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 4

Members

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

Hearing commenced at 12.22 pm

HANDFORD, DR PETER
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The CHAIRMAN: On behalf of the committee, welcome to our meeting. Thank you for attending to assist us with our inquiries. There are just a couple of formalities I need to quickly address before we proceed. To begin with, will you please state the capacity in which you appear before the committee?

Dr Handford: I am representing the President of the Law Society of Western Australia in relation to the submission that the Law Society made originally on the 2004 bill.

The CHAIRMAN: You would have signed a document entitled "Information for Witnesses". Have you read and understood that document?

Dr Handford: Yes, I have.

The CHAIRMAN: Today's discussions with you are public. They are being recorded, and 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 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 a confidential statement, you can ask that the committee consider taking your statement in private. If the committee agrees, the public will be asked to leave the room before we continue.

I note that you have provided us today with a document and attachment, which I anticipate you will table when you commence. Therefore, I invite you to make an opening statement, which would include an explanation of the status of the document; that is, in particular it appears to us from just the title of the document that it is intended to supersede the document that we have previously received.

Dr Handford: Perhaps I should tell you, firstly, that, although I am here representing the Law Society and I am a member of the Law Society, my involvement with this area comes from another direction. I was the Executive Officer and Director of Research of the Law Reform Commission of WA between 1983 and 1997, and in that capacity I worked on the Law Reform Commission's report on the limitation of actions, which this bill does not implement, at least in relation to its general recommendations, but it has obviously had some influence. Since 1998, I have been an academic lawyer, with a specialist interest in this area, and that is, I suppose, why the Law Society asked me to stand in for the president.

With regard to the document, the Law Society made a submission on the original 2004 bill, which of course did not continue, as Parliament was dissolved. Now there is a new bill, with some changes and some additional provisions. The clauses have been renumbered and so forth, so I

thought the most helpful thing that I could do would be to submit a revised version of this document. All I have done is change the clause numbers to represent the clauses in the present document, and add some comments in bold where the changes have affected what the Law Society was going to say.

I will take you briefly through some of those changes, just for noting purposes. The first change is in relation to clause 4, where the point made by the Law Society has largely been met by a redraft. That particular comment is not now one that you need worry about too much because it has been dealt with. Clause 14, on defamation: it is my understanding that there are to be some amendments in line with the Defamation Bill now before Parliament. That will change the limitation period for defamation, pretty much in line with a suggestion made by the society. Having said that, there is really no need for me to deal with that issue further.

The next one is clause 43, where the clause, as commented on by the society, has now been redrafted, although not I think to take account of the society's comment. Therefore, the comment does not really make sense in light of the new provision, and I think we can just put it aside.

Clause 54 about personal injury: there are two comments here that have been affected. One is about the drafting and the meaning of the word "symptom". The comment probably still has relevance, although the clause has been redrafted; but, possibly more importantly, the comment about asbestos-related diseases has now been met by the restoration of the existing law. Finally, clause 57 in the original bill, which was about judgments, has now been taken out, so that comment no longer has relevance. I put it in square brackets because it is 57 in the original bill.

[12.30 pm]

Those are five areas in which the society's comments have been overtaken by events, and I do not propose to say any more about them. Many of the comments made by the society are simply comments and the society is generally approving of a lot that is done in the bill. Generally, I am sure the society would say, and I would endorse the comment, that this bill will be a tremendous improvement compared with the old law. This, of necessity, has been a long, long time in the gestation period. It is over 20 years ago since I started working on it in the Law Reform Commission, so it is real progress to see this - I assume it will eventually go through - pass into law.

There are three areas I would like to comment on in relation to what the society says in its submission, and there is one little one that I would like to add of my own.

The first matter that I want to comment on is the material beginning at clause 29 on minors. Under the present law, the limitation period does not start running at all when the plaintiff is a minor. It does not start until he is aged 18 and there is then a six-year period, so it runs out when a person reaches his twenty-fourth birthday. In respect of an injury at birth, you have what is effectively a 24-year limitation period. The problem, of course, is that it is a very long period as far as defendants are concerned. In a lot of the press coverage of this bill in its early stages it was referred to as an obstetrician's bill, or something like that, because of that problem. It has been illustrated by a case in Western Australia called Dissidomino v Newnham, which was that kind of case. The writ was issued just before the twenty-fourth birthday of the minor who suffered an injury at birth. The case was not heard until she was about 30, and then went on appeal. This is the problem that the bill is seeking to address; the problem of very long limitation periods. It seeks to address it by a series of provisions, as I am sure you are aware.

We have clause 29 which deals with minors under the age of 15, which gives a six-year period. We have clause 30 for minors aged 15, 16 and 17, under which the period expires when the minor reaches the age of 21. Persons aged 18 or over would simply be governed by the normal rule, where normally there would be a six-year limitation period under the general period in clause 12. If it is for personal injury it will be a three-year period. In applying this to personal injury cases you have to remember that the act defines when the cause of action accrues. It is not the old rule - when

damage is suffered; it is now the rule as set out in clause 54 which, simplifying it somewhat, means the period starts when someone discovers there is something wrong.

The basis of all these provisions in the bill is that it is assumed that minors will have guardians who can make decisions on their behalf, so you do not need the long period of the old law. Under clause 31, the period is suspended if the minor has no guardian; and also under clause 32, to provide for the situation in which the minor has a close relationship with the defendant, which might be difficult for anyone bringing an action on the minor's behalf, there is a special rule governing close relationships under which there is a much longer limitation period going to age 25. Yet another clause deals with another aspect of this; under clause 40 you can get an extension of the ordinary period, but under clause 40 the minor would have to satisfy the court that in the circumstances it was unreasonable for the guardian not to commence the action within the limitation period. I have been concentrating on clauses relating to minors, but there are equivalent clauses for persons who have a mental disability.

On page seven of the document I have tabled, the Law Society makes three criticisms of these provisions. First, it is critical of the general concept of shortening the limitation period in this way. These criticisms appear under the heading of clause 29. The Law Society would argue for the retention of the present rule whereby the limitation period does not start running until the minor is 18. The present rule should be maintained because, as it says, it is important that the most vulnerable in our community should be protected. That statement is made in the society's conclusion. The bill, in its current form, makes children significantly worse off than under the present law. That is the Law Society's basic point. In the comments under clause 29 it gives its reasons. It says there are many issues that impact on why the guardian may not make a claim on behalf of the child in respect of an injury sustained at birth or shortly afterwards. It lists them in the four dot points. It goes on to say in the next paragraph that it is no answer to these objections to say that the child can bring an application for an order that the guardian was unreasonable in not bringing the action within the limitation period or in the period of time the child was not under the care of the guardian.

It makes a third point: it is uncertain what constitutes unreasonable behaviour. Will it cover poor financial circumstances, for example? The society's position is that the existing rule is preferable to what the bill puts forward here.

I do not want to state a point of view of my own, but if I can step back from the society's position for a moment I will give you a bit of background that might be helpful to you. This problem of long limitation periods for actions involving children is one that has arisen all over the place - Canada, England and throughout Australia. All Australian states and territories bar Western Australia have addressed it in one form or another. The Law Reform Commission in its report recommended something similar in a general way to what is in the bill; that is, that the limitation period should run in the normal way if the minor has a guardian. As for the close relationship problem, that could be dealt with by one of the commission's recommendations which is that there be a general provision under which a limitation period could be extended in appropriate circumstances.

I am not saying that the details are consistent with the Law Reform Commission's report, they certainly are not. But the general idea is one that the Law Reform Commission put forward. There are lots of interests that are opposed to this. For example, the Queensland Law Reform Commission, which reported just after the WA Law Reform Commission, was opposed to it for the sorts of reasons I have been through.

In 2002 the Attorney General, in a paper on limitation law reform, provisionally stated the view that the existing state of things should continue. At that stage the Attorney General was definitely not proposing what is now proposed in the bill. I think momentum for change in this area probably gathered pace with the Ipp report - the commonwealth committee on the Review of the Law of Negligence in 2002. They recommended a position of this general kind. Since that report there has

been legislation in all Australian jurisdictions, and I have copies of the relevant provisions which I will leave so that you have convenient access to them if you wish.

[12.40 pm]

Without going into details, essentially three states - Victoria, New South Wales and Tasmania - have legislation based on the Ipp report. Western Australia will sort of fall into that camp, but the WA provisions are different from anybody else's. The other jurisdictions have not elected to go this way. The ACT, South Australia and the Northern Territory stick with the old law, but have special provisions designed to give notice to a plaintiff to try to induce the action to be brought sooner rather than later. Queensland has not done anything at all. At the moment, only a minority of Australian jurisdictions have thought that this was a good move, even though the commonwealth committee urged that this change should take place as uniform law. It just shows how complex it is, and how many different responses there are to the problem. I will conclude on the first point I am making about the problem of children by saying that, for your information, I have given you an extract from the submission of the Law Council of Australia to the Ipp review in 2002, which I think is quite useful because it goes through the various approaches, including a different approach again, proposed by the English Law Commission. The Law Council of Australia says that, of all the approaches, it prefers the English approach, which attempts to seek a middle way between the existing provision, under which you have a very long limitation period, and the approach in Victoria, New South Wales, Tasmania and Western Australia, under which you now have a much shorter limitation period. This is the proposed middle way. I have probably given you lots of information on that which may help or may just make things more confusing; I do not know. The point is that this is one of the most complex problems that is dealt with by the bill.

The other two points I want to make about children are much shorter. They really relate not to the general idea but to the way in which the bill is drafted. I refer now to clause 30 on minors aged 15, 16 and 17. The Law Society's position is that it cannot understand the difference in treatment between minors of these ages. For minors under 15, there is a six-year period. For minors aged 15, 16 and 17, you have something less than the six-year period, going down to a little more than three years in the case of a minor who would be, say, 17 years and 11 months. Then, when you turn 18, you are back up to a six-year period, except in a personal injury case. The Law Society cannot understand why minors of these different ages are treated differently, and recommends that it would be better to have the same six-year period for all minors, which, among other things, would be a lot simpler. In my view, this is a very strong argument. Even if you take the jurisdictions that I referred to of Victoria, New South Wales and Tasmania, which have gone down the path of shortening the period, and assuming that minors have guardians, none has a provision that is anything like this. In particular, I refer to section 27E of the Victorian Limitation of Actions Act and section 30B of the ACT Limitation Act. You do not have these acts in front of you; I am simply referring them to you for reference purposes. I can table the provisions, and I will. Each of those jurisdictions has a standard six-year period for dealing with minors, rather than the differential period in the bill. The ACT act deals with claims against health services, so it is more particular than is the Victorian one. That is the second point relating to clause 30.

The third and final point relating to children is made in relation to clause 35. This is the clause that deals with a defendant in a close relationship with a person with a mental disability. As it says, the effect of the clause is to extend the limitation period for up to three years after a relationship has ceased. The society says that it will be very difficult to establish when a relationship has ceased, and regards this as an undesirable provision for that reason. Again, by way of general comment, and hopefully offering you some assistance, as I looked at the legislation in various jurisdictions, I found that WA is unique in trying to extend this sort of provision to persons with a mental disability. New South Wales, Victoria and Tasmania - the other jurisdictions with a close relationship provision - limit it to minors. Again, I can give you some section references; section 50E of the New South Wales Limitation Act, section 27I of the Victorian Limitation of Actions Act,

and section 26(7) of the Tasmanian Limitation Act. In each case, it is limited to minors; they do not seek to have a close relationship provision for persons with a mental disability. They either do not deal with it or try to deal with it in other ways. It seems to me that that perhaps underlines the point made by the Law Society in that it is just too hard to try to operate a satisfactory provision for persons with a mental disability, because of the problem of determining when a special situation ceases. Those are the points made by the Law Society in relation to the provisions on children. They would be the main areas in which the Law Society is critical of the provisions of the bill.

There are two other matters on which I would like to comment on behalf of the Law Society, referring to comments that have been made. One is clause 45 dealing with confirmation. This is part of a series of provisions whereby if you acknowledge a debt or make a part payment, it is a way of extending the ordinary limitation period. There is no doubt that the provisions in the bill, which are based on those of New South Wales legislation, are much, much better than the ones we have at present, which are almost impossible to understand because they are rooted in history. If anybody wants to try, you could look at paragraphs 18.9 to 18.24 of the WA Law Reform Commission report. Really, there are three stages in the evolution of provisions such as this. We are still rooted in the nineteenth century, based on English legislation. Some of the other states have at least progressed as far as the English reforms of 1939. The most modern provisions are found in New South Wales, vintage 1969. You can see why the bill uses New South Wales as its model. However, New South Wales has actually made a change of substance in its provisions, because these confirmation provisions cover all kinds of actions, including claims for damages and for personal injury and contract, which were not covered before by these provisions. The society has a concern about this. It says, for example, "Is it the intention that it would capture such correspondence as acknowledgments of claims being made against occupiers of premises?", and it goes on to make a similar comment in the next paragraph. There is a change of substance here. In adopting simpler provisions, there has been a change of substance; it is not just a question of adopting up-to-date provisions instead of old ones. The Law Reform Commission actually recommended against the wholehearted adoption of the New South Wales changes in paragraphs 18.36 to 18.41 of its report.

[12.50 pm]

It made an alternative recommendation, which has not been followed in the bill. There are differences of view about this. I suppose you could look again at what the Law Reform Commission has suggested to see if you were persuaded. The society has not made a recommendation about this; it has just expressed a concern. Once again, stepping back from the society's comments just for a moment, it could be argued that the New South Wales provisions have operated in New South Wales now for 35 years or more; likewise in the ACT and the Northern Territory, and there does not seem to be any crisis. They seem to operate satisfactorily. I think there is scope here for legitimate differences of view, but in light of the society's comment you may want to have a look at this.

The third and final point that I want to make about the society's comments arises from a comment made about clause 71, although it actually does not have anything to do with clause 71. The comments on clause 71 include -

> The society notes that limitation periods are to be applied to all equitable actions, including actions for breach of trust. The society notes that the present state of the law in this area is not entirely certain, but it is at least arguable that presently no period of limitation runs to protect the fiduciary from the consequences of his or her breach of trust.

This relates to an area that is incredibly complex, I am sorry to have to say; that is, the question of the application of limitation periods to equitable claims. The history of this is that for centuries in England there were two systems of law - common law and equity - administered by different courts, and the limitation acts traditionally applied to only common law claims. However, they applied to

equitable claims only to a limited extent, and there were doctrines under which, if the limitation act did not directly apply to an equitable claim, it could apply by analogy, or it did not apply at all; and equity had a doctrine called "laches" under which it would disallow a claim by a party who had delayed too long.

The current position under the present law in Western Australia is that the Limitation Act only applies to equitable claims to a certain extent. The Law Reform Commission has recommended that the rational modern position should be that the Limitation Act should apply to all claims, both legal and equitable. Under its recommendations, it had two general limitation periods and a discretion to extend either of those, which would have taken care of the difficult cases. What we have under the bill is clause 12, which is a general limitation period for all kinds of claim that have no particular period. That is consistent with what the Law Reform Commission recommended. Then we have clause 37, which says that you can extend time if there is fraud or improper conduct. That is a much more limited kind of extension than the Law Reform Commission had in mind, and there are areas which, under the existing law, are not suited to a short limitation period of six years, necessarily, but which would not fall under clause 37. In particular, there are claims involving "mistake". I should say that the present law does not deal satisfactorily with claims relating to fraud and mistake. That is one of the problems of the present law, because claims of fraud and mistake caused the whole matter to be referred to the Law Reform Commission in the first place. In the bill we have the general six-year period in clause 12, then we have clause 37, which makes a reform in relation to fraud and other improper conduct and allows for the extension of the period; however, the issue of mistake and one or two other claims of this kind was not taken care of in the original version of the bill.

It is my understanding that representations were made to the Attorney General after the 2004 bill originally appeared in Parliament, and the result was that a new clause was added - clause 26 - dealing with equitable claims, but it appears that clause 26 is not going to fix all the problems. I think the problem here is that those dealing with the bill were trying to fix a problem that had appeared at a fairly late stage when a lot of the bill was, as it were, set in concrete. Clause 26 says that an equitable action cannot be commenced later than six years running from accrual or three years since time started running on equitable principles. Then it says that it applies only to equitable actions for which, had the limitation period not been provided by clause 12 or clause 26, the limitation period would not be determined in equity by analogy to the limitation period for any other kind of action.

Simplifying that as much as I can - this is incredibly difficult to understand - it takes care of cases to which the Limitation Act would not have applied in any way, either directly or by analogy. Those cases are dealt with by clause 26, 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. I should probably say that in conveying these comments I am relying very much on an academic colleague of mine who was the person who originally raised the concerns with the Attorney General and understands these areas much better than I do. She is at the moment on her way to England, so there is not an awful lot she can do about it in person. I have tried to explain the problem, which, as I say, is a complex problem. The difficulty is to know what, if anything, can be done about it at this stage. Maybe the government could look at it again or maybe at least we should copy the provisions of the other modern jurisdictions on matters of mistake. Anyway, I will leave you with those comments.

I raise one other thing very briefly that is not in the Law Society's comments at all. This relates to clause 15, which contains a three-year limitation period for actions for trespass to the person, menace, assault, battery, wounding and imprisonment. I find it interesting that we have been so ruled by the old legislation here. That reproduces a list of causes of action that you find in section 38 of the present act, which is based on the English Limitation Act of 1623. In particular, actions of

menace, as I understand it, became obsolete in the fourteenth century. I am probably the only person in the world who has read every case reported on actions of menace, all of which date from the Middle Ages, and I am positive that it is an obsolete cause of action. I will leave with you an article that I once wrote about this for the *Canadian Bar Review*. I would not inflict the whole of the article on you, but if you wanted to, you could have a look at pages 571 to 573, which deal with this issue. I just wonder whether we could actually modernise this clause a little bit by leaving the references to trespass to the person, assault, battery and imprisonment, which all relate to causes of action that do exist, and perhaps get rid of the references to menace and wounding. I have no doubt there are reasons, which the drafters may know about, that those references are still in the legislation. I do not understand why they are still there.

Perhaps in concluding I should emphasise the positive aspects of the society's conclusion, and I will endorse this in every way. The government is to be congratulated for eventually moving to implement this piece of reform that has long been needed. Most of the clauses are endorsed without any qualification whatsoever. From studying the bill, I would say in particular that the drafting has been very carefully done. Even where, as in many provisions, they are using the most modern example as a model - namely, that of New South Wales - the drafting has gone forward from that. Our provisions will be even more modern and simpler to understand. This really is a matter for great optimism. It is just that, with complicated legislation like this, inevitably there are one or two complex issues on which either people will have differences of view or which might be thought to be unsatisfactory.

[1.00 pm]

The CHAIRMAN: We note the society's suggestion in relation to the definition of tax in clause 3 to include the words "imposed by a government agency". Is the society aware of problems with the use of that definition of tax to the extent that the amendment is required?

Dr Handford: This is something on which I am not really going to be of any help. It is quite obvious that the original submission was drafted by somebody who knew a lot about the tax areas. I do not, except to say that, as I understand it, the tax provisions in the bill simply copy what is in the present act. Those provisions were introduced in 1997 as part of an exercise in uniform law reform. There probably has to be a good reason for changing the definition if the existing definition is the uniform definition.

The CHAIRMAN: I refer to clause 27 in the submission. I am not sure whether you have commented on that at this stage. I do not think you have.

Dr Handford: No; I did not make any comment on clause 27.

The CHAIRMAN: It is a tax clause. Are you able to add anything about that clause from the society's point of view, such as whether there is any suggested alternative or improvement to it?

Dr Handford: I did not read anything in the comments to clause 27 suggesting the need for amendment. There is an awful lot of comment, I suppose along the lines of what I provided in relation to other clauses. My major comment, I think, would be exactly the same: clause 27 is the re-enactment of something we already have that was originally enacted as part of a uniform measure. All the other jurisdictions have legislation in pretty much the same terms. I imagine, therefore, that it is not one that we would be likely to want to interfere with.

The CHAIRMAN: Will you expand on the society's proposed amendment to clause 43?

Dr Handford: That is something I inadvertently did not refer to. Clause 43 is the general provision that comes at the end of the division dealing with extension provisions. The submission suggests an addition to the final sentence of what was clause 39(b) and is now 43(b), which states -

> whether extending the time would significantly prejudice the defendant

The submission suggests adding a reference to the "interests of justice" as a matter that should be taken into account when a court is deciding whether or not to extend a provision under any of the provisions of that particular division. It is true that other jurisdictions have general extension provisions of one kind or another - most of which are confined to personal injury. 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 court can have regard to and "the interests of justice" will be in there somewhere.

I wanted to make a point, which I inadvertently did not make when I was talking about the general problem of limitation periods and children. I think I omitted to say that the society recommended that it should be possible for a court to grant an extension if it is in the interests of justice. The clause to which I am referring is clause 40, headed "Court may extend time to commence action by person under 18 when cause of action accrues, with guardian". That is when, in order to get an extension, the minor or former minor must satisfy the court that, in the circumstances, it was unreasonable for the guardian of the plaintiff not to commence the action within the limitation period. The society says in its comments on clause 29 that, at the very least, it would be a good idea to amend clause 40 to allow the court to grant an extension if it is in the interests of justice. There is certainly a precedent for a similar provision in the legislation of one of the other jurisdictions. I have it here. I think that, even if there are not to be more fundamental amendments to the children's provisions, that might be a very useful amendment to clause 40 because it would, at any rate partially, answer one of the comments made by the society.

The CHAIRMAN: I refer now to clauses 54 to 56 or at least clause 55, which I think was clause 54 in the previous version of the bill. Can you explain or expand on the society's concerns with that clause, and why it submitted that the clause will significantly disadvantage sufferers of latent disease?

[1.10 pm]

Dr Handford: That is a comment made in relation to the original version of what is now clause 54 of the bill concerning how the personal injury period can be extended. I have the previous version of the bill in my briefcase. I will not get it out. It was originally drafted in a different form from clause 54 as it now appears. Under the original bill, one clause dealt with all kinds of personal injury, with no separate provision for asbestos-related diseases. That was a very rational position. It is consistent with the WA Law Reform Commission's recommendation. Western Australia is irrational in having one set of rules for asbestos-related diseases and one set of rules for everybody else. That is especially so under the present law, the history of which, as I am sure you are aware, is as follows. We had no way of extending the ordinary six-year period at all in a personal injury case - this is the case at the moment - so the 1983 amendments were introduced, but these were limited to asbestos-related diseases. There is no logic about distinguishing between one form of dust-borne disease and another form of dust-borne disease, or one form of latent injury and another form of latent injury that has nothing to do with asbestos or dust or otherwise. This anomaly has been in our law for a long time. Amendments were introduced to fix problems emerging from Wittenoom. A previous Law Reform Commission report on limitation of actions urged the adoption of a general period that the court should be able to apply if it were just and reasonable to do so. Neither side of politics was interested in that amendment. The Liberal government was not, the Burke Labor government was not, and the 1983 legislation resulted. We have had that anomaly ever since. The Law Reform Commission recommended that we have one provision, and not a separate provision for asbestos-related disease.

Inevitably, there must be some compromise if we are to have one position. As I understand it, when the original 2004 bill was published, objections were expressed by interests to do with asbestos-

related diseases indicating that the present law was satisfactory, thank you very much. They did not want anything to weaken the position of asbestos and mesothelioma sufferers. Of course, we can all sympathise with that point of view. Whatever the logic, those in charge of the bill decided that it would be better to restore the existing provisions, which were effectively those introduced in 1983. The current bill has clause 54 for personal injury in general, and clause 55 for asbestos-related diseases - the clauses are slightly different. The society's comments related to the original version of clause 54; namely, the original clause 50. In my view, it has been overtaken by events. Under the bill as it now stands, sufferers of latent diseases, at least those who suffer asbestos-related diseases, will not be significantly disadvantaged because they will be able to make use of the same provisions they have under current law. You could say, "What about people who suffer other kinds of latent injury other than asbestos-related diseases?" The provisions may not be as favourable to them as those for asbestos-related disease, but their position will be improved under this legislation. In times gone by, the limitation was six years, and that was it. Look at the problems with the Christian Brothers actions, for example. The law in Western Australia was very unfair in ruling out such actions that could have been brought elsewhere, such as those related to sexual abuse, which, in a sense, is a kind of latent injury if you only realise later on exactly what has happened to you and what it has done to you. People in those categories will be much better off under the bill than would be the case under the present law. People might not be quite as well off as those who suffer from asbestos-related diseases. The only thing one could do to overcome that would be to apply the asbestos-related provisions to all personal injury cases. I have not given consideration to that in detail. When the 1983 provisions first came out, they were known to be based on English legislation that had some disadvantages of its own. As far as I can tell - I have not studied it closely - it seems to work satisfactorily. We have that model. If those people who represent such persons are satisfied with it, we can say it works satisfactorily. I would not like to sit here and assure you that it would work for all personal injury sufferers without thinking much more about it.

The CHAIRMAN: The last issue I raise with you are the comments in the submission on clause 69 of the bill. Does the society have any concern about that clause? If it does, does it offer an alternative or amendment to that provision?

Dr Handford: This is the clause related to forfeiture.

The CHAIRMAN: Yes.

Dr Handford: In my opinion, I think when the Law Society of Western Australia refers to "the concept of accrual on discovery, which appears to have had the support of the WALRC," it is referring to the general principle that cause of action should commence when somebody knows they have a cause of action. The WALRC certainly did not support that principle in relation to forfeiture specifically. The WALRC recommendation about forfeiture dealt with actions relating to land. The WALRC recommendation was simply to stick with the existing law from the substantive point of view, but to draft it in a modern form; that is, follow New South Wales. The submission reads -

> The concept of accrual on discovery, which appears to have had the support of the WALRC, does not seem to have been adopted.

I do not think it was ever the intention of the WALRC to adopt that concept in relation to forfeiture. I do not see any problem with clause 69.

Hon GIZ WATSON: I take you back to clauses 37 and 38 regarding extension.

Dr Handford: Is that the numbering in the existing bill?

Hon GIZ WATSON: Yes, I refer to the 2005 bill. These clauses relate to the extension of time to commence an action. I seek your response to a submission we just heard from Mr Greg Burgess from the WA branch of the Australian Lawyers Alliance, who suggested looking at following the Victorian approach; that is, rather than restricting clause 37(2) in what is necessary to commence an

action, allow it to be more broadly put. I do not know whether you are familiar with the Victorian approach.

Dr Handford: I have some familiarity with it.

Hon GIZ WATSON: Do you have a comment on that aspect?

[1.20 pm]

Dr Handford: I hope I interpret what was said rightly - obviously I was not here - but the point being made is that there should be a much more broadly based extension provision. Under clause 54, in a personal injury case, the period would normally run from when the symptoms are discoverable, or something of that kind, and, under the present law, the period would run from when the damage happened to you, whether you knew it had happened or not. Even though we have clause 54, and even though Victoria has an equivalent of that in a personal injury case, Victoria has retained its previous extension provision that says, in effect, that a court can extend the limitation period if it is just and reasonable to do so. Clause 37 is sort of an amalgamation of provisions that can be found in many acts relating to fraud. I mentioned "mistake" a little while ago; fraud is the companion to mistake in this regard. It also applies to improper conduct. That could be all sorts of things, although I understand from the explanatory memorandum that one of the things the government has in mind is sexual abuse cases. I suppose the comment I would make is this: if we go back to the Ipp report, the commonwealth's review of the law of negligence in 2002, which was in response to the so-called insurance crisis and aimed to set out what might hopefully be a uniform set of provisions - of course it has not come about, but that was the aim - the Ipp committee was not in favour of general extension provisions of that kind. It said that we should have two provisions that operate side by side: we should have one provision that says three years from discovery and another provision that says 12 years from the act or omission, and that the limitation period should run when the first of those runs out. If a person knows he is injured, he immediately has 12 years effectively. If it is a case in which the person does not immediately know that he has a cause of action, his three-year period begins running when he does know he has a cause of action, subject to the running of the 12-year period.

The idea of two periods is a similar concept to that recommended by the Law Reform Commission. However, in the Ipp recommendation, it is limited to personal injury. The Ipp recommendation was that the 12-year period, but not the three-year period, should be capable of limited extension. The Ipp committee was not in favour of totally open-ended extension provisions. Without going through all the jurisdictions, New South Wales and Tasmania have followed Ipp faithfully, so that is what they have. Victoria also has provisions like these, but it elected to retain its own much more liberal extension provision. That is the background to the sort of suggestion that is being made. I think that something like that would be supported by the Law Society, which, as we have just heard, has made a recommendation that the interests of justice ought to be considered. At the end of its submission, it states - I think, with respect, this comment is a bit overstated - that the society notes that Western Australia will remain alone and the most restrictive of any jurisdiction in making no provision for a power of general extension of any limitation period by leave of the court and when the interests of justice would be served by the extension. I do not think that is really true. I do not think any jurisdiction has any provision like that, and certainly not for all causes of action. Some jurisdictions have a provision like that which is limited to personal injury. Victoria is perhaps the most prominent example. I think the society would support the suggestion that has been made, which would be an expansion of clause 37 into a general provision, and certainly in the personal injury field; in other words, to adopt something like the Victorian position. That in itself would not fix the other problem to which I referred when I spoke about equitable claims. If clause 37 were converted into something that dealt only with personal injury, an improvement would be made in one direction, but problems would be caused somewhere else. One has to be fairly careful. It might even be that perhaps we need two provisions. We might want to adopt the Victorian equivalent for

personal injury cases, but retain clause 37 to do the job that it is doing and also consider amending it to deal with some of those equity problems.

Hon SALLY TALBOT: I take you back to clause 26. I thank you for making it crystal clear why this is such an unfathomable area.

Dr Handford: I do not know that I succeeded in making it crystal clear. I am not sure that it is crystal clear to me.

Hon SALLY TALBOT: You made it crystal clear why it is so difficult. I detect from your comments that there might be some cross-purposes in some of the comments about the omission of this clause, which were made when the bill was originally introduced in 2004. Are you suggesting that perhaps the equity provisions should be omitted? Are we making it worse by including clause 26? Is that what you are suggesting?

Dr Handford: No, I think that the inclusion of clause 26 makes it better than it was before. However, I think that - I am relying very much on my colleague with whom I have discussed these matters - some holes still have not been filled. I could not possibly begin to tell you how to draft it, but it might mean a redraft or an extension of clause 26.

Hon SALLY TALBOT: Is it in some sense because we need special provisions to cover things such as breach of trust and mistake, or is this a problem that is inherent in the very concept of equivalence?

Dr Handford: It may be because we are trying to do too many things at once. 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. The Law Reform Commission recommended that, yes, we should try to deal with all the claims. However, instead of the traditional approach in which there are lots of limitation periods for different causes of action, it recommended that there be two general limitation periods that cover everything, except land claims, and a general provision under which those claims could be extended in appropriate circumstances. We have the interests of justice and various other recommendations in there. Because none of those provisions was limited to particular causes of action, we would not run into the problems that we might otherwise run into - problems that relate to how particular kinds of action are classified. It is much too late to undo everything and go back to the Law Reform Commission recommendations, and I am certainly not urging that. However, I am explaining how it addressed the problem. In a sense, we now have something that falls a little between two stools, because it is not totally traditional in the sense that it holds back from dealing with some causes of action at all and it is not totally modern and futuristic in that it says that we should do away with everything and simply have two limitation periods that cover all causes of action; it is somewhere in between. In taking that position somewhere in between - as I say, an awful lot of good things have been done in the bill - there may be some potential problems in this particular area.

[1.30 pm]

Hon SALLY TALBOT: I guess I am pushing you slightly in terms of practical suggestions. If we were to take seriously the final comment in that section of the commentary you have provided - that the prospect that a fiduciary might ultimately benefit from a breach of trust is plainly an unattractive one - I am wondering whether you have a specific recommendation for overcoming that potential effect of the bill.

Dr Handford: I am not sure that I will be able to give you an answer to that problem. It is certainly true that most limitation acts do not cover breaches of trust completely; they leave out some areas, one of which, I think, is the area that is referred to there. Certainly our present act does

not cover all breaches of trust. There are some exceptional cases like this. This is very difficult to do off the top of the head, as it were. It is really the sort of thing, unfortunately, that requires somebody who knows the area intimately to sit down for several months and think about it and maybe come up with something. I think the difficulty here - I hope I am not doing an injustice to anybody - is that this may have been something that was not considered when the bill was originally drafted. Ever since then, people responsible for the bill have been in a difficult position, as they have to deal with this problem against the background of provisions that have already been drafted. I am not enough of a equity or restitution lawyer to be able to advise specifically how these provisions might be drafted, but I think there is a bit of a problem with clause 26, which unfortunately, apart from anything else, in just referring to this concept of analogy, is another clause that is reaching back into history. It is a pity that we have to rely on that idea to fix this problem when we are trying to be modern. I do not really have a specific suggestion for you, I am afraid. I just know that there is something of a problem.

The CHAIRMAN: Thank you very much for your evidence today. We appreciate the contribution you have made. The transcript will be sent to you in the next day or so. We are under reasonable time pressure, so we ask that you get corrections to that transcript back as soon as possible. Thank you very much.

Hearing concluded at 1.33 pm