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 3

Members

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

Hearing commenced at 11.30 am

BURGESS, MR GREG
Western Australian Branch President, Australian Lawyers Alliance,
c/- Hammond Worthington,
Level 2, 40 St Georges Tce,
Perth 6000, examined:

YOUNG, MR JOHN
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The CHAIRMAN: Welcome to the meeting this morning. There are a couple of formalities that I will quickly address before we commence our discussions. You will have signed a document entitled "Information for Witnesses"; have you read and understood that document?

Mr Burgess: Yes.

The CHAIRMAN: Today's hearing is public, and is being recorded. A copy of the 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 the premature publication of the transcript or inaccurate disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. If you wish to make confidential statement, you can ask the committee to consider taking your statement in private. If the committee agrees, the public will be asked to leave the room before the hearing continues.

The committee invites you to make an opening statement. We note that you have provided some documents to the committee this morning. It might be appropriate in the first instance for those documents to be tabled. In addition to that, you can make an opening statement if you wish.

Mr Burgess: I would like to table those documents. I have handed eight copies to the committee. I have prepared another, supplementary, set of submissions. The Australian Lawyers Alliance prepared some submissions late last year, which I think were dated November 2004. I felt the need to provide supplementary submissions to the committee to try to outline the association's main concerns. Unfortunately, it is about nine pages long, with double spacing. The association's earlier submissions go into the history of limitations laws and the like and refer also to some other legislation. I have tried to provide an outline of submissions, given that this bill is different from the one that was before Parliament last year. I apologise for not being able to present the submission to the committee by last Wednesday. I simply was not able to do that.

I may refer to passages from the other documents I have submitted. One is a paper that was given to the Australian Lawyers Association by Mr Geoffrey Hancy, a senior barrister, in May. He provided a very good paper on the Limitations Bill that raises one or two concerns about it, which I will refer to and have referred to in my submissions. I have tabled another document because I have referred to it in the submission. Members will be familiar with it. It is the *Limitations Law Reform* report which the Attorney General, Mr McGinty, signed in May 2002 and which contains the recommendations of the WA Law Reform Commission at the time. The Australian Lawyers Association supports some of those recommendations. I table those three documents.

In my opening statement, I will skim over my submission. The first point I will make is that I read in *Hansard* that there was some discussion about the reduction of the time limit from six years to

three years. I noted that some concerns were raised, particularly from some of the Liberal members and also one of the Independent members, about that change. The Attorney General referred to the Australian Lawyers Association's conclusion and its initial executive summary. I must admit that it had been some months since I looked at that document. I was surprised that the conclusion was drawn that the organisation was in favour of the reduction of the time limits from six to three years. That certainly is not the case. I will explain that. The association is a national voluntary organisation. The Western Australian branch requires some help from the national office to present submissions to a committee such as this. A substantial part of that document was drawn up in the Sydney office. Some statements in the executive summary may not accurately reflect the sentiments of the members of the Western Australian branch of the organisation. Certainly, we did not support a reduction of the time limits. Some comments were made in the submission about some of the benefits of a reduction in the time limitation period. However, we do not support that. We think that personal injuries claims are being singled out unfairly with regard to that change. Our focus, of course, was on other aspects of the bill, particularly the accrual provisions and the extension of time provisions and how that related to children. As members are aware, in the eastern states there are three-year time limitation periods - or at least there are in New South Wales. Perhaps the drafting of that conclusion may have reflected the sentiment of people in Sydney who have been used to a three-year limitation period.

[11.40 am]

I point out and concur with some of the arguments that were made in the parliamentary debate by Dr Woollard - interestingly, they are all doctors - Dr Hames and Dr Jacobs. I thought they all made some relevant points. They warned of the dangers of decreasing the time limitation period from six to three years. Some concerns related in particular to injured workers, who must now obtain a threshold under the new legislation that will come into force in November. Some of their concerns may have been a little unwarranted in that an injured worker now has to overcome a 15 per cent impairment. They have to get a certificate from a specialist within 12 months, or they can apply for two extensions, I believe, of six months each, depending on their medical condition. In other words, if it is not ready for certification, they can apply for extensions. The concern - this is quite right - is that some injuries take many years to manifest and reach the stage at which permanent impairment can be assessed. The concern of the members was that the three-year time limitation period could expire before a permanent impairment assessment could be made. That may well still be the case. That will present difficulties for injured workers in those circumstances. The point is still valid for not only workers, but also victims of other kinds of injuries whose symptoms may not manifest in the initial three-year period. I make the point that by my reading of clause 38(3), an injured worker may not be in a position to apply for an extension of time in those circumstances merely because the permanent impairment cannot be assessed because he could still be (a) aware of physical cause of the injury, (b) aware that the injury was attributable to the conduct of a person, and (c) aware of the identity of the person to whom the injury was attributable. It would be useless to apply for an extension in those circumstances merely on the grounds that their permanent impairment cannot be assessed at that time. I make the point that there are already restrictions in the Civil Liability Act on a person having access to a personal injury lawyer. There may be good policy reasons for that, but the simple fact is that it is now more difficult for a personal injury lawyer to advertise or make people in the public aware that they may have a claim. In my respectful submission, this means that some people are simply not going to get to a lawyer within the three-year period. The restrictions already exist in other legislation, so I am submitting that we do not need another restriction by bringing the period back by three years. Dr. Woollard - I submit rightly - pointed out that no statistics indicate that there is an urgent pressing need to reduce the time limitations period from six to three years. Indeed, there is a body of opinion that tort reforms have gone too far. I note that Supreme Court judges in New South Wales - Justice Spigelman and Justice De Jersey - have spoken out against the drastic push towards tort reform. I ask the

committee to take those comments on board. Reducing the period in which people may make a claim to three years is a significant reduction in people's rights.

I did not note in the parliamentary debate any great concern about the six-year period. There was a lot of debate about childbirth cases and obstetrics cases and the fact that some doctors can face a claim 24 years after a wrongful childbirth. That is a concern. We share the sentiments of parliamentarians in that regard. It has previously been our position to oppose any reduction even in childbirth cases, but I think that that is an unrealistic position. What I have put forward in my submissions is that we have safeguards. The time limitations period should be brought back to six years, even in cases of childbirths that have gone wrong, but we need safeguards. The ability to apply for an extension under clause 38, we submit, does not give judges significant discretion to take into account all the relevant factors for why somebody might have missed the time limitation period. I refer the committee to the bottom of page 3 and the top of page 4 of our submission and to the recommendations of the Western Australian Law Reform Commission - I think that was done in 1997. It is referred to in the Attorney General's report, which I have tabled. It is part of the recommendations at annexure 2. On page 2, paragraph 4, we submit that instead of the existing clause 38, a clause including certain factors should be available to a judge when considering an extension of time application. It states -

> . . . the court should be able to take all the circumstances of the case into account including 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 nature of the plaintiff's injury;
>
> (d) the position of the defendant, including the extent, if any, to which the defendant has taken steps to make available to the plaintiff the means of ascertaining facts which were or might be relevant to the cause of action of the plaintiff against the defendant;
>
> (e) the conduct of the defendant;
>
> (f) the duration of any disability of the plaintiff arising on or after the date on which the injury became discoverable;
>
> (g) the extent to which the plaintiff acted properly and reasonably once the injury became discoverable;
>
> (h) the steps, if any, taken by the plaintiff to take medical, legal or other expert evidence and the nature of any such advice received.

I note that there is already a provision in the Victorian Limitation of Actions Act 1958 - it was added in 1972 - that contains those exact factors and gives judges the discretion to take into account all those factors. We submit that the provisions of clause 38 are simply too narrow, especially when combined with clause 43. Clause 43 requires specifically that the court take into account the prejudice to the defendant. I will comment about that later, but as a separate clause it seems to give greater importance to the prejudice to the defendant than to factors that may be relevant to the plaintiff. We submit that this is unfair, and that the defendant's prejudice should simply be one of the overall factors that a judge can take into account when considering an extension of time application.

I move to child abuse cases. This is a matter of some particular concern to me, particularly in the light of cases of the nature that are hitting the news, such as the abuse in care of state wards and potential actions against the Department for Community Development. And, of course, the many other child abuse cases that hit the news.

[11.50 am]

I refer you to Geoffrey Hancy's paper in this regard. I will quote a section from paragraph 29 on page 7. He discusses the provisions relating to child abuse and states -

> It is not obvious that these provisions provide protection for a victim of child abuse who did not report the abuse and who may have repressed his or her memories of the abuse. As a very young child the victim might know about the abuse, that it has harmed him or her and the identity of the perpetrator. The right to claim damages will go after 3 years. That there was a legitimate reason why the child did not report the abuse or act on it does not appear to be relevant under the proposed legislation. On one view the Bill could be said to provide protection for perpetrators of abuse of children.

That right may not always go in three years. I think it would depend upon the age of the child and when the child's sexual abuse occurred. Nevertheless, it is my submission that that time limitation period could easily expire before a victim of child sexual abuse is able to do anything about it - I mean personally able to do anything about it. It should be of paramount importance to this committee and the Parliament that perpetrators of child sexual abuse are not protected by the limitations laws. In this regard, we would propose two amendments. Firstly, I think that child sex abuse victims would be afforded some protection by the changes to the extension of time provisions that I have already referred to; but, secondly, in relation to accrual, we would ask the committee to consider section 5(1) of the Victorian legislation that I referred to, which is based upon a person's knowledge of the injuries and that those injuries were caused by the act or omission of some person, rather than being based on the first symptom, clinical sign or other manifestation of personal injury as contained in clause 54 of this bill. I have already quoted section 5(1)(a) of the Victorian legislation. I think it appears in both sets of our submission. But, essentially, the date the cause of action accrues shall be 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. The problem, in our respectful submission, with clause 54 is that the first symptom, clinical sign or other manifestation of personal injury consistent with a victim of child abuse having sustained a not insignificant personal injury may occur without that person's knowledge. I have not specifically stated it in my submissions, but the thing that really concerns me about that clause is the words that it shall be "the only or earlier" of such following events. The concern I have is that symptoms may have arisen earlier in time before a person becomes aware of them. That really opens it up to a defendant to argue that a person is out of time even though he was totally unaware of the symptoms he was suffering from. In particular, that will be relevant to not only child sex abuse cases but also cases of latent diseases, in which a person may not necessarily go to a medical practitioner to seek help at the earliest possible time.

I move now to latent diseases. I note that clause 55 applies different rules for the accrual of an action for damages relating to a personal injury that is attributable to the inhalation of asbestos. In my submission, the accrual of a person's action relating to asbestosis is more generous than the accrual provisions in clause 54. It begs the question: why are there more generous laws for the accrual of an action for a person suffering an injury as a result of the inhalation of asbestos than for persons who suffer other latent diseases as a result of the inhalation or exposure to other hazardous substances? We certainly support clause 55 but we would rather that it apply to sufferers of any latent disease rather than purely asbestos-related diseases.

I now refer to the definition of personal injury and/or mental disability. This is a point that Mr Hancy raised in his paper. I refer the committee to paragraph 8 on page 2 under "Scope of operation". Mr Hancy referred to the definition of personal injury and noted that it included the term "mental disability" -

> . . . is defined to mean "a disability suffered by the person (including an intellectual disability, a psychiatric condition, an acquired brain injury or dementia) an effect of which is

> that the person is unable to make reasonable judgements in respect of matters relating to the person or the person's property".

Mr Hancy noted the term "disability" is not defined and he also queried whether "mental disability" would include a psychiatric illness and that such an omission may have significant ramifications for a person who suffers purely psychiatric illness as a result of a tort. I would respectfully submit that those definitions be given closer inspection.

I refer to clause 43. I have touched on the prejudice to the defendant. I submit that the prejudice to the defendant needs only to be part of the factors that are taken into account by the court when considering an extension of time under clause 38, if that were amended to include the WA Law Reform Commission recommendations. The clause as it stands gives greater weight to the defendant's prejudice than any other factor. If a claim is brought, for example, by a child sexual abuse victim at the age of 30 who is suffering from severe emotional and psychiatric trauma, he will face the inevitable response that the perpetrator is prejudiced because he can no longer find potential witnesses, documents etc which may have exculpated him.

Consider also sufferers of latent diseases such as asbestosis and the APB workers exposed to 2, 4, 5-T etc. Clause 43 enables the asbestos company to argue prejudice by saying that all the supervisors are dead and all the documents are gone. We will all remember the famous tobacco case, BAT v Cowell in 2003 in Victoria, in which the company deliberately destroyed documents. I do not think that we wish to have a situation in which a company conducts itself in that manner and is protected by limitations laws, and, in particular, is given the benefit of a prejudice to the defendant because the documents no longer exist. We respectfully submit that one solution to clause 43 would be to exclude cases of sexual abuse and other latent diseases cases from the provisions to avoid defendants being able to rely on self-created prejudice or the absence of witnesses by reason of the nature of the injury. The real issue is why should one factor be elevated above others. Prejudice to the defendant must already be considered by common law principles; and, as I have already outlined, it is included in the factors contained in the recommendations by the WA Law Reform Commission.

[12 noon]

Finally, I commend the legislation in respect of abolishing the technicalities relating to government and government instrumentalities not requiring any notice provisions or having just a one-year time limitation period in respect of governments. We commend that part of the bill. With regard to the standardisation of the time limitation period, we simply argue that it should remain at six years and not three. That is an outline of my submission.

The CHAIRMAN: I have some questions for you. In your submission today you have gone some way towards addressing these issues, but it may require some further refinement on your part. You have said in your submission that you oppose the changes to time limits with respect to children, particularly in cases of birth trauma and child abuse. We understand you are proposing that the solution to these concerns is the overriding judicial discretion to extend the time limits. Do you have a view on any further restriction on the extension of time limit that the court may grant; that is, the provision that it be for a further three years?

Mr Burgess: Do you mean that the application must be brought within three years?

The CHAIRMAN: No. Once a person goes to court to seek an extension, the court may grant an extension for up to that finite period. Do you have a view on whether the court should have a discretion to grant an open-ended extension?

Mr Burgess: No. I do not think we would be arguing that somebody should be given an open-ended extension. I think if a person has reached the stage of going to the court and applying for an extension, then the period of time in which the person should commence proceedings after that should be relatively short.

The CHAIRMAN: So you would not take exception to the provisions of the bill in that respect?

Mr Burgess: Not really. I suppose the only other thing I did not touch on is when a person can make an application for an extension. I would not like to see people miss out because it is only three years, particularly after a period of three years had already passed. Also, perhaps some thought needs to be given to child sexual abuse cases, because the problem is that the issues relating to a sex abuse victim can manifest many years later. That is the real concern. The categories that we are really worried about are child sex abuse and latent diseases cases. The run of the mill back injury or neck injury, or whatever, is not so much of a concern for us. I am sure most of those people will be able to comply. The concern is that the symptoms may manifest some time later, or, in the case of sexual abuse, it may take some time before the person is able to deal with the issue. That is what really concerns me.

The CHAIRMAN: We note your concerns with respect to clause 54 and your proposal to replace that with the Victorian provision, which we understand provides for a different test and appears to include a limitation period of three years. Are you in favour of a shorter limitation period?

Mr Burgess: I would qualify that by saying that we would still maintain that it should be six years, not three. I actually state that in my submission. Can I offer an alternative? Our first position would be to adopt the Victorian model. However, the alternative is that the words "the only or earlier of such" be changed to "the latter"; in other words, it is either when the person becomes aware, or when the first symptom, clinical sign or other manifestation appears, or has been sustained. That would seem to be fairer, in my mind. I am really concerned about someone not being aware that they have sustained a not insignificant personal jury, and therefore the time period running out before the person is even aware of it. A classic example of that would be the APB workers in the Kimberley, or people in remote situations, whose access to medical treatment is not so good.

The CHAIRMAN: You have spoken today about clause 55 and have said that your contention would be that that would alleviate your concerns about clause 54.

Mr Burgess: I think a special case has been made for victims of asbestos inhalation, and although I did not have any objection to that whatsoever, I am not sure that such a person should be given preference over a person who has been the victim of any other hazardous substance. I just do not see the logic in that. If we are prepared to protect one group in the community, then we should be prepared to protect any other member of the community who has suffered a similar sort of disease.

Hon GIZ WATSON: If we wanted to broaden that - and the obvious way would be to say "any latent disease" - we would then have to define that, which I know is a vexed question. Do you have any suggestion about how we could word that? I have worked extensively with people with multiple chemical sensitivity. It would be difficult to put multiple chemical sensitivity, for example, into a definition, because it is not even recognised as a medical condition, even though a lot of people suffer from it. I do not know how we could find a definition that would be broad enough, or whether we should just leave it up to a court to decide whether a condition was a latent disease or not. How would you deal with that?

Mr Burgess: I agree with you that it would need to be defined very carefully. I do not have a specific definition for you this morning. Our organisation would be more than willing to give consideration to that matter and get back to the committee if that were asked of us.

Hon GIZ WATSON: I am also aware that some conditions have only emerged over time as recognised conditions, so they are not only latent, but also emerging in a medical sense. For example, initially chronic fatigue syndrome was not recognised as a medical condition, but eventually it was recognised as having medically-recognisable features. Other conditions, such as multiple chemical sensitivity, are also in that grey area. I think we want to avoid precluding any other conditions that might emerge. How you do that, I do not know.

[12.10 pm]

Mr Burgess: I think it is important to remember that we are just talking about accrual of an action and when the time period should run. A sufferer of any of these newer or developing types of conditions would still have to go to court and prove that that condition resulted from somebody else's wrongdoing. I think that is important to bear in mind. I would submit that we ought not be too restrictive in the definition of a latent disease, but I agree that it should be given careful consideration.

The CHAIRMAN: Thank you very much for your evidence today. That concludes your session with the committee. The transcript will be provided in a few days. We are working to a fairly restricted time frame.

Mr Burgess: I understand.

The CHAIRMAN: Therefore, we would ask you to deal with the draft *Hansard* transcript as soon as you can.

Mr Burgess: I have one question about publication of submissions. Our November 2004 submissions are already on our web site, and have been since November. Does that create any problem for the committee?

The CHAIRMAN: The covering letter to Peter Foss is dated December. Is that the document you are referring to?

Mr Burgess: Yes, that is right.

The CHAIRMAN: That has been declared a public document, so that will not cause any difficulty for us.

Mr Burgess: Good. I am relieved.

The CHAIRMAN: However, the documents you have tabled today are confidential until the committee determines to declare them public documents, should it so decide. Therefore, you should not reveal to anyone that you have submitted those documents to the committee.

Mr Burgess: Very well. Thank you for the opportunity to appear before you today.

Hearing concluded at 12.13 pm