will an entity (again such as the State) with a good system of record keeping.

- While there is unfairness in plaintiffs not being able to pursue meritorious but stale claims, it can also be said to be unfair that inherent in the exercise of a discretion is the real possibility of one plaintiff with a disability being permitted to pursue an otherwise barred claim against a defendant, but another plaintiff with the identical disability being precluded from suing another, or even the same, defendant. This result, too, has implications for the Courts' standing in the community."
It is to be noted that the absence from the Limitation Bill 2005 of a broad judicial discretion is consistent with the view of the Ipp Report Review of the Law of Negligence, issued in September 2002, that it was "unnecessary and indeed undesirable to give the court a discretion to extend the limitation period" [paragraph 6.27, and see also the reference in paragraph 6.39 to a general discretion being "creative of uncertainty"]: That observation was made in the context of a recommended regime in which a cause of action for personal injury would accrue upon the plaintiff's discovery of specified information. The Limitation Bill 2005 does not have an automatic discoverability extension, but does provide in clause 38 for a judicial extension where material facts were not known to the plaintiff, so that the Ipp Report's concerns as to the appropriateness of a general judicial extension are equally applicable to the Limitation Bill 2005.

The Ipp Report did recommend a Court discretion to extend the proposed 12 year long stop for up to three years from discovery, but the Limitation Bill 2005 does not incorporate a long stop regime (save for the 30 year long stop in clause 35 governing claims by the mentally disabled arising out of a close relationship). Accordingly, that recommendation, which was primarily concerned with the impact of long stops on claims for latent injuries (see paragraph 6.37), has no relevance to the Bill.

I would draw particular attention also to the detailed discussion of the rationales for limitation periods by Justice McHugh in the High Court decision of Taylor v Brisbane South Regional Health Authority (1996) 186 CLR 541.

Generally, a broad judicial discretion to extend time is seen as incompatible with the structure of the Limitation Bill 2005, which endeavours to achieve a large measure of certainty by clear accrual dates and defined criteria for suspensions and extensions.

2. The effect of clause 37 of the Bill is that a Court may extend time for the commencement of proceedings if the plaintiff's failure to bring the action within time was caused by "fraudulent or other improper conduct" of the defendant. The phrase "fraudulent or other improper conduct" is not defined, the preference being to allow the courts to determine on a case by case basis whether conduct which led to an action not being commenced is appropriately to be characterised as "fraudulent" or "improper".

The facts of British American Tobacco Australia Services Ltd v Cowell (2002) 7 VR 524, [2002] VSCA 197 (6 December 2002) (note the incorrect citation of that decision in the Australian Lawyers Alliance's submission) were, relevantly, that in an action for damages by a Rolah McCabe against British American Tobacco Australia Services Ltd and its predecessors for lung cancer consequential upon smoking, the trial judge dismissed the
defence and entered judgment for Mrs McCabe on the grounds, relevantly, that Ms McCabe's claim had been irretrievably prejudiced by the tobacco company's destruction of potentially relevant documents, albeit prior to the proceedings having been commenced. The trial judge concluded that while the company's document retention and destruction policy did have legitimate management and administrative purposes and benefits, nevertheless "the primary purpose of the development of the new policy in 1985 and subsequently was to provide a means of destroying damaging documents under the cover of an apparently innocent house-keeping arrangement" (quoted in the Court of Appeal's decision at para [76]). The Court of Appeal concluded, however, that that finding was not open on the evidence led, ie the Court of Appeal concluded that the tobacco company had not embarked upon a deliberate policy of destruction of records in order to defeat a future claim such as that brought by Mrs McCabe.

The Court gave lengthy consideration to what it described as the "vexed question" (para [136]) of the circumstances in which it would not be proper for a person or entity to destroy documents at the time when proceedings to which those documents might be relevant had not commenced but could reasonably be anticipated. (It is clear law that where proceedings have been commenced material documents should be retained.) The tobacco company contended that there was no inhibition on a prospective defendant doing what it wished with its own documents. Ms Cowell, Mrs McCabe's executor, argued on the other hand that a prospective defendant was in law precluded from destroying documents which might be relevant to anticipated litigation. Ultimately, the Court of Appeal concluded, at para [173]:

"[I]t seems to us that there must be some balance struck between the right of any company to manage its own documents, whether by retaining them or destroying them, and the right of a litigant to have resort to the documents of the other side. The balance can be struck, we think, if it be accepted that the destruction of documents, before the commencement of litigation, may attract a sanction (other than the drawing of adverse inferences) if that conduct amounts to an attempt to pervert the course of justice or (if open) contempt of court, meaning criminal contempt".

The Court found it unnecessary to determine whether on the evidence led at trial there had been an attempt to pervert the course of justice or a contempt as a submission that the tobacco company's destruction of records should be so characterised had not been put to or considered by the trial judge. I think it fair to say, however, that having regard to the other findings made by the Court of Appeal, it is unlikely that findings of an attempt to pervert the course of justice or of contempt could legitimately have been made against British American Tobacco Australia Services Ltd.

Applying the approach of the Victorian Court of Appeal in the Cowell case, it appears clear that the pre-action destruction of documents would be
characterised as "improper conduct" for the purposes of clause 37 of the Limitation Bill 2005 if that destruction would amount to an attempt to pervert the course of justice or a contempt. The circumstances of the documents' destruction, and in particular the prospective defendant's motives for destroying the documents, would have to be closely examined to determine whether, in the particular case, those criteria had been satisfied. Of course, even if document destruction in a particular case was regarded as "improper conduct", a Court would be empowered to extend time under clause 37 only if that destruction relevantly caused the prospective plaintiff not to commence the proceedings within the applicable limitation period. It would not be sufficient, for example, that the document destruction (even allowing for any adverse inferences which could be drawn against the alleged wrongdoer by reason of its destroying documents) merely would make it more difficult for the plaintiff to establish its case.

It is to be noted that, pursuant to clause 42 of the Bill, a Court to which an extension application under clause 37 (or otherwise) is made may, if the circumstances warrant, allow the substantive proceedings to be issued without resolving the extension application and reserve that application for determination at some future time. The intention, having regard to the potential for some extension applications to be closely intertwined evidentially and legally with the action proposed to be commenced, is to allow Courts the flexibility to determine extension applications at the time which is most appropriate in the interests of justice. Thus, in a case where the sinister destruction of documents material to the proposed action is alleged, it would be open to a Court to hear all or part of the substantive action and to grant or refuse an extension at that stage. In any event there are the mechanisms in the Bill to ensure that relevant factual issues can be fully ventilated before a decision under the Bill is made.

3. Clause 38 of the Bill permits a Court to extend time for the commencement of proceedings where the prospective plaintiff was not aware of the matters set out in clause 38(3). One of those matters is "the physical cause of the death or injury" in respect of which proceedings are proposed. The words "physical cause" are intended to refer to the physical circumstances which led to the death or injury which is the subject of the damages claim - as distinct from a cause which draws in notions of fault (such as that a dust disease was caused by a failure to provide a respirator). In the case of the contraction of a dust disease, the "physical cause" would be the inhalation of the responsible asbestos fibre, silicon or other dust or fibre.

I cannot see how a defendant could contend that a person had the relevant knowledge of the physical cause of the death or injury sought to be the subject of an action for damages before the prospective plaintiff was aware that he or she had contracted the injury. Clause 38(3)(a) addresses the circumstance where a person has contracted a disease or injury but has not
commenced proceedings because he or she does not know what physical circumstances resulted in that disease or injury. A person who was not aware that he or she had contracted, say, mesothelioma could not be said, it seems to me, to be aware of the physical cause of that mesothelioma.

4. Clause 40(3) of the Bill would, as indicated, oblige a person seeking an extension of time to pursue a claim in circumstances where that claim had accrued while the person was a child but had not been pursued within time by the child's guardian, to argue that the guardian's failure to bring the action was unreasonable. An application would involve criticism of the (by then former) guardian's conduct. This outcome was foreseen. Clauses 29 and 30 of the Bill are intended to encourage parents and guardians to bring proceedings on behalf of a child in their care in a timely fashion. Clause 40 recognises that there will arise situations in which proceedings ought reasonably to have been brought, but were not and, as a safety net, allows applications for extension to be made.

A guardian's failure to commence an action during the applicable period will be characterised as "unreasonable" if, in all the circumstances, a reasonable person in the position of the child's guardian would have brought an action. The issue will be one of fact, requiring consideration of the social and financial circumstances of the guardian, the value and prospects of success of the action not pursued, the availability of legal assistance, the cost of bringing proceedings, and so on.

5. Where a Court is satisfied that the criteria in say clause 37(3) or clause 38(3) are met, it in consequence has the power to grant the extension sought but must exercise a discretion as to whether in all the circumstances leave ought to be granted. Both clause 37(2) and clause 38(3) use the words "a court may extend". The discretion is a broad one, but clause 43 obliges a Court, when considering the exercise of a discretion, to have regard as of course, albeit along with any other relevant factors, to two specific matters. Those two matters were given special significance by the High Court in Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541 (a case concerning the construction of section 31(2) of Queensland's Limitation of Actions Act 1974).

I would accept that the effect of clause 43 is that the prospects of a fair trial and the very much related issue of prejudice to the defendant would be a "dominant consideration" guiding the court's discretion.

It should be appreciated that, in the context of limitation period extensions, the potential prejudice to defendants of commencing proceedings is of a very different character from the prejudice to plaintiffs of an extension not being permitted. Generally, prejudice to a defendant will be evidentiary in nature (arising from the unavailability of documentation or witnesses or simply the
impact upon recollections of the passage of time) or will lie perhaps in a defendant having ordered his or her financial or other affairs on the assumption that an action could not be brought or in some consequential action against a third party for indemnity or contribution having now been precluded. The prejudice to a prospective plaintiff will be simply the loss of a prospect of success in the proceedings per se (in contrast with clause 43(b)'s precluding the commencement of an action as of itself a ground of prejudice of a prospective defendant).

The Taylor case itself makes it clear that in the limitations context it is not a case of weighing potential prejudice to the applicant against the potential prejudice to the prospective defendant.

6. It would be fair to say that clause 43 is compatible with the observations made by the High Court in Taylor v Brisbane South Regional Health Authority (1996) 186 CLR 541. However, the issue of the factors which must be taken into account in the exercise of a discretion always is ultimately one of statutory construction and clause 43 makes clear that for the purposes of the Limitation Bill 2005 the two specified factors must be accorded a special significance.

7(a). In the case of a person who was sexually abused 20 years previously but had experienced a psychologically recognised repression of the abuse throughout that period, clause 54 of the Bill would operate so that the limitation period ran from when the first manifestation (including psychiatric manifestation) of the abuse occurred or the person became aware of not insignificant harm consequential upon the abuse, whichever first occurred. Assuming that the abused person has manifested symptoms of say a psychiatric condition more than three years prior to the memory of the abuse being revived, so that the limitation period has expired (this assuming that clauses 32 and 35, relating to close relationships, have no application), then it would be open to a court to extend time under clause 38(3) if any of the three criteria in that provision are satisfied. If the person was unaware, when the material limitation period expired, that he or she had suffered a psychiatric harm, then the person similarly would not be aware of the physical cause of the injury, namely, the improper interference with the person as a child. In becoming aware of the physical reason for the relevant psychiatric condition, the person would also of course become aware that the condition was attributable to the conduct of a person. However, if the victim was unaware, having made reasonable enquiry, of the assailant's identity, criteria (c) would be satisfied, again enabling a clause 38(3) extension application. It is to be emphasised that, by reason of clause 38(5), the knowledge which would prevent the application of clause 38(3) may be acquired either by the victim personally or, in the case of a child, by that person's parent or guardian.
The observation should be made that a cause of action for damage arising out the one incident accrues only once - "further injury arising from the same act at a later date does not give rise to a further cause of action": Cartledge v E. Jopling & Sons Ltd [1963] AC 758, per Lord Reid at 772. So if a child suffers physical harm during an assault of a magnitude sufficient to meet the criteria in clause 54(1)(a) or (b), time will run from the assault, notwithstanding that the child may not manifest the more serious psychiatric symptoms for some time. Claims involving both physical and mental harm also have implications for the operation of clause 38(3) (as to which see generally the observations in Stubbings v Webb [1992] QB 197).

(b) Where a person is aware at the time the limitation period expires of the fact of abuse, that his or her physical or psychiatric condition is attributable to that abuse and the identity of the abuse perpetrator, but is emotionally unable to commence legal proceedings within the required period, then there is no scope for an application for extension under clause 38.

Dr Ben Mathews' article Limitation Periods in Child Sexual Abuse Cases: Law, Psychology, Time and Justice (2003) 11 Torts Law Journal 1 was had regard to in the development of the policy reflected in the Limitation Bill 2005.

8. Pursuant to clause 45(1)(b) of the Bill, a person confirms a cause of action if he or she makes a payment in relation to a second person's right or title and "makes the payment in circumstances not inconsistent with an acknowledgment of that right or title".

A "without prejudice" payment or an ex gratia payment made in circumstances where it was clear that there was no admission of liability would, in my view, not be "not inconsistent" with an acknowledgment of the second person's right or title. If, on the other hand, a person makes a payment intending it to be "without prejudice" or ex gratia but fails to make that intention clear, such payment would on the face of it constitute a confirmation. This result is compatible with clause 45's intention.

9. Where a patient presents to a doctor with symptoms, the patient's cause of action will, pursuant to clause 54, accrue when the symptoms became manifest, notwithstanding that those symptoms were misdiagnosed. If the symptoms are subsequently properly diagnosed but in circumstances where the limitation period (which is calculated from the initial appearance of symptoms consistent with a not insignificant injury or disease) has expired, then the issue will be whether the prospective plaintiff can meet the criteria in section 38(3) of the Bill and so be in a position to apply for an extension of time.
The Australian Lawyers Alliance's suggestion that time should run from the plaintiff discovering specified matters material to his or her proposed action for damages is appropriate to a regime (such as that reflected in section 5(1A) of Victoria's Limitation of Actions Act 1958) in which accrual is defined in terms of discoverability. That is not, however, the scheme of the Limitation Bill 2005. That scheme, as I have indicated, is objectively determinable accrual dates, with its then being open to seek extensions of time in appropriate circumstances.

The difficulty with a discoverability accrual approach is that time runs from a date whose determination will frequently be within the sole knowledge of the prospective plaintiff. When proceedings are issued under such a regime many years after the event giving rise to the material harm, the defendant will often not be in a position to make a judgment as to whether the proceedings were brought outside the applicable limitation period and will be faced with the task of having to use the court processes to elicit the plaintiff's knowledge and so make a decision as to whether, even arguably, the proceedings were or were not brought within time. By contrast, under the Limitation Bill 2005, while the defendant retains the onus of proving that an action is limitation barred, the defendant will not have the onus of disproving issues such as the plaintiff's lack of awareness of the cause of the injury or of the identity of a person whose conduct contributed to the injury, as it will be for the plaintiff, in the context of an extension application, to prove that those criteria have been satisfied. The onus of proof of such matters properly lies, under the Bill, with the person able to establish the relevant circumstances.

Moreover, a discoverability accrual approach, inherent in which is the potential for very significant periods to elapse between injury and the commencement of proceedings, does not allow for a Court's discretionary intervention to not permit proceedings where, say, by reason of the delay, there is no reasonable prospect of a fair trial.

10. Clause 54(1)(a) is to the effect that a cause of action for damages for personal injury accrues (subject to any earlier accrual under clause 54(1)(h)) when the person proposing to sue becomes aware that an injury has been suffered. The provision is intended to address the circumstance where an injury or disease is asymptomatic but has nevertheless been discovered by means such as X-ray. The criterion is an objective one in the sense that time runs when, as a fact, the victim becomes aware that injury has been sustained. Proof of that objective fact will ordinarily be determined by objective evidence (such as, in the example given, the X-ray itself together with the contents of a letter communicating the X-ray findings to the plaintiff) but it may involve subjective evidence from the plaintiff himself as to when he or she believed knowledge of the injury was acquired.
In any event, it is not apparent why the current criterion in clause 54(1)(a) is inappropriate. The test suggested by the Australian Lawyers Alliance of what a reasonable person in the plaintiff's circumstances would have been aware of would render accrual more difficult to determine in any particular case and, while clause 54(1)(a) has in practical terms a fairly limited operation by reason of clause 54(1)(b), the Australian Lawyers Alliance's proposal could only operate to create accrual dates earlier than are envisaged by clause 54.

11. The word "symptom" in clause 54(1)(b) is intended to have its ordinary meaning, i.e. a bodily indication of disease or injury. Issues such as whether the person was aware of the symptom or appreciated its significance are relevant, under the Bill, not to accrual (clause 54(1)(a) aside) but to whether or not an extension under clause 38 should be granted in the event that the limitation period expires without proceedings having been issued.

12. The term "not insignificant" is not a term of art. It was included in clause 54 so as to reflect the common law principle that tortious claims of which damage is an element accrue "as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible" (Cartledge v E. Jopling & Sons Ltd [1963] AC 758, per Lord Reid at 771-2) or "when the damage - that is, real damage as distinct from purely minimal damage - is suffered" (per Lord Evershed at 774, and see generally also J. Stapleton's article "The Gist of Negligence: Part 1 - Minimum Actionable Damage" (1988) 104 LQR 213). The issue was put another way in Cartledge, a pneumoconiosis claim, by Lord Pearce, at 779, in the following terms: "It is for a judge or jury to decide whether a man has suffered any actionable harm and in borderline cases it is a question of degree."

It will be seen that a variety of terms could have been used - "not insignificant", "non-negligible", "damage which is not minimal", even perhaps "actionable".

I do not see it as helpful to the interpretation of the words "not insignificant" in clause 54(1) to compare them with the word "significant" in clause 55(2) as in the latter provision "significant" does not have its ordinary dictionary meaning but the meaning specifically ascribed to it, for the purposes of clause 55 only, by clause 55(3).

13. The Limitation Bill 2005, including clause 78, maintains the position under the Limitation Act 1935 whereby a failure to commence proceedings within the time allowed will bar the remedy rather than extinguish the relevant right unless the Bill otherwise, expressly or by necessary implication, provides. The scheme of the Bill is to preclude actions being "commenced" (subject to any relevant suspensions and extensions) once the limitation period applicable to the cause of action has expired and clause 78 similarly uses the
phrase "cannot be commenced". On ordinary principles, this is the language of procedural provisions barring a remedy, as distinct from substantive provisions barring any right of action. Express provision for extinguishment is made in clauses 74, 76 and 77. By implication in any event, causes of action not falling within those provisions have procedural effect only.

Yours faithfully

[Signature]

DEPUTY STATE SOLICITOR

7 September 2005

Attached
APPENDIX 7
SUPPLEMENTARY NOTICE PAPER NO 6, ISSUE NO 1
APPENDIX 7
SUPPLEMENTARY NOTICE PAPER NO 6, ISSUE NO 1

WESTERN AUSTRALIA
LEGISLATIVE COUNCIL

AMENDMENTS AND SCHEDULES

Supplementary Notice Paper No. 6
Issue No. 1

TUESDAY, AUGUST 16 2005

LIMITATION BILL 2005 [006-2]

When in committee on the Limitation Bill 2005:

Clause 4

The Parliamentary Secretary to the Attorney General: To move -

1/4 Page 6, line 27 - To delete “section 7” and insert instead -

“ sections 7 and 8 ”.

Clause 14

The Parliamentary Secretary to the Attorney General: To move -

2/14 Page 10, line 4 - To insert after “if” -

“ one year has ”.

The Parliamentary Secretary to the Attorney General: To move -

3/14 Page 10, lines 5 and 6 - To delete the lines.

The Parliamentary Secretary to the Attorney General: To move -
Clause 33

The Parliamentary Secretary to the Attorney General: To move -

Page 10, line 7 - To delete “6 years have”.

Clause 33

The Parliamentary Secretary to the Attorney General: To move -

Page 18, line 14 - To delete “Subject to subsection (2),”.

The Parliamentary Secretary to the Attorney General: To move -

Page 18, line 14 - To insert after “32” -

“ do not ”.

The Parliamentary Secretary to the Attorney General: To move -

Page 18, lines 16, 17 and 18 - To delete the lines.

Clause 36

The Parliamentary Secretary to the Attorney General: To move -

Page 20, line 6 - To delete “Subject to subsection (2),”.

The Parliamentary Secretary to the Attorney General: To move -

Page 20, line 5 - To insert after “35” -

“ do not ”.

The Parliamentary Secretary to the Attorney General: To move -

Page 20, lines 7 and 8 - To delete the lines.

Clause 37

The Parliamentary Secretary to the Attorney General: To move -

Page 20, line 13 - To delete “any” and insert instead -

“ a ”.

The Parliamentary Secretary to the Attorney General: To move -

Page 20, line 21 - To delete “33, 36” and “39,”.

The Parliamentary Secretary to the Attorney General: To move -

Page 22, line 15 - To delete “6 months have” and insert instead -

“ (4) This section does not apply to an action relating to the publication of defamatory matter. ”.
“one year has”.

The Parliamentary Secretary to the Attorney General: To move -

15/39 Page 22, lines 15 and 16 - To delete “the person alleged to be defamed became aware of”.

The Parliamentary Secretary to the Attorney General: To move -

16/39 Page 22, lines 17 and 18 - To delete “it thinks it just to do so, may” and insert instead -

“satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within one year from the publication, must”.

The Parliamentary Secretary to the Attorney General: To move -

17/39 Page 22, lines 19 to 24 - To delete the lines after “commenced”.

The Parliamentary Secretary to the Attorney General: To move -

18/39 Page 22, line 26 - To delete “6” and insert instead -

“3”.

The Parliamentary Secretary to the Attorney General: To move -

19/39 Page 22, lines 28 to 32 and page 23 lines 1 and 2 - To delete the lines.

Clause 40

The Parliamentary Secretary to the Attorney General: To move -

20/40 Page 23, line 9 - To delete “subsections (3) and (4)” and insert instead -

“subsection (3)”.

The Parliamentary Secretary to the Attorney General: To move -

21/40 Page 23, line 16 - To insert before “An” -

“This section does not apply to”.

The Parliamentary Secretary to the Attorney General: To move -

22/40 Page 23, lines 17 and 18 - To delete the lines.

Clause 41

The Parliamentary Secretary to the Attorney General: To move -

23/41 Page 23, line 25 - To delete “subsections (3) and (4)” and insert instead -

“subsection (3)”.

The Parliamentary Secretary to the Attorney General: To move -

24/41 Page 24, line 1 - To insert before “An” -

“This section does not apply to”.
The Parliamentary Secretary to the Attorney General: To move -

25/41 Page 24, lines 2 and 3 - To delete the lines.

New Clause

The Parliamentary Secretary to the Attorney General: To move -

26/NC8 Page 8, after Clause 7 - To insert the following new Clause -

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8. Special provisions for certain defamation actions

(1) Section 14 applies to the publication of defamatory matter on or after commencement day unless subsection (2) provides otherwise.

(2) Section 14 does not apply to a cause of action relating to the publication of defamatory matter that accrues on or after commencement day (the “post-commencement action”) if —

(a) the post-commencement action is one of 2 or more causes of action in proceedings commenced by the plaintiff;

(b) each cause of action in the proceedings accrues because of the publication of the same, or substantially the same, matter on separate occasions (whether by the same defendant or another defendant);

(c) one or more of the other causes of action in the proceedings accrued before commencement day (a “pre-commencement action”); and

(d) the post-commencement action accrued no later than 12 months after the day on which the earliest pre-commencement action in the proceedings accrued.

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APPENDIX 8
MARKED-UP CLAUSES OF THE LIMITATION BILL 2005
APPENDIX 8
MARKED-UP CLAUSES OF THE LIMITATION BILL 2005

4. Application of limitation periods under this Act

(1) The limitation periods provided for under this Act apply only to causes of action that accrue on or after commencement day.

(2) This section is subject to section 7 sections 7 and 8.

8. Special provisions for certain defamation actions

(1) Section 14 applies to the publication of defamatory matter on or after commencement day unless subsection (2) provides otherwise.

(2) Section 14 does not apply to a cause of action relating to the publication of defamatory matter that accrues on or after commencement day (the “post-commencement action”) if:

(a) the post-commencement action is one of 2 or more causes of action in proceedings commenced by the plaintiff;

(b) each cause of action in the proceedings accrues because of the publication of the same, or substantially the same, matter on separate occasions (whether by the same defendant or another defendant);

(c) one or more of the other causes of action in the proceedings accrued before commencement day (a “pre-commencement action”); and

(d) the post-commencement action accrued no later than 12 months after the day on which the earliest pre-commencement action in the proceedings accrued.
14. Defamation — 6 months from discovery or 6 years from publication

An action relating to the publication of defamatory matter cannot be commenced if one year has —

(a) 6 months have elapsed since the person alleged to be defamed became aware of the publication; or
(b) 6 years have elapsed since the publication.

33. Defamation — no extension beyond 6 years after publication

1. Subject to subsection (2) sections 29, 30, 31 and 32 do not apply to an action relating to the publication of defamatory matter.

(2) An action relating to the publication of defamatory matter cannot be commenced if 6 years have elapsed since the publication.

36. Defamation — no extension beyond 6 years after publication

1. Subject to subsection (2), sections 34 and 35 do not apply to an action relating to the publication of defamatory matter.

(2) An action relating to the publication of defamatory matter cannot be commenced if 6 years have elapsed since publication.

Division 3 — Extension by courts

37. Court may extend time to commence any kind of action in cases of fraud or improper conduct

1. A plaintiff may apply to a court for leave to commence an action on any a cause of action even though the limitation period provided for under this Act has expired.

2. On an application a court may extend the time in which the action can be commenced up to 3 years from when the action ought reasonably to have been commenced if the court is satisfied that the failure to commence the action was attributable to fraudulent or other improper conduct of the defendant or a person for whom the defendant is vicariously liable.

3. Nothing in section 33, 36, 38, 39, 40 or 41 prevents a court from extending, under this section, the time in which a plaintiff can commence an action.

4. This section does not apply to an action relating to the publication of defamatory matter.
39. **Court may extend time to commence defamation actions**

(1) A plaintiff may apply to a court for leave to commence an action relating to the publication of defamatory matter even though 6 months have one year has elapsed since the person alleged to be defamed became aware of the publication.

(2) Subject to subsection (3), on an application a court, if it thinks it just to do so, may satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within one year from the publication, must extend the time in which the action can be commenced up to 12 months from when a person to whom the cause of action accrues became aware, or ought reasonably to have become aware of —

(a) the defamation; and

(b) the identity of a person who published the defamation (whether a defendant or not).

(3) An action relating to the publication of defamatory matter cannot be commenced if 6-3 years have elapsed since the publication.

(4) In subsection (2)

**“person to whom the cause of action accrues”**

(a) in the case of a person who is under 18 years of age when the cause of action accrues, means either that person or a guardian of that person;

(b) in the case of a person with a mental disability, means either that person or a guardian of that person.
40. **Court may extend time to commence action by person under 18 when cause of action accrues, with guardian**

(1) A plaintiff who was under 18 years of age when a cause of action accrued to that person may apply to a court for leave to commence an action even though the limitation period provided for under this Act has expired.

(2) Subject to subsections (3) and (4) subsection (3), on an application a court may extend the time in which the action can be commenced up to when the plaintiff reaches 21 years of age.

(3) A court is not to extend time on an application unless the court is satisfied that in the circumstances it was unreasonable for a guardian of the plaintiff not to commence the action within the limitation period for the action.

(4) This section does not apply to an action relating to the publication of defamatory matter if 6 years have elapsed since the publication.

41. **Court may extend time to commence action by person with a mental disability, with guardian**

(1) A plaintiff who suffers a mental disability at any time after a cause of action accrues to that person may apply to a court for leave to commence an action even though the limitation period provided for under this Act has expired.

(2) Subject to subsections (3) and (4) subsection (3), on an application a court may extend the time in which the action can be commenced up to 12 years from when the cause of action accrued.

(3) A court is not to extend time on an application unless the court is satisfied that in the circumstances it was unreasonable for a guardian of the plaintiff not to commence the action within the limitation period for the action.

(4) This section does not apply to an action relating to the publication of defamatory matter if 6 years have elapsed since the publication.
APPENDIX 9

EXTRACTS FROM THE LIMITATION ACT 1985 (ACT)
APPENDIX 9

EXTRACTS FROM THE **LIMITATION ACT 1985** (ACT)

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**EXTRACTS FROM THE LIMITATION ACT 1985 (ACT)**

6. **Acquiescence etc**

Nothing in this Act affects any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise

11. **General**

(1) Subject to subsection (2), an action on any cause of action is not maintainable if brought after the end of a limitation period of 6 years running from the date when the cause of action first accrues to the plaintiff or to a person through whom he or she claims.

(2) Subsection (1) does not apply to a cause of action in relation to which another limitation period is provided by this Act.

33. **Fraud and concealment**

(1) Subject to this section, if—

(a) there is a cause of action based on fraud or deceit; or

(b) a fact relevant to a cause of action or the identity of a person against whom a cause of action lies is deliberately concealed;

the time that elapses after a limitation period fixed by or under this Act for the cause of action begins to run and before the date when a person having (either solely or with other persons) the cause of action first discovers, or may with reasonable diligence discover, the fraud, deceit or concealment, as the case may be, does not count in the reckoning of the limitation period for an action on the cause of action by him or her or by a person claiming through him or her against a person answerable for the fraud, deceit or concealment.
(2) Subsection (1) has effect whether the limitation period for the cause of action would, apart from this section, end before or after the date mentioned in that subsection.

(3) Without limiting subsection (1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(4) For subsection (1), a person is answerable for fraud, deceit or concealment if, but only if—

(a) he or she is a party to the fraud, deceit or concealment; or

(b) he or she is, in relation to the cause of action, a successor of a party to the fraud, deceit or concealment under a devolution from the party occurring after the date when the fraud, deceit or concealment first occurs.

(5) If property is, after the first occurrence of fraud, deceit or concealment, purchased for valuable consideration by a person who is not a party to the fraud, deceit or concealment and does not, at the time of the purchase, know or have reason to believe that the fraud, deceit or concealment has occurred, subsection (1) does not, in relation to that fraud, deceit or concealment, apply to a limitation period for a cause of action against the purchaser or a person claiming through him or her.

34. Mistake

(1) Subject to subsection (3), if there is a cause of action for relief from the consequences of a mistake, the time that elapses after a limitation period fixed by or under this Act for the cause of action begins to run and before the date when a person having (either solely or with other persons) the cause of action first discovers, or may with reasonable diligence discover, the mistake does not count in the reckoning of the limitation period for an action on the cause of action by him or her or by a person claiming through him or her.
(2) Subsection (1) has effect whether the limitation period for the cause of action would, apart from this section, end before or after the date mentioned in that subsection.

(3) If property is, after a transaction in which a mistake is made, purchased for valuable consideration by a person who does not, at the time of the purchase, know or have reason to believe that the mistake has been made, subsection (1) does not apply to a limitation period for a cause of action for relief from the consequences of the mistake against the purchaser or a person claiming through him or her.
APPENDIX 10
SUPPLEMENTARY NOTICE PAPER NO 7, ISSUE NO 1
LIMINATION LEGISLATION AMENDMENT AND REPEAL BILL
2005 [007-2]

When in committee on the Limitation Legislation Amendment and Repeal Bill 2005:

Clause 4

The Parliamentary Secretary to the Attorney General: To move -

Page 3, after line 8 - To insert -

(4) The Limitation Act 1935 applies, despite its repeal and the enactment of the Limitation Act 2005 (the “new Act”), to a post-commencement action, as defined in section 8(2) of the new Act, to which section 14 of the new Act does not apply because of section 8(2) of the new Act.

The Parliamentary Secretary to the Attorney General: To move -

Page 3, lines 9, 10 and 11 - To delete “in relation to causes of action that accrued before commencement day and”. 
"in relation to a cause of action —
  (a) that accrued before commencement day; or
  (b) of a kind mentioned in subsection (4)."
APPENDIX 11
MARKED-UP CLAUSES OF THE LIMITATION LEGISLATION AMENDMENT AND REPEAL BILL 2005
APPENDIX 11
MARKED-UP CLAUSES OF THE LIMITATION LEGISLATION
AMENDMENT AND REPEAL BILL 2005

Part 2 — Repeal

4. Limitation Act 1935 repealed and savings provisions

(1) The Limitation Act 1935 is repealed.

(2) The Limitation Act 1935 continues to apply, despite its repeal and the enactment of the Limitation Act 2005, to causes of action that accrued before commencement day.

(3) Subsection (2) is subject to the Limitation Act 2005 sections 6 and 7.

(4) The Limitation Act 1935 applies, despite its repeal and the enactment of the Limitation Act 2005 (the “new Act”), to a post-commencement action, as defined in section 8(2) of the new Act, to which section 14 of the new Act does not apply because of section 8(2) of the new Act.

(4) A reference in a written law to the Limitation Act 2005 may, in relation to causes of action that accrued before commencement day and where the context so requires, be read as if it were a reference to the Limitation Act 1935 in relation to a cause of action -

(a) ____ that accrued before commencement day; or

(b) ____ of a kind mentioned in subsection (4).