



LAW REFORM COMMISSION
of
WESTERN AUSTRALIA

Provisional Damages and Damages for Gratuitous Services

**FINAL REPORT
Project 106**

June 2016

The Law Reform Commission of Western Australia

Commissioners

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This final report is intended to provide general information and discussion points on matters that are relevant to the Law Reform Commission of Western Australia's inquiry into provisional damages and damages for gratuitous services. While all reasonable efforts have been made to prepare the content of this report, it is not intended to be comprehensive; nor does it constitute legal advice. Members of the public should seek legal or other professional advice before acting or relying upon any of the content of this report.

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Foreword

Introduction

In May 2014, the Law Reform Commission of Western Australia (**the Commission**) was requested to examine the law and make recommendations in relation to two areas:

1. whether the 'once and for all' rule under the common law should be modified through the introduction of 'provisional damages'
2. whether a specific head of damages for the value of gratuitous services (domestic or otherwise) provided by the plaintiff to others should be introduced.

In November 2015, the Commission released a discussion paper that set out a number of options in relation to these areas. In that paper, the Commission proposed that the 'once and for all' rule be modified in Western Australia through the introduction of a provisional damages regime in specific circumstances. However, the Commission had not reached a preliminary view at that stage about whether compensation for the loss of gratuitous services provided by the plaintiff to others should be introduced in Western Australia. Instead, the Commission proposed that, if damages for the loss of gratuitous services were to be introduced, they should be available for all classes of personal injury, subject to particular restrictions.

The Commission sought submissions on the proposed law reforms outlined in the Discussion Paper. The Commission received 26 submissions from stakeholders, including the Asbestos Disease Society, the Law Society of Western Australia and Members of Parliament. The submissions were of great assistance in completing the project, and the Commission appreciates the time and effort that went into their preparation.

Modifying the 'once and for all' rule

Following an analysis of the submissions received and its own research, the Commission recommend that the 'once and for all' rule be modified in Western Australia through the introduction of a provisional damages regime in the following circumstances:

1. Provisional damages be permitted where there is a chance that a different injury or disease (a new condition) may arise after the initial judgment or settlement and from the same causal event or circumstance (not a deterioration of the injury or disease giving rise to the judgment or settlement).
2. Provisional damages be permitted in relation to all classes of personal injury or disease.
3. Plaintiffs only be entitled to seek further damages for a new injury or disease where the potential for the development of that injury or disease was expressly identified at the time of the initial judgment or settlement.

4. Plaintiffs not be restricted in the number of claims that can be made for further damages, provided that such claims relate to the development of a different injury or disease which was expressly identified at the time of the initial judgment or settlement.
5. When assessing further damages, courts be allowed to take into account the provisional damages initially awarded to the plaintiff.
6. There be no additional time limit imposed on when the further injury or disease must arise after the initial judgment or settlement¹.
7. Estate claims be allowed where the deceased victim had commenced, but not completed, an action for further damages prior to his/her death.

The Commission considers that the introduction of a legislative scheme allowing Courts to award provisional damages in tightly prescribed circumstances will add substantial flexibility to the structuring of judgments or settlements while still providing an element of certainty for defendants that is said to justify the “once and for all rule”.

The Commission considers that this reform would not be desirable for all plaintiffs. In order to ensure that Plaintiffs who are content to follow the existing regime, which applies the “once and for all rule”, the Commission considers that a provisional damages regime should not be compulsory; rather it should be available at the election of the plaintiff.

Damages for gratuitous services

Following an analysis of the submissions received and its own research, the Commission consider that the proposed reform should be implemented if the economic analysis indicates that it is affordable. The Commission recommend that further work be undertaken by the Government of Western Australia to assess the financial implications of the proposed reform and its impact on affordability (such as the affordability of insurance premiums). The precise nature of the recommended reform is that damages for gratuitous services, which a plaintiff can no longer provide to others, be introduced in Western Australia in the following circumstances:

1. Such damages be introduced for all personal injury claims.
2. Such damages only be available for gratuitous domestic services.
3. Such damages be restricted to services provided to ‘relatives’, which should align with the definition used in the Fatal Accidents Act 1959 (WA) and include unborn children of the plaintiff.
4. The services must have been provided before the plaintiff’s injury for a defined number

¹ See section 4.8 as to the time limit for bringing a claim for further damages following the discovery of a different injury or disease.

of hours per week and consecutive period of time, or there must be a reasonable expectation that, after the development of the injury, the services would have been provided for a defined number of hours per week and consecutive period of time.

5. There must be a reasonable need for the services to be provided for those hours per week and that consecutive period of time after the development of the injury.
6. The plaintiff will not need to prove expenditure incurred in consequence of his/her inability to continue providing the services.
7. The calculation of such damages should include the 'lost years' after the plaintiff's death.

The Commission consider that the introduction of a legislative scheme allowing the award of damages for gratuitous services, which a plaintiff can no longer provide to others, is a desirable reform to ensure that plaintiffs are more completely compensated for losses arising from their illness or disease.

The Commission consider that while this reform is desirable, it is also likely to have serious economic consequences that may render the proposed reform unattainable. Naturally this will only be known once the full extent of those consequences has been ascertained. The Commission recommend that a broad economic analysis be undertaken to ascertain the likely true costs of the scheme to allow a careful consideration of the benefits and burdens that the proposed scheme will impose on the Western Australian Government, the private insurance industry and the broader community as a whole.

Recommendations

1. The Commission recommend that the 'once and for all' rule be modified in Western Australia through the introduction of a provisional damages regime in the manner outlined above.
2. The Commission recommend that the Government of Western Australia consider whether the three-year time restraint set out in Limitation Act 2005 (WA), or a shorter period of time, would be appropriate for bringing a further claim in relation to a different injury or disease that is discovered after the initial judgment or settlement for provisional damages.
3. The Commission recommend that damages for gratuitous services which a plaintiff can no longer provide to others be introduced in Western Australia in the manner outlined above.
4. The Commission recommend that the Government of Western Australia assess the financial implications of the above recommendations. The Commission consider that the proposed reforms should be implemented unless the costs are determined to substantially outweigh the benefits.

The Commission is grateful to its project writers, Alex Marsden of Marsden Jacob Associates and Andrew Douglas of Macpherson Kelley Lawyers, for their diligence and hard work in researching and writing the Discussion Paper and this Final Report. Alex Marsden was very capably assisted by Elizabeth O'Brien and Andrew Douglas was very capably assisted by Sarah Colmanet. The assistance provided by Ms O'Brien and Ms Colmanet was extensive and without them, this Report would not have been delivered within the timeframes that it was. For those efforts the Commission is also grateful. Following the release of the Discussion Paper, and with the assistance of Mr Marsden, the Commission engaged in a broad program of face to face consultations. The assistance provided by Mr Marsden was extensive and the Commission extend its thanks to him for his patience and strong project management skills.

This reference was commenced by a Commission comprising Dr Augusto Zimmerman, Mr Alan Sefton and myself. During the course of the reference, Mr Sefton retired from the Commission and he was replaced by Ms Seaward. Over the course of the reference the administrative support to Commission was provided by Sarah Burnside, Dominic Fernandes, Dave Major and Andrew Marshall. To each of Sarah, Dominic, Dave and Andrew and to other officers within the Department of the Attorney General who assisted the Commission from time to time, your efforts have not gone unnoticed; the Commission recognise your efforts and is truly grateful for them. The Commission also thank the Acting Director General of the Department of the Attorney General, Pauline Bagdonavicius, as well as previous Director General, Cheryl Gwilliam, for their support of the Commission. Finally, the Commission thank the Attorney General for providing this reference and for his continued support of the Commission's work.

Dr David Cox
Chairman

1. Introduction

In May 2014, the Commission received a letter of reference (**the Reference**) from the Attorney General of Western Australia, the Honourable Michael Mischin MLC, which requested that the Commission examine the law and make recommendations in relation to the areas set out in Section 1.1 below.

The Attorney General's request stems from concerns about the impact that asbestos has had on the health of Western Australians, the compensation claims that have come before the courts and the introduction of the Asbestos Diseases Compensation Bill 2013 to the Western Australian Parliament by the Honourable Kate Doust MLC.

Although the Asbestos Diseases Compensation Bill 2013 applies to asbestos-related claims only, the Reference requested that the Commission consider whether reform is required in relation to all personal injury claims or whether it should be confined to claims of a particular class (such as asbestos-related claims).

1.1 Reference

The Reference requested the Commission to inquire into compensation regimes for persons suffering from asbestos-related diseases with particular regard to the following areas:

1. Modifying the 'once and for all' rule — 'provisional' damages

1. Whether the 'once and for all' rule applicable to judgments in personal injury actions should be reformed so that, where the victim of a tort develops, subsequent to judgment, an injury or disease which is of a different or more serious character than the injury or disease from which the person suffered at the time of judgment, a court will be authorised in certain circumstances to award further damages to that victim.
2. If such reform is recommended, the form of the proposed regime for the award of further damages, including but not limited to identifying:
 - (a) the circumstances in which a court is to be authorised to award further damages, including whether such a power—
 - (i) should be available in all personal injury claims or should be confined to claims of a particular class, such as claims relating to the contraction of an asbestos-related disease;
 - (ii) should be available whenever a different or more serious injury or disease develops or only where the potential for the development of a different or more serious injury or disease was expressly identified at the time of the initial judgment;
 - (b) the manner in which an award of further damages is to be approached by a court, including:

- (i) whether the entirety of the damages which are the subject of the initial judgment should be assessed afresh or only a head or heads of the damages further assessed;
 - (ii) how the damages the subject of the initial judgment are to be taken into account;
 - (iii) in circumstances where the initial judgment was entered by consent or where heads of the damages awarded had been agreed between the parties;
- (c) whether there should be any time limit for bringing an application for further damages;
- (d) whether, generally or (in view of section 4(2a) of the *Law Reform (Miscellaneous Provisions) Act 1941*) in the case of actions for latent injury attributable to the inhalation of asbestos, it should be open to the estate of a deceased victim to seek from a court an award of further damages which could have been sought from the victim during his or her lifetime.

2. Damages for the value of services provided by the plaintiff to others

1. Whether, where a personal injury prevents a plaintiff from providing gratuitous services, domestic or otherwise, to another person, the damages recoverable by the plaintiff should include a specific head of damages calculated by reference to the value of those services.
2. If the inclusion in an award of such a head of damages is recommended:
 - (a) whether such a head of damages should be awarded in all personal injury claims or should be confined to claims of a particular class, such as claims relating to the contraction of an asbestos-related disease;
 - (b) the criteria that ought to be applied in the assessment of such a head of damages including, but not limited to:
 - (i) the character of the services which should attract compensation;
 - (ii) the character of the relationship between the plaintiff and the recipients of the services which the plaintiff is prevented from providing;
 - (iii) whether regard should be had to the likelihood that the services would have been provided by the plaintiff;
 - (iv) whether damages should be awarded only where expenditure has been incurred in consequence of the plaintiff being prevented from providing a particular service;
 - (c) whether such damages should be awarded only in respect of services which the plaintiff was prevented from providing during his or her lifetime or whether, in the

case of injury or disease resulting in death, damages should be awarded for the 'lost years', i.e. for the years in which the services might have been provided after the plaintiff's actual death until the date to which he or she was expected to have lived had the injury or disease not occurred.

1.2 Clarification of scope

In considering the complex issues which form the subject of this inquiry, the Commission has clarified the scope of the Reference and any subsequent law reform as follows.

1.2.1 Court judgments and out-of-court settlements

It is proposed that any law reform that follows this inquiry would apply equally to court judgments and out-of-court settlements enacted through a signed deed or agreement.

1.2.2 Interim damages

In considering the first area for potential reform in relation to modifying the 'once and for all' rule, it is necessary to differentiate between 'provisional damages' and 'interim damages'. The Commission note that interim damages fall outside the scope of the current reference.

Interim damages are paid to a plaintiff on account of final damages (that is, before the assessment of damages has been completed) primarily to overcome financial difficulties which a plaintiff might experience pending final assessment, such as ongoing out-of-pocket expenses.² The Commission note that the United Kingdom and some Australian jurisdictions³ have introduced legislation which allows interim damages or payments to be awarded for certain personal injury claims.

As mentioned in Section 2.2.1 of this report, provisional damages involve an immediate assessment of all losses (including future losses) except those attributable to the happening of a future event, most usually the development of a specified medical condition or a serious deterioration of the plaintiff's existing condition. The plaintiff is given the right to apply to the court for further damages should the specified condition or serious deterioration come about.

1.2.3 Common law only

As noted below in Section 2.3.4, the scope of the Reference is limited to damages that are awarded at common law in relation to the commission of a 'tort' (that is, a civil wrong), such as negligence. The Reference does not extend to claims which are made pursuant to workers compensation or fatal accidents legislation.

² New South Wales Law Reform Commission, *Provisional damages*, report 78, 1996.

³ See, for example, the *Safety, Rehabilitation and Compensation Act 1988* (Cth), the *Motor Accidents Act 1988* (NSW) and the *Supreme Court Act 1935* (SA).

1.2.4 No retrospective law reform

In this reference, the Commission consider that the retrospective application of any reforms would not be desirable. While the Commission acknowledge that this may result in a disparity between historical claims and future claims, the complexity and costs associated with reopening previous settlements and court decisions are likely to be significant.

1.3 Structure of this report

The remainder of this report is divided into four chapters:

- Chapter 2 provides background to the Reference, including information on asbestos-related diseases and a high-level overview of jurisdictional variances across Australia.
- Chapter 3 sets out the Commission's approach to the Reference.
- Chapter 4 addresses the first area of reform outlined in the Reference in relation to modifying the 'once and for all' rule through the introduction of 'provisional damages'.
- Chapter 5 addresses the second area of reform outlined in the Reference in relation to damages for the value of services provided by the plaintiff to others.

A list of submissions received and people consulted in the course of the project is in Appendix A.

2. Background

The Asbestos Related Diseases Bill 2013, which was introduced into the Western Australian Parliament by the Honourable Kate Doust MLC, seeks to provide for a second award of damages in the case of an injured person suffering from more than one asbestos-related disease and to provide compensation for the loss or impairment of the injured person's capacity to perform domestic services for another person.

While the Bill is limited to compensation for asbestos-related diseases, it highlights two aspects of the law in Western Australia where there are perceived fairness concerns and anomalies with other Australian jurisdictions. The first is the 'once and for all' rule and the second is damages for gratuitous services which the plaintiff can no longer provide to others due to personal injury.

This chapter provides background to the Reference which has led to the Commission's inquiry and outlines the jurisdictional variances across Australia which exist for provisional damages and for damages in relation to gratuitous services provided by the plaintiff.

Information on asbestos-related diseases and exposure in Western Australia is also provided as a useful case study and background to the inquiry.

2.1 Background to the reference

The Honourable Kate Doust MLC presented the Asbestos Related Diseases Bill 2013 on 31 October 2013. The Bill includes two key proposals for victims of asbestos-related diseases. First, the Bill proposes the introduction of 'provisional damages' for plaintiffs who may develop another asbestos-related disease. Secondly, the Bill proposes to provide compensation for the impairment of a plaintiff's capacity to perform domestic services for another person.

The Attorney General, the Honourable Michael Mischin MLC, stated in his response to the Bill on 8 May 2014 that he would ask the Commission to inquire into the matters raised and consider whether the proposed changes should be extended to litigants generally.

2.2 Current provisions and jurisdictional variances

The Reference, and the jurisdictional variances which have arisen across Australia, are briefly described below.

2.2.1 The 'once and for all' rule

Under the common law, plaintiffs who have suffered a personal injury are awarded damages on the basis of the 'once and for all' rule. This means that damages are assessed at a single stage, cannot be subsequently enlarged, and are calculated as a lump sum (whether by court judgment or by agreement between the parties). The consequence of this is that, once an award of damages is made, a plaintiff cannot obtain any further damages in relation to the

original claim, even if the plaintiff develops a different or more serious injury or disease after the initial judgment.⁴ This creates obvious difficulties where a court is required to make provision for future losses in circumstances where there is a chance that the plaintiff could suffer a serious deterioration of his/her condition or develop a further condition.⁵

Some jurisdictions have modified the common law position by passing legislation which allows a court to make an award of 'provisional damages'. Such an award involves an immediate assessment of all losses (including future losses), except those attributable to the happening of a future event, most usually the development of a specified medical condition or a serious deterioration of the plaintiff's existing condition. The plaintiff is given the right to apply to the court for further damages should the specified condition or serious deterioration come about.

Legislation providing for provisional damages for asbestos- or dust-related conditions has been passed in Victoria, New South Wales, South Australia and Tasmania (Table 1). However, the legislation in those jurisdictions is not identical. The differences, and the underlying policy rationales, are discussed in Chapter 4.

2.2.2 Damages for gratuitous services provided by the plaintiff

'Gratuitous services' include work or labour which is rendered without charge and is usually domestic. Gratuitous services may be provided to the plaintiff by others or by the plaintiff to others.

Gratuitous services provided to the plaintiff by others are already provided for under the common law across Australia. However, plaintiffs have been unable to seek damages at common law for their inability to provide gratuitous services to others since the High Court of Australia in *CSR Limited v Eddy*⁶ unanimously overturned the decision of the New South Wales Court of Appeal in *Sullivan v Gordon*.⁷ Such damages are commonly referred to as 'Sullivan v Gordon damages' (see Section 5.1).

This means that plaintiffs are unable to seek compensation for unpaid caregiving or domestic services provided to others, such as family members, in the event of personal injury.

All jurisdictions in Australia, except for Western Australia and the Northern Territory, have modified the common law position by introducing legislation to enable damages to be awarded for gratuitous services provided to others (Table 1). However, the legislation in those jurisdictions is not identical. The differences, and the policy rationales, are discussed in detail in Chapter 5.

4 *Fitter v Veal* (1701) 12 MOD REP 542; 88 ER 1506.

5 The distinction between provisional damages in the United Kingdom and provisional damages in the relevant Australian jurisdictions is discussed in Section 4.1.1.

6 [2005] 226 CLR 1.

7 (1999) NSWLR 319.

Table 1: Australian legislation dealing with provisional damages and damages for gratuitous services provided to others

| Jurisdiction ^a | Provisional damages | Damages for gratuitous services provided by plaintiff |
|---------------------------|--|---|
| Vic. | <i>Asbestos Diseases Compensation Act 2008</i> (Vic) | The <i>Wrongs Amendment Act 2015</i> (Vic) was recently enacted by the Victorian Parliament. It inserts an entitlement to damages for loss of capacity to provide gratuitous care in the <i>Wrongs Act 1958</i> (Vic) |
| NSW | <i>Dust Diseases Tribunal Act 1989</i> (NSW) | <i>Civil Liability Act 2002</i> (NSW) |
| Qld. | – | <i>Civil Liability Act 2003</i> (Qld) |
| SA | <i>Dust Diseases Act 2005</i> (SA) | <i>Dust Diseases Act 2005</i> (SA) |
| Tas. | <i>Civil Liability Act 2002</i> (Tas) | <i>Civil Liability Act 2002</i> (Tas) |
| ACT | – | <i>Civil Law (Wrongs) Act 2002</i> (ACT) |
| NT | – | – |
| WA | – | – |

a Provisional damages may also be awarded in the United Kingdom under the *Senior Courts Act 1981* (UK). New Zealand does not appear to provide a statutory entitlement to either provisional damages or damages for services provided by a plaintiff.

2.3 Asbestos-related diseases

While the Commission’s inquiry contemplated potential reforms which are broader than asbestos-related diseases, it is useful to consider asbestos as an example or case study.

2.3.1 Asbestos-related diseases

Asbestos-related diseases (such as asbestosis and mesothelioma) can be contracted by breathing in tiny airborne particles when asbestos-containing material is disturbed. Diseases arising from asbestos exposure are characterised by long latency periods between exposure and the development of symptoms, and a single exposure to asbestos can result in multiple diseases.

Mortality rates associated with asbestos-related diseases such as lung cancer and mesothelioma are very high, and those diseases often arise sometime after the development of lesser, yet still debilitating, asbestos-related conditions (for example, asbestosis and pleural plaques).

The World Health Organization has stated that there is no minimum safe exposure level for

some forms of asbestos fibres.⁸ The National Health and Medical Research Council likewise has noted that asbestos is highly toxic and environmentally persistent.

The long latency period for asbestos-related diseases, and the ability for exposure to lead to a secondary (potentially more serious) disease, mean that the extent of injury due to asbestos exposure may not be apparent with an initial disease diagnosis or for many years afterwards.

Four key categories of asbestos-related disease and the corresponding latency periods are⁹:

- pleural diseases (such as pleural plaques, pleural effusion and pleural thickening), which—depending on the form of disease—can have a latency of less than 10 years or over 20 years
- asbestosis, which can have a latency of over 20 years
- lung cancer, which can have a latency of 15 to 20 years or longer
- mesothelioma, which can have a latency of 20 to 40 years.

2.3.2 Asbestos production and exposure in Western Australia

In Western Australia, most exposure to asbestos is through three key sources—asbestos mining, asbestos production and the use of asbestos in residential housing.

Crocidolite asbestos (blue asbestos) was mined at Wittenoom in the Pilbara until the final closure of the mine in 1966. Chrysotile (white asbestos) was also mined in Australia¹⁰ until a complete ban on mining asbestos came into effect in 1984.

Despite this ban, the importation of raw chrysotile asbestos and the use of chrysotile asbestos products remained lawful until the asbestos use ban in 2003.

Prior to the asbestos use ban in 2003, asbestos products—such as asbestos cement sheeting—were both manufactured in Western Australia and imported from interstate and overseas.

Until the 1980s, asbestos products were extensively used to build residential houses in Western Australia. The peak years for the use of asbestos-containing materials in the construction of domestic dwellings in Australia were between 1945 and 1987,¹¹ and it is estimated that until the 1960s approximately 25% of all new housing was clad in asbestos cement. The use of asbestos in building and construction materials declined in the 1980s and had virtually ceased by the early 1990s.

Therefore, exposure to asbestos in Western Australia has been widespread through

8 http://apps.who.int/iris/bitstream/10665/69479/1/WHO_SDE_OEH_06.03_eng.pdf.

9 Based on content of Ondrich, R. and Muir, E, Submission on behalf of Griffith University, Brisbane, Queensland, June 2015, Table 2.0, p. 17–26.

10 Such as at Woodsreef near Barraba in New South Wales.

11 Asbestos Management Review Report, June 2012.

occupational exposure (such as through mining and building construction) and exposure at home or elsewhere.

2.3.3 Future disease development in Western Australia

While asbestos-related diseases have traditionally been linked to workers who have had direct contact with the material, either through mining or working with asbestos in manufacturing processes (referred to as the 'first wave'), and to construction workers, carpenters and other tradespeople exposed to asbestos fibres from building materials (referred to as the 'second wave'), a 'third wave' of exposure is currently occurring in relation to 'do-it-yourself' home renovators and home handypeople who have been exposed to existing asbestos products in the home.¹²

The long incubation period means that the incidences of mesothelioma and other asbestos-related diseases caused by exposures prior to bans on asbestos use are still increasing in Australia.

2.3.4 Asbestos and the law

Because of the nature of asbestos products, a substantial proportion of asbestos disease sufferers were exposed to asbestos as part of their occupation—whether asbestos mining, asbestos production or construction-related jobs. For this reason, asbestos-related disease compensation is strongly linked to workers compensation under statute.

In Western Australia, this is governed by the *Workers' Compensation and Injury Management Act 1981* (WA). Under the Act, employees who are injured in the course of their employment can claim weekly payments, medical and other expenses and compensation for permanent impairment in relation to that injury (which includes diseases). If the injury reaches the required statutory threshold, the employee may make a claim for common law damages under the *Workers' Compensation and Injury Management Act 1981*. Such damages are offset against the workers compensation benefits which the employee has already received.

In the case of personal injuries which are sustained outside the course of employment (for example, by a member of the public) due to the commission of a tort, common law damages may be sought and awarded pursuant to civil liability legislation such as the *Civil Liability Act 2002* (WA). Relatives of a person who dies due to the commission of a tort may also claim common law damages pursuant to fatal accidents legislation such as the *Fatal Accidents Act 1959*.

The focus of the Commission's inquiry was on claims for common law damages, other than those made pursuant to workers compensation or fatal accidents legislation.

¹² Asbestos Management Review Report, June 2012.

2.4 Other diseases and injuries

The Reference for the inquiry left open the question of whether causes of action in relation to other diseases or injuries, beyond asbestos-related diseases, should be included in proposed reforms. This is considered in Chapters 4 and 5.

3. The Commission's methodology

3.1 Introduction

In undertaking its functions under the *Law Reform Commission Act 1972* (WA), the Commission must, on a reference made to it by the Attorney General:

- examine critically the law with respect to the matter mentioned in the reference
- report to the Attorney General on the results of the examination of that law and make any recommendations with respect to the reform of that law that it considers to be desirable.¹³

The reference provided by the Attorney General identifies the scope and matters that the Commission is asked to investigate. The Reference for this inquiry included a number of elements for consideration, and multiple options arise for each one.

To undertake the Reference, the Commission drew on the expertise of Macpherson Kelley Lawyers and Marsden Jacob Associates, who undertook background research on the approach used in other jurisdictions and who also conducted stakeholder consultations.

3.2 Discussion Paper

Based on the research undertaken and the stakeholder consultations, the Commission developed a discussion paper that set out a range of options for each element of the Reference and a proposed approach for each element.

A total of 25 submissions were received in response to the Discussion Paper. In addition, targeted discussions were held with a number of individuals and organisations who have an interest or expertise in personal injuries (including asbestos-related diseases) and litigation. The full list of submissions received and meetings held is set out in Appendix A.

The respondents can broadly be categorised into two groups:

those advocating for the plaintiffs, who tended to support the proposed reforms or suggest that the reforms should be broader or more extensive

those advocating for the defendants and/or insurers, who tended to favour maintaining the *status quo* in Western Australia or restricting the extent of the proposed reforms.

3.3 Preparation of this report

The Commission assessed the submissions received against the legislative principles set out in section 11(4) of the *Law Reform Commission Act 1972*, which provides that the Commission must examine the law for the purposes of ascertaining and reporting whether that law:

- is obsolete, unnecessary, incomplete or otherwise defective

¹³ *Law Reform Commission Act 1972* (WA), s. 11(3).

- ought to be changed so as to accord with modern conditions
- contains anomalies, or
- ought to be simplified, consolidated, codified, repealed or revised, and, if appropriate, whether new or more effective methods for the administration of that law should be developed.

Anomalies identified and considered in this report include inconsistencies within Western Australian law as well as inconsistencies between jurisdictions within Australia.

The effectiveness of the current legislative framework is also considered in this report, together with the question of whether alternative arrangements would be more effective and offer greater fairness.

3.4 Recommendations

The Commission have provided three key recommendations for proposed reforms relating to provisional damages and damages for gratuitous services. The Commission have also provided an additional recommendation that the Government of Western Australia assess the financial implications of the proposed reforms, as such an assessment did not fall within the scope of the Reference.

3.5 Financial implications of reform

In responding to the Reference, the Commission was tasked with assessing the current legislation and recommending desired law reforms.

In considering the practical implications of law reform for this inquiry, the Commission are aware that a reference such as this is likely to have economic implications for both plaintiffs and insurance companies. At the Discussion Paper stage, the Commission indicated that the economic impacts of the proposed reforms fell outside the scope of the Reference, which remains the case in this final report.

The implementation costs of the proposed reforms would be borne by the community in the form of increased court congestion (in terms of the number, duration and finality of claims) and administration costs. Additionally, there is a risk that costs may be disproportionately borne by plaintiffs and defendants (including insurers) as the new provisions in the legislation are tested in the initial cases that come before the courts.

In the longer term, any changes to personal injury law that increase the amount of compensation paid would affect insurance premium levels and affordability and may involve other changes to costs.

While the Commission invited stakeholders to provide feedback on any cost implications arising from the potential reforms, only one group (the Insurance Commission of Western

Australia) provided a quantitative estimate of costs.

3.5.1 Provisional damages

The Commission consider that the potential financial impact of the proposed reform will include transaction costs, the quantum of compensation paid and the particular circumstances involved in the funding agreement for the Asbestos Injury Compensation Fund. As those impacts are beyond the Commission's Reference, each of them is discussed below but conclusions are not made at this point.

Transaction costs

The Commission has not assessed the impact of the proposed reforms on court costs, lawyers' fees and other costs of repeated legal action. The Commission note that those costs are likely to be initially higher after the introduction of the proposed reforms as stakeholders adjust to the reforms and test cases are determined. We are aware that the Government of Western Australia may wish to undertake further analysis of these costs before implementing the reforms.

Compensation paid

The Commission consider that the introduction of provisional damages should not substantially alter the quantum of compensation paid across the whole population. This is because compensation paid on a 'once and for all' basis (which is the current position in Western Australia) should include a component for the possibility that a further injury or disease which arises from the same tortious act as the original injury or disease may develop at a later time. In contrast, an initial award of damages made on a provisional basis would only be made for the current injury or disease, with the understanding that the plaintiff can return for a further award of damages if a second injury or disease arises. This would result in compensation being applied more accurately by avoiding the need to speculate about future events and therefore avoiding potential under- or overcompensation of the plaintiff.

This point can be illustrated using asbestosis and mesothelioma as examples and using nominal or illustrative figures, as set out in Box 1. This illustration was broadly supported by the Insurance Commission of Western Australia at a theoretical level.

Box 1: Illustration of the cost-neutral impact of provisional damages on compensation paid

This illustration uses the following figures:

- Compensation for asbestosis on a provisional basis = \$10,000
- Compensation for mesothelioma = \$40,000 (note that, due to the short life expectancy of a plaintiff with mesothelioma, the damages awarded would be almost identical whether on a provisional or 'once and for all' basis)
- Total population with asbestosis = 100
- Assumed occurrence of mesothelioma after asbestosis = 5%.

'Once and for all' compensation

Using the figures above, the compensation paid for asbestosis on a 'once and for all' basis should be:

**Compensation for the current disease + Likelihood of 2nd disease x
(Compensation for 2nd disease – Compensation for the current disease)**

$\$10,000 + 5\% \times (\$40,000 - \$10,000) = \$11,500$ per person.

Across a population of 100 people with asbestosis, the total compensation would be \$1,150,000.

Provisional damages

Using the figures above, the compensation paid for asbestosis on a provisional basis should be \$10,000.

The compensation subsequently awarded for mesothelioma would be $\$40,000 - \$10,000 = \$30,000$.

Across a population of 100 people with asbestosis, the total compensation paid would be $100 \times \$10,000 + 5 \times (\$40,000 - \$10,000) = \$1,150,000$.

Potential impact on funding agreement for the Asbestos Injury Compensation Fund

While the proposed reforms are broader than asbestos-related diseases, the unique nature of the Asbestos Injury Compensation Fund means that the possible impact of the reforms on the fund requires consideration.

The Asbestos Injury Compensation Fund is a special purpose company that was formed to pay the compensation liabilities of the James Hardie group of companies. In previous court cases, James Hardie had been found liable for some asbestos-related diseases where plaintiffs

were found likely to have been exposed to products containing asbestos (such as cement sheeting) which James Hardie companies had manufactured or distributed.

In 2001, Australian-based companies Amaca (formerly James Hardie & Coy Pty Ltd) and Amaba (formerly Jsekarb Pty Ltd) were separated from the James Hardie group.¹⁴ This resulted in concerns that the liabilities for personal injury claims arising from James Hardie's asbestos products would not be appropriately funded.¹⁵

In 2005, the Government of New South Wales sought to resolve the funding for personal injury claims. Accordingly, the Funding Agreement for the Asbestos Injury Compensation Fund was established through a contract between James Hardie Industries, the Asbestos Injury Compensation Fund and the Government of New South Wales.

Clause 13(4) of the Funding Agreement¹⁶ makes provision for the situation where any State government (not just New South Wales) enacts legislation that has the effect of increasing the amounts payable under the Funding Agreement.

In such a situation, James Hardie and the NSW Government are required to negotiate in good faith to modify the terms of the Funding Agreement (and the Trust Deed), to ensure that the liabilities of the Asbestos Injuries Compensation Fund (and the various James Hardie entities providing funding under the Funding Agreement) are not increased as a result of the introduction of the legislation in question.

In its submission to the Commission, James Hardie considers that the introduction of provisional damages and damages for gratuitous services by the Western Australian government would enliven clause 13(4) of the Funding Agreement. The submission goes on to note that this may negatively impact on the funds available to the Asbestos Injuries Compensation Fund and payments to claimants resident in Western Australia.¹⁷

Further consultation is required with the Government of New South Wales and other parties to the Funding Agreement to determine whether the proposed reform would trigger clause 13 of the Funding Agreement, and if so, the financial implications for claimants relying on the Asbestos Injuries Compensation Fund, and the State of Western Australia.

The Commission note that the proposed reform to the 'once and for all' rule (with respect to asbestos disease sufferers) aligns well to the current provisions for asbestos disease sufferers that apply in New South Wales. The Commission see no reasons why the citizens of Western Australia should be treated differently from residents of New South Wales, but are aware that the financial implications for Western Australia are unknown.

14 Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation, DF Jackson QC, September 2004, p. 8.

15 The terms of reference for the Special Commission of Inquiry, http://www.ir.jameshardie.com.au/jh/asbestos_compensation/special_commission_of_inquiry.jsp; items 1 and 2 relate to these concerns.

16 Available at www.aicf.org.au

17 James Hardie Submission [3.6]-[3.8] and [3.13]-[3.15]

As discussed above, the Commission consider that the proposed reform to the 'once and for all' rule should not affect the quantum of compensation paid but may affect legal costs.

3.5.2 Gratuitous services damages

Due to the breadth of the proposed reforms, the potential impact could include increased premiums for various forms of insurance, such as workers compensation, motor vehicle, compulsory third party and personal liability insurance. In addition, the unique nature of the Asbestos Injury Compensation Fund (discussed above) could result in the Government of Western Australia being asked to contribute to a funding arrangement if either or both of the proposed reforms are implemented.

As mentioned above, the Commission's assessment has not considered the financial implications of the proposed statutory reforms. While the quantification of such costs does not fall within the scope of the Reference, the Commission understand that this is likely to be of interest to policymakers. For this reason, the Commission recommend that the Government of Western Australia assess the financial implications of the proposed reforms, as is common in the assessment of government policy changes.

4. Modifying the 'once and for all' rule in Western Australia

4.1 Introduction

Under the common law, the 'once and for all' rule requires damages to be assessed at a single stage, meaning that they cannot be subsequently enlarged and are calculated as a lump sum (whether by court judgment or by agreement between the parties). This rule provides finality of litigation for the parties and avoids defendants being exposed to multiple claims arising from the same cause of action. The effect is that the plaintiff can make only one claim for damages which must include all past and future loss arising from the tortious act that constitutes the cause of action.¹⁸ The rule therefore provides finality and financial certainty, reduces court congestion and avoids protracted litigation.

In 1982, the *Supreme Court Act 1981* (UK)¹⁹ was amended to allow for the awarding of provisional damages in respect of personal injuries. This amendment was introduced in accordance with the recommendations of the United Kingdom Law Commission's Report on Personal Injury Litigation—Assessment of Damages,²⁰ which were endorsed, in general terms, by the United Kingdom's Royal Commission on Civil Liability and Compensation for Personal Injury.²¹

It is clear from the parliamentary debates that took place before the House of Lords in 1982 that the objective of the reform was, in general terms, to overcome the inadequacy of the 'once and for all' rule in cases where there is evidence that the medical prognosis is uncertain and there is a chance that a serious disease or deterioration of the plaintiff's condition will occur at a later date. This was illustrated through the following examples:

- a person whose sight was impaired following an accident at work and who could still work but, according to the medical evidence, was at risk of going blind within the next five years
- a young child whose skull was fractured in a motor accident and who appeared to have made a complete recovery by the time the case is heard but had a slight possibility of developing epilepsy in future.

In cases of this kind, it was said that the only remedy under the existing law (that is, damages being awarded 'once and for all') was inadequate because, if the chance event never happened, the plaintiff was overcompensated and, if it did happen, the plaintiff was undercompensated, sometimes to a very high degree. Either way, it was said that the award of damages was bound to be wrong. The purpose of introducing provisional damages in the United Kingdom was to make it possible for the court to take a different approach; that is, to award nothing in respect of the chance event but to give damages for what is known, and

18 Michael Tilbury, 'Damages for personal injuries: a statement of the modern Australian law', *Western Australian Law Review*, 1980.

19 Now named the *Senior Courts Act 1981* (UK).

20 Law Com No 56, 1973 (UK).

21 The Pearson Report, March 1978 (UK).

then allow the plaintiff to apply for damages later if the chance event takes place. It was expected that this procedure would not be employed very often because it would only be invoked if the plaintiff wanted it and the court was satisfied that it would not cause serious prejudice to the defendant. However, in those cases where it was used, the result would be manifestly fairer to both parties than under the existing rule.

Subsequent to this change in the United Kingdom, New South Wales introduced provisional damages in the *Dust Diseases Tribunal Act 1989* (NSW). During the second reading of the Courts Legislation Amendment Bill 1995, the Attorney General for New South Wales noted that the Dust Diseases Tribunal (like any other common law court) had to calculate damages on a once-only basis and therefore had to frequently include in its award a component based on a best guess as to the probability of a further condition arising from the same injury. An example was provided of asbestosis, which may or may not progress to mesothelioma and for which the probability of such a progression is often impossible to evaluate. The changes in New South Wales were heralded as a major step forward in the Australian common law jurisdiction and were followed by similar legislative reform in Tasmania, South Australia and Victoria (see Table 1 in Section 2.2.2).

Given the long latency periods of asbestos-related diseases and the possibility of an individual contracting multiple but separate diseases, some groups considered that the traditional method of awarding damages at common law pursuant to the 'once and for all' rule lacks fairness. As the examples set out above illustrate, the current regime is likely to result in either undercompensation (if a subsequent disease develops) or overcompensation (if no further disease develops) due to the difficulty involved in assessing future contingencies. In turn, this may cause plaintiffs to delay bringing a claim until their condition has stabilised, to delay compromising their claim through a negotiated settlement, or both.

This chapter summarises some reform options and outlines the Commission's assessment of the options. Finally, it poses a series of questions for the Western Australian community to consider in relation to the awarding of damages for personal injuries on either a 'once and for all' or a provisional basis. Broadly, the overarching alternatives are to either retain the current common law position in Western Australia (that is, the 'once and for all' rule) or to introduce statutory reform to allow provisional damages for all personal injury actions or a limited subset thereof (with or without further restrictions).

The Reference relating to provisional damages can be summarised simplistically as follows:

1. Should victims of a tort be able to claim provisional damages?
2. If victims of a tort *should* be able to claim provisional damages:
 - (a) In what cases should such a claim be made?

(b) How should further damages be calculated?

(c) What limits should be imposed?

4.1.1 Potential triggers for provisional damages

It is generally understood that provisional damages allow a plaintiff to seek further compensation after their original claim has been resolved if they develop a different injury or disease (that is, a new condition) or suffer a more serious injury or disease (that is, a deterioration in an existing condition).

By their nature, provisional damages are most suitable to situations in which an act or omission giving rise to a cause of action could result in the victim developing multiple conditions over a prolonged period. Provisional damages may be awarded in the United Kingdom where there is a chance that the plaintiff will develop, at some time in the future, a serious disease or suffer a serious deterioration of his/her physical or mental condition.²² In contrast, the relevant Australian jurisdictions (Victoria, New South Wales, South Australia and Tasmania) allow provisional damages to be awarded only where there is a chance that 'another' condition will develop (not a 'deterioration' of the plaintiff's condition).

Discussions with stakeholders indicate that provisional damages would not be relevant in most cases of personal injury (even if provisional damages were broadly available), as few torts would result in the development of a new condition (compared to the deterioration of an existing condition) subsequent to the initial judgment. For this reason, personal injury claims for asbestos-related diseases are unusual compared to most personal injury claims.

The distinction between the deterioration of an *existing* condition and the development of a *new* condition is of fundamental importance in determining the limits for the introduction of provisional damages in Western Australia (see Box 2).

²² Section 32A, *Senior Courts Act 1981* (UK).

Box 2: Deterioration of an existing condition compared to development of a new condition under the 'once and for all' rule

Deterioration of an *existing* condition

In compensation for a personal injury, the damages payment (whether through a court action or a settlement) will include provision for the likelihood that the injury will deteriorate over time. Three examples are as follows:

- Vision impairment may develop into blindness.
- A serious knee injury requiring a knee reconstruction may result in a knee replacement in later life.
- When first diagnosed, asbestosis may result in a low level of incapacitation, but the victim's condition may deteriorate over time without the development of malignant disease.

Development of a *new* condition

In contrast, the damages payment may not include provision for the possible development of a new condition or, at best, it will be speculative. Two examples are as follows:

- A sufferer of asbestosis is statistically unlikely to develop mesothelioma; if that occurs, the mesothelioma is considered to be a separate medical condition.
- A skull fracture injury can result in the victim developing epilepsy after a delay in time.

4.2 Proposed reform for provisional damages

The Commission's assessment in relation to the first area of potential law reform is to propose that the 'once and for all' rule be modified in Western Australia through the introduction of provisional damages (subject to the requirements set out below). The Commission consider that this approach would deliver the maximum benefit to the Western Australian community as a whole when considering the advantages and disadvantages of each reform option (as presented in the remainder of this chapter) and the desirability of delivering certainty, consistency, equity and efficiency to both plaintiffs and defendants.

The Commission's proposed reform is as follows:

1. Provisional damages will be introduced in Western Australia, but defendants will have the right to argue liability and factors such as contributory negligence in an action for further damages.

2. Provisional damages will be permitted where there is a chance that a different injury or disease (that is, a new condition) may arise after the initial judgment or settlement (but not in relation to the deterioration of the plaintiff's existing condition).
3. Provisional and further damages will be permitted in relation to all classes of personal injury or disease.
4. Further damages will be available only where the potential for the development of a different injury or disease was expressly identified at the time of the initial judgment or settlement for provisional damages.
5. Plaintiffs will not be restricted in the number of claims that can be made for further damages, provided that such claims relate to the development of a different injury or disease which was expressly identified at the time of the initial judgment or settlement (for example, if two such injuries develop at different times after the initial judgment or settlement, the plaintiff will be allowed to make two applications for further damages in relation to those injuries).
6. When assessing further damages, courts will be allowed to take into account the damages initially awarded to the plaintiff.
7. after the initial judgment or settlement.²³
8. Estate claims will be allowed where the deceased victim had commenced, but not completed, an action for further damages prior to his/her death.

We envisage that, under the proposed reform, provisional damages would be available to plaintiffs in circumstances in which it is known a further injury or disease could arise. This would allow the plaintiff and the defendant (if by agreement), or a court, to choose the most preferred course of action.

Under the proposed reform, a personal injury case could be settled either on a 'once and for all' basis or on a provisional basis. Figure 1 illustrates the potential outcomes of each option. This illustration is based on a plaintiff who has an injury or disease 'A' and there is a known probability 'p' that they will develop a secondary disease 'B'. In summary:

1. Under Outcome 1, the plaintiff opted for damages on a 'once and for all' basis and was awarded a payment for their current injury/disease (Payment A) plus an additional payment accounting for the probability of the plaintiff contracting an additional injury/disease in the future (Payment B × p). In this case, the plaintiff contracted an additional injury/disease at a later date and was therefore undercompensated by the remainder of Payment B (Payment B × (1 – p)).

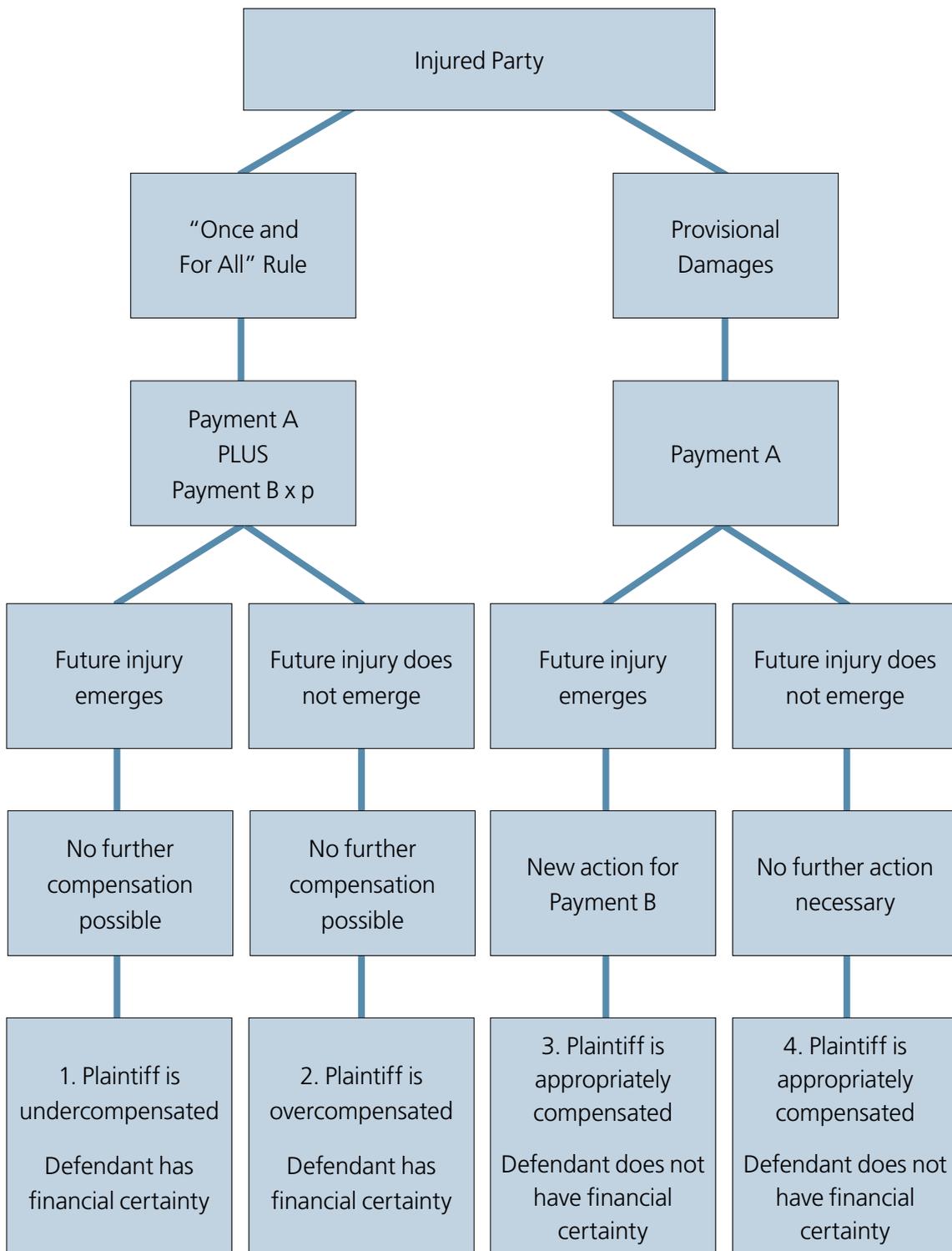
²³ See section 4.8 as to the time limit for bringing a claim for further damages following the discovery of a different injury or disease

2. Under Outcome 2, the plaintiff opted for damages on a 'once and for all' basis and was awarded Payment A plus (Payment B \times p). In this case, the plaintiff did not contract an additional injury/disease at a later date and was therefore overcompensated to the extent of (Payment B \times p).
3. Under Outcome 3, the plaintiff opted for provisional damages and was awarded Payment A. In this case, when the plaintiff contracted an additional injury/disease at a later date, they were awarded Payment B and so they were appropriately compensated.
4. Under Outcome 4, the plaintiff opted for provisional damages and was awarded Payment A. In this case, the plaintiff did not contract an additional injury/disease at a later date and was therefore appropriately compensated.

Currently, only the 'once and for all' option is available to plaintiffs in Western Australia. Under the proposed reform, plaintiffs would have the choice of settling on a 'once and for all' basis or on a provisional basis. It is recognised that, while provisional damages will ensure that the plaintiff is appropriately compensated, it may be advantageous to both the plaintiff and the defendant to settle a case on a 'once and for all' basis.

The plaintiff's decision will depend on their own level of risk aversion and personal circumstances.

Figure 1: Consideration of options for settling the case for an injury or disease 'A' with the potential 'p' for a further injury or disease 'B'



Source: Marsden Jacob analysis.

The remainder of this chapter sets out the options identified and considered by the Commission in response to each of the questions raised by the reference.

Under each of the options set out below, the Commission's proposed reform is shaded in grey.

4.3 Should victims of a tort be able to claim provisional damages?

In relation to paragraph 1 of the Reference, the Commission has identified the following options:

- Option 1—Retain the 'once and for all' rule
- Option 2—Introduce provisional damages in relation to the development of a different injury or disease only
- Option 3—Introduce provisional damages in relation to the development of a different *or* more serious injury or disease.

Table 2 summarises the advantages and disadvantages of modifying the 'once and for all' rule through the introduction of a statutory provision which enables a court to make an order for provisional damages in an appropriate case.

Table 2: Should victims of a tort be able to claim provisional damages?

| Options | Jurisdictions | Advantages | Disadvantages |
|--|---------------------------|---|---|
| Option 1: Retain the 'once and for all' rule | WA NT ACT | <ul style="list-style-type: none"> • No change from common law position • Finality and financial certainty in litigation for all parties (including insurers) • Encourages settlements, as defendant's liability will be known • Maintains low levels of court congestion by encouraging settlements, avoiding delay and reducing protracted litigation | <ul style="list-style-type: none"> • Uncertainty about future injury or disease and future needs result in over- or undercompensation, depending on the future circumstances of the plaintiff (unjust) • Dilemma of when to claim • Delay and pressure to settle • Inconsistent with the other Australian jurisdictions |
| Option 2: Introduce provisional damages—development of a different injury or disease only | Vic. NSW SA Tas. | <ul style="list-style-type: none"> • Avoids over- or undercompensation (greater accuracy and justice) • Avoids dilemma of when to claim • Reduces delay by encouraging plaintiffs to claim once initial injury or disease has stabilised • Potentially easier to establish the development of a new condition compared to deterioration of an existing condition • Lower increase in court congestion due to more claims compared to Option 3 • Lower potential increase in costs and insurance premiums compared to Option 3 • Consistent with the other Australian jurisdictions | <ul style="list-style-type: none"> • Statutory reform will be required • Lack of finality and financial certainty in litigation for all parties (including insurers) • Advances in medicine and science may reveal subsequent injuries or diseases caused by the same tort which were not reasonably foreseeable, and it may be unfair to a defendant to allow unforeseeable events to be compensated • Court congestion due to an increase in claims and protracted litigation • Potential increase in costs and insurance premiums • Assumes there will be an increase to the loss suffered by the plaintiff, which may not be the case if the plaintiff dies as a result of his/her new condition • Unfair to exclude plaintiffs who suffer a serious deterioration to their existing condition but do not develop a new condition (compared to Option 3) |
| Option 3: Introduce provisional damages—development of a different or more serious injury or disease | UK | <ul style="list-style-type: none"> • Same advantages as Option 2 • Greater justice compared to Option 2 for plaintiffs who suffer a deterioration of their existing condition but do not develop a new condition | <ul style="list-style-type: none"> • Same disadvantages as Option 2 • Greater lack of finality and financial certainty in litigation for all parties (including insurers) compared to Option 2 • Difficulties associated with defining, and proving, the required level of deterioration to entitle a plaintiff to further damages • Deterioration assumes there will be an increase to the injury or disease and therefore the loss suffered by the plaintiff (which may not be the case if the plaintiff dies as a result of his/her condition) • Higher increase in court congestion due to more claims compared to Option 2 • Higher potential increase in costs and insurance premiums compared to Option 2 • Inconsistent with the other Australian jurisdictions |

4.3.1 Stakeholder responses to the Discussion Paper

In the Discussion Paper, the Commission's preliminary assessment was to introduce provisional damages but only for the development of a different injury or disease. Input from stakeholders consequently focused on whether the 'once and for all' rule should be retained in Western Australia or whether provisional damages should be introduced and, if so, whether such damages should be applicable to different and/or more serious injuries or diseases.

Responses from stakeholders fell into three categories: those supporting the proposed reform, those advocating for further or broader reforms, and those proposing to retain the 'once and for all' rule. These responses are summarised below.

Submissions supporting the proposed reform

Submissions supporting the proposed reforms stressed that the current 'once and for all' rule results in either over- or undercompensation of the plaintiff, as the compensation is not based on whether the plaintiff develops the additional injury/disease in the future. Some respondents also noted that the 'once and for all' rule results in worse outcomes where the possibility of a further injury/disease is known but cannot be quantified.

Other points raised supporting the proposed reforms were that provisional damages would:

- provide the plaintiff with peace of mind that they can pursue subsequent damages later
- place the burden on the defendant (and insurer) rather than on the family or broader community
- bring Western Australian law in line with other jurisdictions with respect to asbestos-related diseases.

Submissions suggesting further reform

A small number of stakeholders advocated that Option 1 in Table 2 was preferred, as Option 2 (which was proposed in the Discussion Paper) excludes the worsening of *existing* injuries/diseases. The Cancer Council of Western Australia used melanoma as an example, observing that a second melanoma may be considered a worsening of an existing condition and would not therefore be eligible for further damages under the proposed reforms. Furthermore, the Cancer Council observed that one melanoma is an indication that others may follow (usually more aggressive and further progressed).

Submissions opposing the proposed reform

Some respondents pointed to a desire to balance the rights of the plaintiff with what the community can afford. For example, it was noted that the 'once and for all' rule finalises

litigation, removes uncertainty and reduces the defendant's legal costs by avoiding multiple claims arising from the same tortious act. It was argued that further litigation also has the potential, through additional compensation being awarded, to result in funds shortfalls and disadvantage future claims.

4.3.2 The Commission's assessment

The Commission's assessment is that maintaining the 'once and for all' rule is inconsistent with most Australian jurisdictions and, among other things, creates an anomaly in the treatment of asbestos victims. In addition, the 'once and for all' rule is ineffective at appropriately allocating compensation for torts which potentially result in multiple but separate conditions with long latency periods.

The Commission's assessment is that provisional damages (aligning with Option 2 in Table 2) should be introduced in Western Australia, subject to the further limitations set out below.

If provisional damages are introduced in Western Australia, the Commission's assessment is that they should be available only where there is a chance that a different injury or disease (that is, a new condition) will develop in future, not a deterioration of an existing condition, for the reasons set out in relation to Options 2 and 3 in Table 2.

Three submissions²⁴ proposed that any exacerbation of an injury could trigger provisional damages. The Commission acknowledges that some specific injuries or illnesses (such as a second melanoma), or a serious deterioration of the plaintiff's condition, may be excluded under Option 2. However, the Commission consider that the restriction to a different injury or disease is important to focus the reform on the injuries and diseases that are not appropriately compensated under the 'once and for all' rule. If provisional damages were introduced to cover the exacerbation of a condition, that would be a substantial change to the law and would have significant financial and economic impacts.

The Commission consider that extending provisional damages to any case involving the deterioration of an existing condition would not be appropriate, as it would substantially increase the costs of any law reform without a proportionate increase in the benefits to plaintiffs.

The Commission note that the availability of provisional damages will not abrogate a plaintiff's right to resolve his/her claim on a 'once and for all' basis at common law instead.

Consideration must also be given to the scope of the court's power to award such damages and whether the power should be confined in some way. The following sections explore the key considerations and relevant options.

Under each of the options below, it is assumed that the defendant may choose to contest

24 Hon Nick Goiran, MLC, Hon Kate Doust MLC and Cancer Council of Western Australia

liability or argue contributory negligence in relation to a claim for further damages after the initial judgment or settlement (for example, in the case of a heavy cigarette smoker who develops lung cancer subsequent to asbestosis).

4.4 Should provisional and further damages be confined to a particular class of personal injury or disease?

If provisional damages are introduced in Western Australia, the Commission has identified the following options in relation to paragraph 2(a)(i) of the Reference:

- Option 1—Provisional damages will be available for all classes of personal injury or disease
- Option 2—Provisional damages will be available for some classes of personal injury or disease
- Option 3—Provisional damages will be available for asbestos-related diseases only.

Table 3 summarises the advantages and disadvantages for each option.

Table 3: Should provisional and further damages be confined to a particular class of injury or disease?

| Options | Jurisdictions | Advantages | Disadvantages |
|---|--|--|---|
| Option 1: All classes of personal injury or disease | UK (all classes of personal injuries) | <ul style="list-style-type: none"> • Equal treatment of personal injury victims where the medical prognosis is uncertain and there is a chance that a more serious condition, or a deterioration of an existing condition, may occur (fairness) • Equal treatment of conditions arising from the same tort • Allows for advances in medicine and science which may reveal subsequent injuries or diseases caused by the same tort | <ul style="list-style-type: none"> • Greater court congestion due to a higher increase in litigation (compared to Options 2 and 3) • Higher potential increase in insurance premiums (compared to Options 2 and 3) • Inconsistent with other jurisdictions in Australia |
| Option 2: Some classes of personal injury or disease | NSW ^a (dust-related condition) SA ^b (dust disease) Tas. ^c (dust disease) | <ul style="list-style-type: none"> • Can be restricted to classes of claims where there is the greatest need • Limits court congestion due to a lower increase in litigation (compared to Option 1) • Limits the potential increase in insurance premiums • Consistent with other jurisdictions in Australia | <ul style="list-style-type: none"> • Unequal treatment of personal injury victims (unfair)—no logical distinction between types of claims • Unequal treatment of conditions arising from the same tort • Higher increase in litigation (and therefore court congestion) compared to Option 3 • Higher potential increase in insurance premiums (compared to Option 3) |
| Option 3: Asbestos-related conditions only | Vic. ^d (asbestos-related condition only) | <ul style="list-style-type: none"> • Recognises the nature of asbestos-related conditions (i.e. long latency and multiple but separate diseases) • Limits court congestion due to a lower increase in litigation (compared to Options 2 and 3) • Limits the potential increase in insurance premiums | <ul style="list-style-type: none"> • Unequal treatment of personal injury victims (unfair)—no logical distinction between types of claims, especially for other dust diseases • Unequal treatment of conditions arising from the same tort • Inconsistent with other jurisdictions in Australia (except for Vic.) |

a In New South Wales, provisional and further damages may be awarded under the *Dust Diseases Tribunal Act 1989* (NSW) in respect of a 'dust-related condition' as defined in that Act.

b In South Australia, provisional and further damages may be awarded under the *Dust Diseases Act 2005* (SA) in respect of a 'dust disease' as defined in that Act.

c In Tasmania, provisional and further damages may be awarded under the *Civil Liability Act 2002* (Tas) in respect of 'dust-related disease' as defined in that Act.

d In Victoria, provisional damages may be awarded under the *Asbestos Diseases Compensation Act 2008* (Vic) in respect of an 'asbestos-related condition' as defined in that Act.

4.4.1 Stakeholder responses to the Discussion Paper

In the Discussion Paper, the Commission's preliminary assessment was to support the application of provisional damages to *all* classes of personal injury or disease, rather than just some classes or just asbestos-related injuries or diseases. Stakeholder responses are summarised below.

Submissions supporting the proposed reform

Some respondents argued that the extension of the proposed reforms to all classes of injury or disease (not just asbestos-related disease) will avoid the exclusion of future injuries or diseases. As the Honourable Nick Goiran MLC commented:

Provisional damages should be available for all classes of personal injury or disease as there is no case that can reasonably be made that one is more or less deserving than another.

However, it was also argued that the Asbestos Diseases Compensation Bill 2013 should not be delayed while legislation for the broader issues is drafted.

Submissions opposing the proposed reform

Some respondents proposed that the introduction of provisional damages should be restricted to asbestos-related diseases because of their nature (that is, their long latency periods and the possibility of multiple but separate diseases). It is argued that the current 'once and for all' rule provides effective compensation for other cases, even when medical prognosis is uncertain. The extension of provisional damages beyond asbestos- and dust-related diseases would create significant uncertainty for insurers in terms of their prudential reserving requirements and long tail claims, affecting the affordability of liability insurance for personal injury.

The Insurance Commission of Western Australia proposed that further damages for asbestos-related diseases should exclude psychological injury or loss.

4.4.2 The Commission's assessment

The Commission note that, under the legislation in each of the Australian jurisdictions listed in Table 3, provisional damages may be awarded for an asbestos- or dust-related condition (as defined in the legislation) and further damages may be awarded for another asbestos- or dust-related condition. The initial and subsequent conditions are therefore defined within the legislation and fall within the same class of injury or disease.

The Commission note that assessing the impact of an injury or disease on mental health is currently an uncertain science. The Commission consider that it would be inappropriate to specifically exclude one form of injury or disease in legislation when science and medicine will continue to develop in the future. The Commission consider that Options 2 and 3 in Table 3 would reduce anomalies between Western Australia and other Australian jurisdictions by aligning the legislative requirements with one or other jurisdiction. However, Option 1 would provide the highest level of equity by ensuring that all victims of a tort, and all conditions arising from that tort (including impairment to mental health), are treated in the same manner.

In relation to Option 2, the Commission note that during discussions with stakeholders the only other example offered of a substance that has a similar effect on a person to asbestos was silica dust (which may result in silicosis, scleroderma, silica induced carcinoma of the lungs, massive progressive fibrosis, tuberculosis, silica-tuberculosis, oesophageal dysfunction, renal disease and scleroderma lung). However, it was generally agreed that some carcinogenic products may result in both short-term and long-term reactions (for example, cancer).

In light of the above, the Commission's assessment is that provisional damages should be allowed for all classes of personal injury or disease in Western Australia (subject to the further limitations set out in Section 4.3 and the remainder of this chapter).

4.5 Should further damages be available only if the injury or disease was identified at the time of the initial judgment/settlement?

If provisional damages are introduced in Western Australia, the Commission has identified the following options with regard to paragraph 2(a)(ii) of the Reference:

- Option 1—Further damages will be available whenever a different or more serious injury or disease develops
- Option 2—Further damages will be available only where the potential for the development of a different or more serious injury or disease was expressly identified at the time of the initial judgment/settlement.

Table 4 summarises the advantages and disadvantages for each option.

Table 4: Should further damages be available only if the injury was identified at the time of the initial judgment/settlement?

| Options | Jurisdictions | Advantages | Disadvantages |
|---|---|--|---|
| Option 1: Further damages—whenever a different or more serious injury or disease develops | — | <ul style="list-style-type: none"> • Fairness to plaintiffs (ensures that they are correctly compensated regardless of whether they identify the potential for another condition or deterioration of an existing condition to develop in future) • Less room for advocate/plaintiff error (compared to Option 2) • Allows for advances in medicine and science which may reveal subsequent injuries or diseases caused by the same tort | <ul style="list-style-type: none"> • Unfairness to defendants—uncertainty, lack of finality and unforeseeability of conditions due to advances in medicine and science • Greater court congestion due to a higher increase in litigation (compared to Option 2) • Higher potential increase in insurance premiums (compared to Option 2) • Inconsistent with other jurisdictions in Australia |
| Option 2: Further damages—only where the potential for the development of a different or more serious injury or disease was expressly identified at the time of the initial judgment or settlement | Vic. NSW ^a SA Tas. UK ^b | <ul style="list-style-type: none"> • Fairness to defendants (and insurers)—limits the causative nexus of secondary liability to the time of the initial award of damages • Limits court congestion due to a lower increase in litigation (compared to Option 1) • Limits the potential increase in insurance premiums (compared to Option 1) • Avoids concerns about the retrospectivity of any proposed statutory reform, as past cases would not meet the express identification requirement at the time of the initial judgment or settlement • Consistent with other jurisdictions in Australia | <ul style="list-style-type: none"> • Imposes an arbitrary limit on the injuries which are regarded as compensable • Unequal treatment of plaintiffs (unfair)—does not allow for advances in medicine and science • Greater room for advocate/plaintiff error (compared to Option 1) |

- a According to rule 5(4) of the Dust Diseases Tribunal Rules (NSW), an order for an award of provisional damages must specify the dust-related condition in respect of which an award of further damages may be made. According to rule 5(6), the plaintiff must, in the statement of claim, specify the condition(s) in respect of which the plaintiff claims provisional damages and in respect of which the plaintiff seeks an order that further damages may be claimed. Rule 5(5) states that an award of provisional damages may be made in respect of more than one dust-related condition.
- b According to rule 41.2(2) of the Civil Procedure Rules 1998 (UK), an order for an award of provisional damages must specify the disease or type of deterioration in respect of which an application may be made at a future date and may be made in respect of more than one disease or type of deterioration.

4.5.1 Stakeholder responses to the Discussion Paper

In the Discussion Paper, the Commission's preliminary assessment was to support the extension of further damages only where the potential for the development of a different or more serious injury or disease was expressly identified at the time of the initial judgment or settlement. As only two options were identified in the Discussion Paper, some stakeholder responses supported the proposed approach, while a small number suggested that further reforms (under Option 1) were more appropriate.

Submissions supporting the proposed reform

Some respondents supported the proposed reform (that the potential for the development of a different and/or more serious injury or disease must be expressly identified at the time of the initial judgment or settlement) as this is consistent with other jurisdictions. One respondent suggested that this restriction could be extended in exceptional circumstances.

Submissions suggesting further reform

The Cancer Council of Western Australia advocated that provisional damages should apply regardless of whether the potential for the development of a different or more serious injury or disease was expressly identified at the time of the initial judgment or settlement. The Cancer Council argued that it would be unjust for sufferers to be denied damages if the available evidence at the time was not conclusive or was concealed or challenged by the defendant.

A possible solution that was suggested by the Cancer Council is as follows:

... if the Law Reform Commission endorses option (b) we suggest the following:

- a. that the format of identifying potential conditions is informal and broad enough to not prejudice plaintiffs; and*
- b. that the legislation provides for an exception in situations where it is found that a Defendant has deliberately withheld or suppressed information relating to the health effects of a substance.*

4.5.2 The Commission's assessment

The Commission note that the legislation in each of the Australian jurisdictions listed in Table 4 requires that it be proved or admitted in the initial action for provisional damages in relation to an asbestos- or dust-related condition that another asbestos- or dust-related condition may develop in future as a result of the breach of duty giving rise to the cause of action.

In light of this, and after consideration of the advantages and disadvantages set out in Table 4, the Commission's assessment is that further damages should be available in Western Australia only where the potential for the development of a different or more serious injury or

disease was expressly identified at the time of the initial judgment/settlement for provisional damages (Option 2 in Table 4).

The circumstances considered in the Cancer Council’s submission (see section 4.5.1) are beyond the scope of the Reference. However, the Commission note that, in many circumstances, the law currently deals with such issues.

4.6 Where an award of provisional damages is made, should the plaintiff be confined to only one further application?

In relation to paragraph 2 of the Reference, the Commission has identified the following options:

- Option 1—Allow one application for further damages
- Option 2—Allow an unlimited number of applications for further damages.

Table 5 explores the advantages and disadvantages of each option.

Table 5: Where an award of provisional damages is made, should the plaintiff be confined to only one further application?

| Options | Jurisdictions | Advantages | Disadvantages |
|--|--------------------------------|---|--|
| Option 1: Plaintiff allowed one further application only | Vic. NSW ^a UK | <ul style="list-style-type: none"> • Provides limit on defendant’s future exposure to further damages • Reduces court congestion by limiting the number of applications • Legislation could allow judge making subsequent award to grant a further right to return | <ul style="list-style-type: none"> • Over- or undercompensation, depending on the future circumstances of the plaintiff (unjust) • Dilemma of when to claim |
| Option 2: Plaintiff allowed unlimited applications | SA Tas. | <ul style="list-style-type: none"> • Avoids over- or undercompensation (greater accuracy and justice) • Allows for advances in medicine and science which may reveal subsequent injuries or diseases caused by the same tort • Avoids dilemma of when to claim | <ul style="list-style-type: none"> • Lack of finality and financial certainty in litigation for all parties (including insurers) • Court congestion due to an increase in claims • Potential increase in costs and insurance premiums |

a According to rule 5(8)(c) of the Dust Diseases Tribunal Rules, one application for further damages may be made in respect of each dust-related condition specified in the order for the award of provisional damages.

4.6.1 Stakeholder responses to the Discussion Paper

In the Discussion Paper, the Commission’s preliminary assessment was to support the plaintiff’s right to unlimited applications rather than just one further application. Stakeholder responses are summarised below.

Submissions supporting the proposed reform

Almost all respondents supported the suggested reform allowing an unlimited number of applications. The Law Society of Western Australia noted the following major advantages of this approach as being:

- *Prevention of over or under compensation for a Plaintiff and affords greater accuracy, justice and fairness within the Western Australian legal system*
- *Allows for clarity on rights and responsibilities as advancements in medicine and science which may reveal subsequent injuries or diseases caused by the same tort*
- *Avoids the dilemma and agonising decision currently facing Plaintiffs in regards to when to claim*
- *Ensures consistency with other Australian jurisdictions including Victoria, New South Wales, South Australia and Tasmania and with the UK.*

The Law Society of Western Australia also commented that the plaintiffs suffering from asbestos-related diseases who are likely to be unfortunate to have been diagnosed with more than two different illnesses are extremely rare but not unheard of.

Submissions opposing the proposed reform

One respondent suggested that:

To give some finality the plaintiff should be restricted to one subsequent award of damages.

4.6.2 The Commission's assessment

The Commission note that, in Victoria, only one subsequent award of damages for an asbestos-related condition is permitted (section 5 of the *Asbestos Diseases Compensation Act 2008 (Vic)*). In the United Kingdom, rule 41.3(2) of the Civil Procedure Rules 1998 states that only one application for further damages may be made in respect of each disease or type of deterioration specified in the award of provisional damages.

Following targeted consultations with key stakeholders, it appears that allowing one application for further damages by plaintiffs (Option 1 in Table 5) would effectively cover the majority of cases where provisional damages would be appropriate. In contrast, it was reported that allowing unlimited applications for further damages would provide limited benefits to plaintiffs, would impose uncertainty on defendants and may act as a catalyst for more litigation and less meritorious claims.

However, the Commission note that if more than one different injury or disease is identified at the time of the initial judgment or settlement it would seem inconsistent with the purpose

of provisional damages to limit the plaintiff to only one application for further damages. Accordingly, the Commission’s assessment is to not limit the number of claims for further damages that a plaintiff can make, provided that such claims relate to the development of a different injury or disease which was expressly identified at the time of the initial judgment or settlement (in line with the Commission’s proposed approach to paragraph 2(a)(ii) of the Reference in Section 4.5 of this report.

4.7 How should a court approach awards of further damages?

In line with paragraphs 2(b)(i), 2(b)(ii) and 2(b)(iii) of the Reference, the Commission has considered how a court should approach awards of further damages, and whether a court’s discretion to assess further damages should be confined in any way. In particular, it may be desirable to limit a subsequent court’s discretion in some way to reduce the risk of overcompensation and to increase certainty for defendants. Possible limitations which may be imposed upon the award of subsequent damages are set out in Table 6.

Table 6: How should a court approach awards of further damages?

| Options | Jurisdictions | Advantages | Disadvantages |
|--|--|---|---|
| Option 1: Confine the further assessment of damage to one or more specified heads of damage | – | <ul style="list-style-type: none"> • Confines the subsequent assessment in a predetermined way • Enables some heads of damage to be settled with finality | <ul style="list-style-type: none"> • Places a predetermined limit on the type of losses which are further compensable • Inconsistent with other Australian jurisdictions |
| Option 2: Allow a court take into account the damages initially awarded to the plaintiff | Vic. ^a Tas. ^b | <ul style="list-style-type: none"> • Reduces the chances of overcompensation by ensuring that a subsequent court is directed to consider the earlier award of damages • Consistent with other Australian jurisdictions (Vic. and Tas.) | <ul style="list-style-type: none"> • The need to have regard to the earlier award is inherent in the exercise of awarding ‘further damages’, so an express requirement in the legislation is unnecessary |
| Option 3: Differentiate between damages awarded by a court or entered into by consent | – | <ul style="list-style-type: none"> • Where damages have been arrived at by consent, any subsequent assessment of damages should not disturb previous assessments of current and future loss which the parties have agreed on • Where parties agree to a lump sum award, a subsequent court may face difficulties in ascertaining the components of compensation which form part of that award | <ul style="list-style-type: none"> • Inconsistent with other Australian jurisdictions— consent judgments are not treated any differently because, in all cases, the approach to be taken to any subsequent award of damages is simply a matter for the court |

a The *Asbestos Diseases Compensation Act 2008* (Vic) s. 6 allows a court to have regard to the initial award of damages.

b The *Civil Liability Act 2002* (Tas) s. 28 allows a court to refer to earlier decisions of that or other courts for the purpose of establishing the appropriate award of damages for non-economic loss in the proceedings.

4.7.1 Stakeholder responses to the Discussion Paper

In the Discussion Paper, the Commission's preliminary assessment was that a court should take into account the damages initially awarded to the plaintiff when awarding further damages (Option 2 in Table 6). All respondents supported the Commission's proposed reform. Some respondents, such as the Law Society of Western Australia, noted that:

The need for a court to have regard to an earlier award of damages is inherent in ... awarding 'further damages'. Therefore an express statutory requirement... is not necessary. That said the Law Society has no objections to an express legislative provision to direct a Court to consider the earlier award of damages...

4.7.2 The Commission's assessment

The Commission's assessment is to support Option 2 because it aligns with other jurisdictions (Victoria and Tasmania), improves the effective allocation of compensation funds (compared to Option 1) and does not create an anomaly between court judgments and out-of-court settlements, as would occur under Option 3. While the Commission accept the points raised by the Law Society, the Commission are minded to ensure that any amendments increase certainty for parties. For this reason, the Commission's proposed reform is Option 2.

4.8 Time limits on bringing an application for further damages

The Commission's assessment is that there should be no statutory limitation imposed on a claim arising from a further injury or disease prior to its discoverability, as this would potentially reduce the benefits of introducing provisional damages and would be anomalous with the other Australian jurisdictions.

The United Kingdom requires an award of provisional damages to specify a period of time within which the plaintiff is permitted to bring a return claim for further damages, although the plaintiff may apply to extend the specified period.²⁵ This has the obvious benefit of placing a temporal cap on the defendant's liability, creating greater certainty.

However, the relevant legislation in the Australian jurisdictions is silent on the question of whether a time limit should be imposed on the bringing of applications for further damages, leaving it to the judge making the provisional award to decide whether a time limit should be imposed. This enables the judge to decide whether the circumstances of the particular case require such a limit.²⁶

While the approach followed in Australia is different from that in the United Kingdom, they both result in similar policy objectives being achieved.

²⁵ *Civil Procedure Rules 1998* rule 41.2(2).

²⁶ It should be noted that the *Limitation Act 2005 (WA)* imposes a time limit of three years from the date that the cause of action accrues, which, in the case of an asbestos-related illness, is when the person has knowledge of the relevant facts.

4.8.1 Stakeholder responses to the Discussion Paper

In the Discussion Paper, the Commission's preliminary assessment was to support the notion that an additional statutory time limit for bringing an application for further damages should not be imposed, but that the legislation should authorise the judicial officer to set a time limit if the circumstances deem it appropriate.

A number of respondents suggested that, while there should be no time limit imposed on when the further injury or disease must arise, the standard time limit of three years under the *Limitation Act 2005* (WA) should still apply. This means that the claim for further damages must be made within three years from the date that the cause of action accrues—this is often paraphrased as the 'discoverability' of the further injury or disease.

4.8.2 The Commission's assessment

The Commission's assessment is that an additional statutory limitation should not be imposed on when the further injury or disease must arise because that would potentially reduce the benefits of introducing provisional damages and would be anomalous with the other Australian jurisdictions.

However, from the date of 'discoverability' of the new injury or disease, there was some uncertainty as to whether the three-year restraint set out in the *Limitation Act 2005*, or a shorter period of time, would be appropriate for bringing a further claim in relation to a different injury or disease that is discovered after the initial judgment or settlement for provisional damages. The three-year restraint is well understood, and would be consistent with the limitation for asbestos-related claims. However, the *Limitation Act 2005* would not have contemplated this new regime. Consequently, we ultimately resolved that this is a question to be considered by the Government of Western Australia and therefore did not form a concluded view.

4.9 Estate claims

In relation to paragraph 2(d) of the Reference, the Commission considered whether the estate of a deceased victim of a tort should be allowed to make a claim for further damages which could have been sought by the victim during his or her lifetime.

As the law currently stands in Western Australia, where a cause of action survives the death of a person for the benefit of his or her estate, the general rule is that the estate may not seek damages for the pain or suffering of that person, for any bodily or mental harm suffered by him or her, or for the curtailment of his or her expectation of life unless:

- the death resulted from a latent injury that is attributable to the inhalation of asbestos which has been caused by the act or omission giving rise to the cause of action

- proceedings in respect to the cause of action had been instituted by that person before his or her death and were pending at the time of death.²⁷

Similar provisions exist in Victoria,²⁸ New South Wales,²⁹ Queensland,³⁰ South Australia³¹ and the Australian Capital Territory.³² Those provisions confer on the estate of a claimant a significant capacity to seek damages in respect of the losses sustained by the victim of the tort. Paragraph 2(d) of the Reference raises the question of whether the estate should also be able to exercise a victim's right to claim further damages under a provisional damages award or whether this right should terminate on the victim's death. This raises the further question of whether such a right should be conferred on an estate only in respect of asbestos-related claims or of personal injury claims more generally.

Table 7 sets out the options identified with respect to estate claims for the award of further damages pursuant to a provisional damages award.

27 *Law Reform (Miscellaneous Provisions) Act 1941* (WA), ss. 4(1), (2) and (2a).

28 *Administration and Probate Act 1958* (Vic), s. 29(2A).

29 *Dust Diseases Tribunal Act 1989* (NSW), s. 12B.

30 *Succession Act 1981* (Qld), s. 66(2A).

31 *Survival of Causes of Action Act 1940* (SA), s. 3(2).

32 *Civil Law (Wrongs) Act 2002* (ACT), s. 16(4).

Table 7: Estate claims

| Options | Jurisdictions | Advantages | Disadvantages |
|--|---------------|---|---|
| Option 1: Estate of a victim who died due to any personal injury can claim further damages on behalf of the deceased, even where the deceased had not yet filed an application for further damages | – | <ul style="list-style-type: none"> • Avoids potential for injustice where the victim’s condition deteriorates quickly • Equal treatment of personal injury victims (fairness) | <ul style="list-style-type: none"> • Plaintiffs must bring a claim willingly—if the deceased had not commenced an action for further damages before their death, this may be difficult to establish • Greatest potential for court congestion due to a higher increase in litigation (compared to the other options) • Highest potential increase in insurance premiums (compared to the other options) • Compensates the estate, not the victim, contrary to the purpose behind damages awarded for torts • Inconsistent with other Australian jurisdictions. |
| Option 2: Estate of a victim who died due to any personal injury can claim further damages on behalf of the deceased if proceedings for further damages had been commenced by the deceased before death and were pending at the time of death | – | <ul style="list-style-type: none"> • Takes into account the rapid deterioration of victims with asbestos-related conditions who may not have time to conclude an action for further damages • Avoids prejudice to the defendant from an evidentiary perspective if proceedings already commenced • Equal treatment of personal injury victims (fairness) | <ul style="list-style-type: none"> • Greater potential for court congestion due to a higher increase in litigation (compared to Options 3 and 4) • Higher potential increase in insurance premiums (compared to Options 3 and 4) • Compensates the estate, not the victim, contrary to the purpose behind damages awarded for torts |
| Option 3: Estate of a victim who died due to a latent injury attributable to asbestos/dust can claim further damages on behalf of the deceased, even where the deceased had not yet filed an application for further damages | – | <ul style="list-style-type: none"> • Avoids for potential for injustice in circumstances where the deceased victim’s injury is not diagnosed until after, or shortly before, his/her death • Recognises the unique nature of asbestos-related conditions (i.e. long latency and multiple but separate diseases) • Limits the potential increase in insurance premiums (but not as far as Option 4) | <ul style="list-style-type: none"> • Unequal treatment of personal injury victims (unjust)—no logical distinction between types of injuries • Greater potential for court congestion due to a higher increase in litigation (compared to Option 4) • Higher potential increase in insurance premiums (compared to Option 4) • Compensates the estate, not the victim, contrary to the purpose behind damages awarded for torts • Inconsistent with other Australian jurisdictions |

| Options | Jurisdictions | Advantages | Disadvantages |
|---|---------------|---|---|
| Option 4: Estate of a victim who died due to a latent injury attributable to asbestos/dust can claim further damages on behalf of the deceased <i>if</i> proceedings for further damages had been commenced by the deceased before death and were pending at the time of death | Vic. NSW | <ul style="list-style-type: none"> • Takes into account the rapid deterioration of victims with asbestos-related conditions who may not have time to conclude an action for further damages • Avoids prejudice to the defendant from an evidentiary perspective if proceedings already commenced • Recognises the unique nature of asbestos-related conditions (i.e. long latency and multiple but separate diseases) • Least potential for an increase in insurance premiums compared to the other options • Consistent with other jurisdictions in Australia | <ul style="list-style-type: none"> • Unequal treatment of personal injury victims (unjust)—no logical distinction between types of injuries • Compensates the estate, not the victim, contrary to the purpose behind damages awarded for torts • Consistent with other Australian jurisdictions (Vic. and NSW) |
| Option 5: Plaintiff's right to seek further damages pursuant to a provisional damages award does not survive his/her death | – | <ul style="list-style-type: none"> • Limits defendant's exposure to claims from the estate, providing greater certainty | <ul style="list-style-type: none"> • Unjust to the deceased victim and his/her relatives • Inconsistent with other Australian jurisdictions |

4.9.1 Stakeholder responses to the Discussion Paper

In the Discussion Paper, the Commission's preliminary assessment was to support the notion that the estate of a victim who died due to *any* personal injury can claim further damages on behalf of the deceased if proceedings for further damages had been commenced by the deceased before death and were pending at the time of death. This goes beyond merely asbestos-related injuries or diseases but denies the ability to *begin* a new action *after* the victim's death. Stakeholder responses are summarised below.

Most respondents agreed that claims by a deceased plaintiff's estate should be permitted, as noted by Slater and Gordon and the Asbestos Diseases Society:

Since the enactment of the survivorship legislation³³, in the event that an asbestos disease sufferer commences an action but does not survive to trial and judgement (or settlement), a claim for pain and suffering (ie general damages) and for the curtailment of expectation of life remains claimable by the estate. Such a 'race against time' must

³³ Law Reform (Miscellaneous Provisions (Asbestos Disease Act)) 2002 (WA) which amended the Law Reform (Miscellaneous Provisions) Act 1941 to provide for the survival of claims for damages in certain causes of action in relation to asbestos-related conditions.

not be reintroduced into Western Australian law and it should be open to the estate of a deceased victim to seek further damages which could have been sought by the victim during his or her lifetime.

However, others supported alternative options.

Submissions suggesting further reform

Some respondents argued that claims on behalf of a plaintiff's estate should be allowed without limitation, even when the claim was not commenced prior to the plaintiff's death. The Law Society of Western Australia stated:

... there are circumstances where asbestos related injury is not diagnosed until after death (ie during the post mortem process) or where a person so rapidly deteriorates they are too unwell to seek legal advice in their lifetime.

Similarly, the Cancer Council of Western Australia stated:

Cancer diagnosed at a late stage can be fatal within weeks and not allow time for legal proceedings to be commenced and finalised in the claimant's lifetime. Individuals or families under emotional stress will not necessarily think to consult a personal injury lawyer after the diagnosis of a late stage and/or rapidly fatal cancer.

Submissions opposing the proposed reform

The Insurance Commission of Western Australia proposed that estate claims should be allowed but should be:

- restricted to asbestos-related diseases only
- subject to limitation legislation
- limited to relatives as defined in the Fatal Accidents Act.

The Asbestos Injury Compensation Fund proposed that estate claims should not be allowed. In contrast:

AICF also considers there is justification for restricting the awarding of further damages ... and not extending it to [a] benefit that will pass to beneficiaries of the Estate.

Points were also raised against the proposed reforms based on a desire to balance the rights of the plaintiff with what the community can afford. For example, limiting the possibility of litigation to the victim's lifetime brings finality and removes the unfairness and uncertainty associated with possible claims after death. The potential for posthumous litigation also has the potential to increase litigation, the duration of cases and court congestion and, through higher compensation, result in funds shortfalls and disadvantage future claims. The extension of damages beyond the victim's lifetime would create significant uncertainty for insurers in

terms of their prudential reserving requirements and long tail claims, affecting the affordability of liability insurance for personal injury.

4.9.2 The Commission's assessment

The Commission's assessment is that while Option 4 in Table 7 aligns with other Australian jurisdictions, it creates an anomaly for asbestos-related diseases.

In line with the Commission's proposed approach in relation to paragraph 2(a)(i) of the Reference (see Section 4.4), the Commission's assessment is to support Option 2 in Table 7 in order to allow the estate of a victim who died due to any personal injury to claim further damages on behalf of the deceased, provided that the deceased had commenced proceedings for further damages before his/her death and those proceedings were pending at that time.

The Commission have considered whether the requirement to commence proceedings prior to the death of the plaintiff was necessary. The Commission are of the view that this requirement has the advantage of determining whether the plaintiff intended to seek further damages prior to their death. In addition, the Commission consider that the requirement to commence proceedings (such as by filing a writ) is a relatively low bar to set while the plaintiff is alive.

While the requirement to commence proceedings prior to the victim's death may exclude a small number of plaintiffs, the alternative situation would be to allow proceedings to commence any time within three years of the death of the plaintiff.

On balance, the Commission still consider that Option 2 provides a reasonable balance between the rights of the plaintiff and those of the defendant.

The Commission note that there is currently an anomaly between asbestos-related disease claims and other personal injury claims that are continued as estate claims. Under the *Law Reform (Miscellaneous Provisions) Act 1941* (WA), the estates of asbestos-related disease sufferers are able to obtain damages for pain, suffering and curtailment of life. However, those provisions do not apply to any other personal injury claims.

However, the Commission have offered no other views on this matter as it falls outside the scope of the Reference.

5. Damages for gratuitous services in Western Australia

5.1 Introduction

In Australia, the common law until recently allowed a plaintiff to claim the commercial value of gratuitous services which they could no longer provide to others due to suffering a personal injury. This was known as ‘Sullivan v Gordon damages’.³⁴ The principle was overruled unanimously by the High Court of Australia in *CSR Limited v Eddy*,³⁵ which held that loss or impairment of the amenity constituted by the capacity to assist others could not be compensated by reference to the commercial value of the services, although the court allowed that they may be compensated as part of general damages. While the court determined that such damages should not be part of the common law of Australia, it did observe that:

*... if it is desired to confer the rights recognised in Sullivan v Gordon on plaintiffs, the correct course to follow is that taken in the Australian Capital Territory and Scotland: to have the problem examined by an agency of law reform, and dealt with by the legislature if the legislature thinks fit.*³⁶

Prior to *CSR Limited v Eddy*, the Australian Capital Territory was the only jurisdiction which had introduced a legislative right to damages for the loss of capacity to perform domestic services for another.³⁷ Following *CSR Limited v Eddy*, South Australia (in 2005),³⁸ New South Wales (in 2006),³⁹ Queensland (in 2010),⁴⁰ Tasmania (in 2014)⁴¹ and Victoria (in 2015)⁴² enacted legislation to restore the effect of *Sullivan v Gordon*.

This chapter summarises some reform options and poses a series of questions for the Western Australian community to consider in relation to the awarding of damages for the value of services provided by the plaintiff to others. Broadly, the overarching alternatives considered by the Commission were to either retain the current common law position in Western Australia or to introduce such damages, subject to certain criteria and limitations.

The Reference relating to damages for gratuitous services can be summarised simplistically as:

1. Should victims of a personal injury tort be able to claim damages for gratuitous services that they can no longer provide to others?

34 (1999) NSWLR 319.

35 [2005] 226 CLR 1.

36 *ibid.* at [67].

37 *Civil Law (Wrongs) Act 2002* (ACT), s. 100 (which was formerly s. 39 in that Act and s 33 in the *Law Reform (Miscellaneous Provisions) Act 1955* (ACT)). In Victoria, the right to Sullivan v Gordon damages was limited by statutory provision (s. 28ID of the *Wrongs Act 1958*), but the entitlement to such damages still arose from the common law.

38 *Dust Diseases Act 2005* (SA), section 9(3).

39 *Civil Liability Act 2002* (NSW), section 15B.

40 *Civil Liability Act 2003* (Qld), section 59A.

41 *Civil Liability Act 2002* (Tas), section 28BA.

42 The *Wrongs Amendment Act 2015* (Vic) was enacted soon before the publication of the Commission’s Discussion Paper. It inserts an entitlement to damages for loss of capacity to provide gratuitous care in the *Wrongs Act 1958* (Vic) in a new section 28ID.

2. If victims of a personal injury tort should be able to claim damages for gratuitous services that they can no longer provide to others:
 - (a) In what cases may such a claim be made?
 - (b) How should damages for gratuitous services be calculated?
 - (c) What limits should be imposed?

5.2 Proposed reform for gratuitous services

The Commission consider that the second area for potential law reform in relation to compensation for services which a plaintiff can no longer provide to others is a matter of principle, as it raises a number of significant policy issues. While six Australian jurisdictions have introduced reforms in this area, that legislation is relatively new. The Commission note that the New South Wales legislation has been in place for around 10 years, but that the narrow scope of the provisions means that they continue to be tested before the courts. Accordingly, in the Discussion Paper, the Commission had not reached a preliminary view as to whether such reforms are appropriate in Western Australia.

Following the input of stakeholders on the Discussion Paper, the Commission have now identified a proposed reform as set out below. However, as noted in Section 3.5, the financial implications of this proposed reform have not yet been considered, as such an assessment did not fall within the scope of the Reference. Based on responses to the Discussion Paper, it appears likely that the impact on insurance and assessments of affordability will be key considerations in any reforms in the area of damages for gratuitous services.

The Commission consider that the proposed reform set out below would align with other jurisdictions in Australia (except that it should not be limited to asbestos-related conditions) and maximise the benefit to the community as a whole when considering the advantages and disadvantages of each reform option (as presented in the remainder of this chapter) and the desirability of delivering certainty, consistency, equity and efficiency to both plaintiffs and defendants.

As a general proposition and on the basis of equity, the Commission do not think that damages for loss of gratuitous services should be introduced only for victims of asbestos-related diseases.

The Commission recommend that further work be undertaken by the Government of Western Australia to assess the financial implications of the proposed reform and the impact on affordability (such as insurance premiums). Unless there is clear, unfavourable cost-benefit assessment, the Commission consider that the proposed reform should be implemented.

In light of the above, the Commission's proposed reform is as follows:

1. Damages for gratuitous services which a plaintiff can no longer provide to others will

- be introduced in Western Australia.
2. Such damages will be introduced for all personal injury claims.
 3. Such damages will be available only for gratuitous domestic services.
 4. Such damages should be restricted to services provided to 'relatives', the definition of which should align with the definition used in the Fatal Accidents Act and include unborn children of the plaintiff.
 5. The services must have been provided before the plaintiff's injury for a defined number of hours per week and consecutive period of time, or there must be a reasonable expectation that, after the development of the injury, the services would have been provided for a defined number of hours per week and consecutive period of time.
 6. There must be a reasonable need for the services to be provided for those hours per week and that consecutive period of time after the development of the injury.
 7. The plaintiff does not need to prove expenditure incurred in consequence of his/her inability to continue providing the services.
 8. The calculation of such damages should include the 'lost years' after the plaintiff's death.

The remainder of this chapter sets out the options identified and considered by the Commission in response to each of the questions raised by the Reference.

Under each of the options set out below, the Commission's proposed approach is shaded in grey.

5.3 Should plaintiffs be able to recover damages calculated by reference to the value of gratuitous services provided to others?

In relation to paragraph 1 of the Reference, the Commission has considered whether plaintiffs should be able to recover damages calculated by reference to the value of gratuitous services provided to others.

Policy arguments in support of introducing legislation to restore the effect of *Sullivan v Gordon* include the following:

1. It recognises that the true subject matter of the loss to be compensated is the plaintiff's 'accident-created need', regardless of whether it is productive of financial loss. The exclusion of services performed for others from an award for damages discriminates against those who devote themselves to the care of others within the family household (usually women), to the benefit of the wrongdoer.
2. The loss of, or impairment to, a plaintiff's capacity to provide services to others is capable of evaluation by reference to the market value of the services; therefore, it is a

compensable form of damage.

3. Appropriate compensation cannot be found by relying only on recovery for loss of amenities as part of general damages because, commonly, the supply of the services does not generate the pleasurable feelings often connected with amenities which have been lost.
4. If the work is not done, the health and safety of families will suffer, and, if compensation is refused, the injured plaintiff's family will suffer hardship. The purpose of compensation is to put the injured person in a position similar to their position if the injury had not occurred.
5. In the absence of such provisions, the wrongdoer may be advantaged at the expense of the plaintiff or the plaintiff's family members—or possibly at the expense of the public purse.
6. The law should recognise the economic value of the domestic contribution of a spouse and parent to his/her family and treat the loss or diminution of the capacity to make that contribution as the spouse's loss.
7. It is difficult to disentangle the services which the plaintiff provided to his or her family from those provided to themselves.

Policy arguments against introducing legislation to restore the effect of *Sullivan v Gordon* include the following:

1. *Sullivan v Gordon* damages are anomalous from the usual rule that financial loss is recoverable as special damages and non-financial loss is recoverable as undifferentiated general damages. The effect of *Sullivan v Gordon* is that it separates one aspect of the plaintiff's post-injury incapacity from the global award of general damages. There is no other instance where the diminished capacity of an injured plaintiff is compensated by special damages except for *Griffiths v Kerkemeyer* damages (in respect of gratuitous services provided to the plaintiff).
2. This head of damage can result in disproportionately large awards, in circumstances where there is no guarantee that the care would have continued, compared to the sums payable under traditional heads of damage.
3. It is difficult to evaluate the 'need' of the plaintiff to care for others compared to the need of the recipient of that care.
4. The plaintiff's family indirectly benefits from this head of damage. However, the law of tort concentrates on compensating injured plaintiffs, not on avoiding loss to their families. The injured party is not the person who suffered the loss from the withdrawal of services, and third-party claimants arguably should not receive compensation for services which do not benefit the injured party.
5. It is difficult to define and assess the limits of this head of damage.

6. The ageing of the population creates a wider need for care, which increases the liability of defendants who have tortiously injured the carers of those people.

5.3.1 Stakeholder responses to the Discussion Paper

In the Discussion Paper, the Commission did not form a preliminary assessment as to whether damages for gratuitous services should be introduced in Western Australia. Rather, the Commission sought comments on this matter as well as on the restrictions that should be applied if *Sullivan v Gordon* damages were introduced. A broad range of stakeholders provided responses on this question through both meetings and written submissions.

Responses from stakeholders fell into two categories: those supporting the introduction of damages for gratuitous services and those opposing the reform. The responses are summarised below.

Submissions supporting the proposed reform

The arguments and reasoning for supporting the proposed reform largely followed the points identified by the Commission in the Discussion Paper. Key arguments in favour of the proposed reform were as follows:

- The reform would make Western Australia consistent with other jurisdictions.
- The loss of ability to provide gratuitous services is analogous to the loss of earning potential, and therefore should be compensated.
- Rather than increasing demand on government services, the tortfeasor should be held responsible for the loss.

Submissions opposing the proposed reform

The arguments and reasoning against the proposed reform also largely followed the points identified by the Commission in the Discussion Paper. Key arguments against the proposed reform were as follows:

- The plaintiff is not the person who suffers the loss—rather, this falls to a third party.
- The reform will result in increased damages claims, which will result in higher insurance premiums and may make insurance unaffordable.
- It is difficult to define and assess gratuitous services, and this is likely to result in increased disputes and court congestion.
- A number of alternatives already exist to compensate for gaps in domestic services/ care, such as Disability Services Commission services and payments, home and community care, the National Disability Insurance Scheme and other carer-related payments.

Some respondents indicated that, although their preference is against the implementation of the proposed reform, an alternative would be to implement the reform but carefully restrict

the criteria for compensation.

5.3.2 The Commission's assessment

The Commission note that one of the points raised against the proposed reform by stakeholders is that alternatives already exist to compensate for gaps in domestic services/care. While the Commission did not specifically consider this point in the Discussion Paper, some respondents (including the Law Society of Western Australia) who were in favour of the reform commented that:

The [tortfeasor] should be held responsible for the loss rather than resulting in increased demand on government services.

The Commission consider that the presence of a 'safety net', such as the National Disability Insurance Scheme, that is paid for out of the public purse should not relieve a tortfeasor from the obligation of paying appropriate compensation. As noted above, one of the arguments in support of damages for gratuitous services is that the wrongdoer should not be advantaged at the expense of the plaintiff or the plaintiff's family members—or the public purse. The Commission also note that the same reasoning could have been used against the introduction of the no-fault compulsory third-party insurance scheme for people catastrophically injured in motor vehicle accidents. However, that reform was endorsed and will commence on 1 July 2016.

As noted in Section 5.2, the Commission have not considered the financial impacts of the proposed reforms in our inquiry. The Commission agree that, if unconstrained, *Sullivan v Gordon* damages could have a significant impact on likely compensation payments. For this reason, the Commission's assessment is that damages for gratuitous services should be introduced in Western Australia subject to the constraints that are considered in detail in the following sections.

5.4 Should damages for the value of services be awarded in all personal injury claims?

In relation to paragraph 2(a) of the Reference, the Commission has identified the following options:

- Option 1—Damages for services to others will be made available for all personal injury claims
- Option 2—Damages for services to others will be made available for some personal injury claims
- Option 3—Damages for services to others will be made available for asbestos-related diseases only.

The advantages and disadvantages of each option are set out in Table 8.

Table 8: Should damages for the value of services be awarded in all personal injury claims?

| Options | Jurisdictions | Advantages | Disadvantages |
|--|--|--|---|
| Option 1: Damages for services to others—all personal injury claims | NSW ACT Qld. | <ul style="list-style-type: none"> • Equal treatment of personal injury victims (fairness) | <ul style="list-style-type: none"> • Greater court congestion due to a higher increase in litigation (compared to Options 2 and 3) • Higher potential increase in insurance premiums (compared to Options 2 and 3) • Inconsistent with other jurisdictions in Australia |
| Option 2: Damages for services to others—some personal injury claims | Tas. (all personal injuries excluding intentional acts to cause injury or death, sexual misconduct and injuries from smoking etc.) SA (‘dust disease action’) | <ul style="list-style-type: none"> • Can be restricted to classes of claims where there is the greatest need • Limits court congestion due to a lower increase in litigation (compared to Option 1) • Limits the potential increase in insurance premiums | <ul style="list-style-type: none"> • Unequal treatment of personal injury victims (unfair)—no logical distinction between types of claims • Higher increase in litigation (and therefore court congestion) compared to Option 3 • Higher potential increase in insurance premiums (compared to Option 3) |
| Option 3: Damages for services to others— asbestos-related diseases only | – | <ul style="list-style-type: none"> • Limits court congestion due to a lower increase in litigation (compared to Options 2 and 3) • Limits the potential increase in insurance premiums | <ul style="list-style-type: none"> • Unequal treatment of personal injury victims (unfair)—no logical distinction between types of claims, especially for other dust diseases • Inconsistent with other jurisdictions in Australia |

5.4.1 Stakeholder responses to the Discussion Paper

In the Discussion Paper, the Commission’s preliminary assessment was that damages for gratuitous services should be available for all classes of personal injury. Input from stakeholders considered whether damages for gratuitous services should be restricted to some personal injury claims or to asbestos-related diseases only.

All of the respondents who addressed the issue agreed with the Commission’s preliminary assessment that sufferers of asbestos-related diseases should not be treated differently from other plaintiffs. However, some respondents submitted that this means the proposed reform should not be introduced at all.

5.4.2 The Commission’s assessment

The Commission’s assessment is that damages for gratuitous services should be introduced for all personal injury claims in accordance with Option 1 in Table 8. This provides a high level of fairness and equity. It is recognised that Option 2 may be a preferable interim measure while the legislation is in its infancy. However, Options 2 and 3 would introduce further anomalies into the law in Western Australia, with some conditions enlivening an entitlement to compensation for gratuitous services which a plaintiff can no longer provide while others do not.

5.5 Should the criteria for assessing damages be limited by reference to the character of the services provided?

In relation to paragraph 2(b)(i) of the Reference, the Commission has identified the following options:

- Option 1—Gratuitous services of any kind
- Option 2—Gratuitous domestic services only.

The most common form of gratuitous service provided to others is the provision of unpaid caring services in the domestic setting. Less commonly, gratuitous services can refer to services that are not readily classed as ‘domestic services’. They may include sporting or educational services. Paragraph 2(b)(i) of the Reference raises the question of whether compensation for gratuitous services should be extended to any type of service or limited to services which are domestic in nature.

The advantages and disadvantages of the two options are set out in Table 9.

Table 9: Should the criteria for assessing damages be limited by reference to the character of the services provided?

| Options | Jurisdictions | Advantages | Disadvantages |
|--|--|--|---|
| Option 1: Gratuitous services of any kind | – | <ul style="list-style-type: none"> • Enables the fullest compensation for claimants • Recognises the vast range of services that may be provided on a voluntary basis, including some which may not be readily classifiable as ‘domestic services’ | <ul style="list-style-type: none"> • May be too broad—greater court congestion due to a higher increase in litigation and higher potential increase in insurance premiums • Unlimited or, if limits are imposed, they are difficult to define • Inconsistent with other Australian jurisdictions, which focus on domestic services |
| Option 2: Gratuitous domestic services only | Vic. Qld. ACT SA NSW Tas. | <ul style="list-style-type: none"> • Consistent with the principles in <i>Sullivan v Gordon</i> (i.e. lost capacity to care for dependants) • The most common unpaid services are domestic services, so it targets the damages where needed | <ul style="list-style-type: none"> • May be too narrow, and may miss some gratuitous services that ought to be compensable |

5.5.1 Stakeholder responses to the Discussion Paper

In the Discussion Paper, the Commission's preliminary assessment was to introduce damages for gratuitous domestic services only.

Submissions supporting the proposed reform

The majority of respondents agreed with the Commission's approach, noting that applying gratuitous services damages to domestic services only would be consistent with the principles espoused in *Sullivan v Gordon*, as well as being consistent with other Australian jurisdictions. The Insurance Commission of Western Australia commented that:

Non domestic services are very broad, more difficult to define and are open to ambit claims significantly affecting affordability.

Submissions suggesting further reform

A small number of respondents proposed that compensation should not be limited to domestic services. However, limited justification was provided to support this position. The submission from the Cancer Council of Western Australia noted that an injured person's inability to provide voluntary services has a broader impact than on their immediate family, commenting that:

When a parent with dependent children is diagnosed with a serious or terminal disease, it is not only the individual or immediate family who are impacted. A child's life is impacted by the absence of a mother or father to raise and nurture them, and also the absence of a parent to undertake volunteer roles in sporting clubs or the school community. This legislation must be broad enough to recognise that volunteer services enrich the family and the community.

5.5.2 The Commission's assessment

The Commission's assessment is that the character of services that should enliven a plaintiff's entitlement to damages should be gratuitous domestic services (which the plaintiff can no longer provide due to personal injury).

Restricting the damages to domestic services (Option 2 in Table 9) would avoid some 'ambit' claims for other types of services, align with the compensation that is available to relatives of a person who was killed by accident under the Fatal Accidents Act⁴³ and align with other jurisdictions in Australia.

5.6 Should the criteria for assessing damages be limited by reference to the relationship between the plaintiff and the recipient of services?

In relation to paragraph 2(b)(ii) of the Reference, the Commission has identified the following

⁴³ For loss of 'services around the home': *De Sales v Ingrilli* (2002) 212 CLR 338.

options:

- Option 1—Relatives
- Option 2—Members of the plaintiff’s household/residence
- Option 3—Another person (for example, friends, neighbours, hospital patients, elderly people and so on)
- Option 4—Include unborn children of the plaintiff at the time of injury.

Table 10 sets out the advantages and disadvantages of each option.

Table 10: Should the criteria for assessing damages be limited by reference to the relationship between the plaintiff and the recipient of services?

| Options | Jurisdictions | Advantages | Disadvantages |
|--|---------------|--|--|
| Option 1: Relatives (see Box 3 below) | NSW Vic. | <ul style="list-style-type: none"> • Consistent with the principles in <i>Sullivan v Gordon</i> (i.e. lost capacity to care for dependants) <p>Restricted to services performed for those with the greatest need (e.g. children or people with a mental or physical disability) compared to Options 2 and 3—limits court congestion due to a lower increase in litigation and limits potential increase in insurance premiums</p> <ul style="list-style-type: none"> • duration of the need for the plaintiff’s services after his/her injury based on the likely duration of the dependency (e.g. until children reach the age of 18) | <ul style="list-style-type: none"> • More exclusive—definition of ‘dependants’ may exclude some people • Difficult to distinguish between services that plaintiffs performed for their own benefit and those that they performed for the benefit of their dependants • Unequal treatment of the people the plaintiff provided services to before his/her injury |
| Option 2: Members of the plaintiff’s household/residence | ACT Qld. | <ul style="list-style-type: none"> • More inclusive and therefore may capture more services performed by the plaintiff for those who reside with them but are not necessarily dependent on them • More restricted than Option 3—limits court congestion due to a lower increase in litigation and limits potential increase in insurance premiums | <ul style="list-style-type: none"> • Potentially broader than the principles in <i>Sullivan v Gordon</i> (i.e. lost capacity to care for dependants)—may capture people who are not dependent on the plaintiff • Difficult to distinguish between services that plaintiffs performed for their own benefit and services that they performed for the benefit of the household • More difficult for a court to establish the need for the plaintiff’s services after his/her injury • Greater court congestion due to a higher increase in litigation and higher potential increase in insurance premiums (compared to Option 1) • Unequal treatment of the people the plaintiff provided services to prior to his/her injury |

Table 10 continued:

| Options | Jurisdictions | Advantages | Disadvantages |
|--|---------------------|--|---|
| Option 3: Another person (e.g. friends, neighbours, hospital patients, elderly) | Tas. SA | <ul style="list-style-type: none"> • The most inclusive option—will capture more services provided by the plaintiff to others • Equal treatment of the people whom the plaintiff provided services to prior to his/her injury | <ul style="list-style-type: none"> • Broader than the principles in <i>Sullivan v Gordon</i> (i.e. lost capacity to care for dependants)—will capture people who are not dependent on the plaintiff • Unlimited or, if limits are imposed, they are difficult to define • Difficult to distinguish between services that plaintiffs performed for their own benefit and services that they performed for the benefit of others • More difficult for a court to establish the need for the plaintiff’s services after his/her injury • Greatest potential increase in court congestion due to a higher increase in litigation and higher potential increase in insurance premiums (compared to Options 1 and 2) |
| Option 4: Include unborn children of the plaintiff at the time of injury | Vic. Qld. NSW | <ul style="list-style-type: none"> • If born after the injury, the children will become dependants of the plaintiff, and the services that the plaintiff would have provided to them but for the injury should be treated in the same way as services performed for other dependants who were born before the injury • Contingencies (e.g. divorce) can be factored into the assessment of damages • Consistent with other jurisdictions in Australia | <ul style="list-style-type: none"> • Assumes the plaintiff would have provided services to the child but for the injury, but that may not have been the case—there is no way of proving this |

5.6.1 Stakeholder responses to the Discussion Paper

In the Discussion Paper, the Commission’s preliminary assessment was that gratuitous services damages should be available to relatives (as defined by the Fatal Accidents Act) and unborn children of the plaintiff, but not to other household/residence members or other people.

Responses from stakeholders fell into two categories: those supporting the Commission’s position and those advocating for an extension of the proposed reforms to other household/residence members. These responses are summarised below.

Submissions supporting the proposed reform

Several respondents supported the Commission’s proposed approach that gratuitous services

damages be applicable to 'relatives' in a manner consistent with the Fatal Accidents Act and to unborn children. Limited arguments were provided to advance this position, however; this is probably an indication of support for the analysis provided in Table 10.

Submissions suggesting further reform

Two respondents (Slater and Gordon and the Law Society of Western Australia) suggested that the relevant relationships should include household/residence members who are not relatives of the plaintiff.

The Law Society of Western Australia proposed that the application of gratuitous domestic services should be consistent with section 3D of the *Motor Vehicle (Third Party Insurance) Act 1943* (WA); that is, they should be services provided to persons of the same household or family as the plaintiff. The Law Society submitted that this allowance places sufficient limits on the recipients of the plaintiff's services and therefore should allay fears of increased insurance premiums and speculative or ill-defined ambit claims.

Finally, one respondent (the Honourable Nick Goiran MLC) proposed that there should be no restriction on recipients. This is also consistent with his proposal that damages should not be restricted to domestic services.

5.6.2 The Commission's assessment

The Commission's assessment is that statutory reform should be restricted to relatives (including unborn children⁴⁴) of the plaintiff (Options 1 and 4 in Table 10) to focus on the most important cases, where the victim has a legal, moral and/or ethical duty to provide support and care.

In addition, the Commission consider that alignment with existing Western Australian legislation is more important than alignment with other jurisdictions, as this provides consistency and clarity in Western Australia.

The Commission considered whether alignment with section 3D of the *Motor Vehicle (Third Party Insurance) Act 1943* would be advantageous. However, the Commission note that section 3D relates to services provided to the victim rather than by the victim. Further, the Commission consider that the scope of the term "relative", as defined in the Fatal Accidents Act (see Box 3 below), with the addition of "unborn child", is sufficiently broad to address the categories of relationships.

⁴⁴ The Commission note that the legal status of unborn children is a complex issue and needs to be considered more broadly in Western Australia, but this falls outside the scope of the current Reference. In this instance, the Commission consider that aligning with the Fatal Accidents Act is appropriate.

Box 3: Definition of relatives

While other jurisdictions use the term 'dependants', the Fatal Accidents Act allows for compensation to be sought by 'relatives'. As these terms have similar meanings, the Commission has used the term 'relatives' to ensure consistency with the Fatal Accidents Act. Under that Act, 'relatives' is defined to include:

- a spouse or de facto partner of the deceased
- a parent, grandparent or step-parent of the deceased
- a son, daughter, grandson, granddaughter, stepson or stepdaughter of the deceased (including children not born at the time of death)
- any person to whom the deceased person stood in loco parentis
- any person who stood in loco parentis to the deceased person
- a brother, sister, half-brother or half-sister of the deceased person
- any former spouse or former de facto partner of the deceased person whom the deceased was legally obliged to make provision for with respect to financial matters.

5.7 Should regard be had to the likelihood that the services would have been provided by the plaintiff?

In relation to paragraph 2(b)(iii) of the Reference, the Commission has identified four options, which are considered in Table 11.

Table 11: Should regard be had to the likelihood that the services would have been provided by the plaintiff?

| Options | Jurisdictions | Advantages | Disadvantages |
|---|---|--|---|
| <p>Option 1: Only require that services were provided before the injury (no minimum) or, in the case of an unborn child, that there is a reasonable expectation that, after the injury, the services would have been provided for a defined number of hours per week and consecutive period of time There is a reasonable expectation that, after the injury, the services would have been provided for a defined number of hours per week and consecutive period of time There will be reasonable need for the services to be provided for those hours per week and that consecutive period of time</p> | <p>NSW (after injury— at least 6 hours per week for at least 6 consecutive months) Vic. (same as NSW) Qld. (same as NSW)</p> | <ul style="list-style-type: none"> • Restricted to claims where there is the greatest need; that is, where the plaintiff’s dependants have an ongoing need for significant services previously provided by the plaintiff • Greater fairness to defendants to establish the services that were provided before the injury and would have continued but for the injury due to the ongoing needs of the dependant • Easier for plaintiffs to establish claim if there is no requirement regarding minimum services provided before the injury (leading to shorter trials and less court congestion than Option 2) • Focuses on future need • Potential for more consistent results (compared to Options 3 and 4)— fairness to both parties • Avoids frivolous or speculative claims • Consistent with other jurisdictions in Australia | <ul style="list-style-type: none"> • Unable to test likelihood of future services for a certain duration against past services if such evidence is not admitted at trial |
| <p>Option 2: Services provided before the injury for a defined number of hours per week and consecutive period of time, or, in the case of an unborn child, there is a reasonable expectation that, after the injury, the services would have been provided for a defined number of hours per week and consecutive period of time There is a reasonable expectation that, after the injury, the services would have been provided for a defined number of hours per week and consecutive period of time There will be a reasonable need for the services to be provided for those hours per week and that consecutive period of time</p> | <p>Tas. (before injury— more than 6 hours per week for more than 6 consecutive months; after injury— more than 6 hours per week for more than 6 consecutive months)</p> | <ul style="list-style-type: none"> • Evidence of past services of certain duration would help plaintiff to establish the likelihood of future services • Restricted to claims where there is the greatest need; that is, where the plaintiff’s dependants have an ongoing need for significant services previously provided by the plaintiff • Greater fairness to defendants to establish the services that were provided before the injury and would have continued but for the injury due to the ongoing needs of the dependant • Avoids frivolous or speculative claims • Potential for more consistent results (compared to Options 3 and 4)— fairness to both parties | <ul style="list-style-type: none"> • Harder for plaintiff to establish his/her claim if there are minimum requirements regarding the services provided before the injury • Unnecessary to establish that past services were provided for a certain duration • Potentially increases length of trial and therefore court congestion (compared to the other options) • Inconsistent with other jurisdictions in Australia (except Tas.) |

Table 11 continued:

| Options | Jurisdictions | Advantages | Disadvantages |
|---|---------------|--|---|
| <p>Option 3: Reasonable expectation that services would have been performed but for the injury (no time or duration restrictions)</p> | <p>ACT</p> | <ul style="list-style-type: none"> • Easier for plaintiffs to establish a claim (less restrictive, without time or duration limitations) • Greater fairness to defendants to establish the services would have continued due to the ongoing need of the dependant • Avoids frivolous or speculative claims • Less court congestion due to shorter trials (compared to Options 2 and 3) | <ul style="list-style-type: none"> • More difficult to establish reasonable expectation if no time or duration limitations apply—can lead to inconsistent results (unfairness to plaintiffs and/or defendants) • Inconsistent with other jurisdictions in Australia (except ACT) |
| <p>Option 4: Have no regard to the likelihood that the services would have been provided by the plaintiff but for the injury</p> | <p>-</p> | <ul style="list-style-type: none"> • Easier for plaintiffs to establish a claim (no restrictions) • Less court congestion due to shorter trials (compared to the other options) | <ul style="list-style-type: none"> • Not restricted to claims where there is the greatest need • Assumes plaintiff would continue providing the services, which might not be the case—unfair to defendants • Potential for frivolous or speculative claims • Potential increase in insurance premiums because it is easier to establish a claim • Inconsistent with other jurisdictions in Australia |

Stakeholder responses to the Discussion Paper

In the Discussion Paper, the Commission's preliminary assessment was to introduce gratuitous services damages where:

- the services were provided before the injury for a defined number of hours per week and consecutive period of time, or, in the case of an unborn child, there is a reasonable expectation that, after the injury, the services would have been provided for a defined number of hours per week and consecutive period of time
- there is a reasonable expectation that, after the injury, the services would have been provided for a defined number of hours per week and consecutive period of time
- there will be a reasonable need for the services to be provided for those hours per week and that consecutive period of time.

Responses from stakeholders fell into two categories: those supporting the Commission's position and those advocating for an extension of the reforms to less restrictive circumstances. The responses are summarised below.

Submissions supporting the proposed reform

A number of respondents supported the Commission's proposed approach on the basis that the criteria outlined above clearly and narrowly define eligibility to ensure that gratuitous services damages are awarded only to benefit those with the highest care needs.

A number of stakeholders were of the view that, if damages for gratuitous services are to be introduced in Western Australia, then they should be restricted to situations in which a high level of dependent care is required. This suggested criterion was raised by a number of stakeholders that represent insurance groups (such as the Insurance Commission of Western Australia and the Insurance Council of Australia) and defendants (such as the Asbestos Injury Compensation Fund). In addition, some advocates for plaintiffs (the Honourable Kate Doust MLC and the Asbestos Diseases Society Inc.) focused particularly on cases with family members that require a high level of care, though not necessarily on an exclusive basis.

Submissions suggesting further reform

Two respondents (the Law Society of Western Australia and Slater and Gordon) proposed that it is unnecessary to prove that the services were provided *before* the injury because it is arguably sufficient that the plaintiff must reasonably prove that services would have been provided for a defined number of hours per week and period of time *after* the injury. These stakeholders argue that this change would:

- make it easier for plaintiffs to establish a claim (because there are no minimum requirements regarding services provided before the injury)
- be a balanced approach consistent with that of New South Wales, Victoria and

Queensland, and consistent with the focus on future need in *Sullivan v Gordon*.

5.7.2 The Commission's assessment

The Commission's assessment is that it is appropriate to introduce legislative time requirements and to consider whether the services would have been provided but for the plaintiff suffering a personal injury (Option 2 in Table 11). The Commission consider that this option is consistent with other Australian jurisdictions, balances the imposition on the plaintiff in proving his/her case with the imposition on the defendant to compensate these elements, and ensures that damages are restricted to cases where there is the greatest need (that is, where the plaintiff's relatives have an ongoing need for significant services which the plaintiff can no longer provide).

The Commission consider that setting a high threshold for the number of hours per week (such as 20 hours per week) that services would have been provided but for the injury would limit liability for defendants and be an effective method for targeting compensation to cases with the highest need.

The precise threshold is a matter for the Government of Western Australia, taking into account community standards. Therefore, the Commission do not offer a view on what would be appropriate but note that other jurisdictions have applied an hourly threshold. The Commission further note that, whatever approach is selected, it is likely to alter the economic impact of the proposed reform and should therefore be incorporated in the assessment.

5.8 Should damages be awarded only where the recipient has spent money on services from an alternative service provider?

In relation to paragraph 2(b)(iv) of the Reference, the Commission has identified the following options:

- Option 1—Must prove expenditure incurred in consequence of the plaintiff being prevented from providing a particular service
- Option 2—No expenditure required.

These two options are summarised in Table 12, together with the advantages and disadvantages of each option.

Table 12: Should damages be awarded only where the recipient has spent money on services from an alternative service provider?

| Options | Jurisdictions | Advantages | Disadvantages |
|--|--|---|--|
| Option 1: Must prove expenditure incurred in consequence of the plaintiff being prevented from providing a particular service | – | <ul style="list-style-type: none"> • Greater fairness to defendants • Compensates actual financial loss to the plaintiff, consistent with tort law • Less court congestion due to a lower increase in litigation and limits potential increase in insurance premiums (compared to Option 2) | <ul style="list-style-type: none"> • Inconsistent with the principles in <i>Sullivan v Gordon</i> (i.e. lost capacity to care for dependants) • Inconsistent with other jurisdictions in Australia |
| Option 2: No expenditure required | Tas. SA ACT Qld. NSW Vic. | <ul style="list-style-type: none"> • Recognises the gratuitous and domestic/familial nature of the services provided, which are likely to be picked up by another household or family member if the plaintiff cannot do them • Consistent with the principles in <i>Sullivan v Gordon</i> (i.e. lost capacity to care for dependants) • Consistent with other jurisdictions in Australia | <ul style="list-style-type: none"> • Unfair to claimants and does not fully compensate for the lost services • Greater court congestion due to increased litigation and potential for higher increase to insurance premiums (compared to Option 1) |

5.8.1 Stakeholder responses to the Discussion Paper

In the Discussion Paper, the Commission’s preliminary assessment was to introduce gratuitous services damages *without* the need for the plaintiff to prove that expenditure was incurred in consequence of them being prevented from providing a particular service. All stakeholders appeared to support the Commission’s proposed approach.

5.8.2 The Commission’s assessment

The Commission’s assessment is that Option 2 in Table 12 is the preferred option, as it aligns with the other Australian jurisdictions and the underlying policy reasons supporting *Sullivan v Gordon* damages.

However, the Commission note that there is an argument that *Sullivan v Gordon* damages should be aligned with what relatives can claim under the Fatal Accidents Act upon the death of a person who dies due to a wrongful act, neglect or default (such as a workplace or motor vehicle accident, medical negligence or asbestos exposure). Under the Fatal Accidents Act, relatives can maintain an action to recover damages for medical and funeral expenses incurred, in addition to ‘such damages’ as the court thinks fit in proportion to the ‘injury’ which they have suffered as a result of the death. This has been interpreted by the courts to mean damages for actual economic loss suffered, including both the loss of the deceased’s income and also the loss of ‘services around the home’.⁴⁵

⁴⁵ *ibid.* at 38.

The Commission acknowledge that restricting Sullivan v Gordon damages by requiring plaintiffs to prove expenditure incurred in consequence of their inability to provide a particular service would help to limit the scope of such damages. However, the Commission’s view is that this approach would be inconsistent with the other Australian jurisdictions that have introduced Sullivan v Gordon damages and the underlying policy reasons supporting such damages.

5.9 Where the plaintiff is deceased, should damages be provided for services that would have been provided but for the plaintiff’s death?

In relation to paragraph 2(c) of the Reference, the Commission has considered whether damages should be provided for services that would have been provided but for the plaintiff’s death (that is, for the ‘lost years’ after his/her death).

Table 13 sets out some options which the Commission has identified, together with the advantages and disadvantages of each option.

Table 13: Options for whether damages include ‘lost years’ after the victim’s death

| Options | Jurisdictions | Advantages | Disadvantages |
|---|--|--|---|
| Option 1: Damages for services to others—include ‘lost years’ after death | NSW ^a (case law) | <ul style="list-style-type: none"> Provides courts with greater certainty about how to calculate damages Supports the people who would have continued receiving the plaintiff’s services but for his/her death | <ul style="list-style-type: none"> Speculative (unfairness to defendants) The estate may receive double compensation under the Fatal Accidents Act (unfairness to defendants) Inconsistent with other jurisdictions in Australia |
| Option 2: Damages for services to others during the plaintiff’s lifetime (no ‘lost years’ after death) | NSW ^b (case law) | <ul style="list-style-type: none"> Provides courts with greater certainty about how to calculate damages The estate will not receive double compensation (fairness to defendants) | <ul style="list-style-type: none"> Potential hardship for the people who would have continued receiving the plaintiff’s services but for his/her death |
| Option 3: Legislation silent | NSW SA Tas. Qld. ACT Vic. | <ul style="list-style-type: none"> Gives the courts greater flexibility to calculate damages as they see fit | <ul style="list-style-type: none"> Greater uncertainty for courts about how to calculate damages—could lead to inconsistent results (unfairness to both parties) |

- a In *(re Dawson) Novek v Amaca Pty Limited* [2008] NSWDDT 12, damages were awarded under s. 15B of the *Civil Liability Act 2002* (NSW) from 2008 (when the plaintiff died) until 2020 (when one of the plaintiff’s grandchildren reached the age of 16) because it was found that the plaintiff would have continued to care for her grandchildren during this time but for her illness.
- b In *Perez v State of NSW* [2013] NSWDDT 7, damages were awarded under s. 15B of the *Civil Liability Act 2002* (NSW) until the plaintiff reached the age of 75 because it was improbable that he would continue providing domestic care to his grandchildren until his expected death at the age of 80.

5.9.1 Stakeholder responses to the Discussion Paper

In the Discussion Paper, the Commission's preliminary assessment was to introduce gratuitous services damages that would include the 'lost years' after death. However, the Commission also indicated that this view was not strongly held.

All stakeholder responses supported the express inclusion of compensation for 'lost years'.

5.9.2 The Commission's assessment

The Commission's assessment is that there is benefit in defining the circumstances in which damages regarding 'lost years' may be awarded (Options 1 and 2 in Table 13) over the legislation remaining silent (Option 3 in Table 13).

The Commission's assessment is to support Option 1, as this provides courts with greater certainty about how to calculate damages (and therefore reduces potential inconsistencies between cases) and aligns with the existing provisions under the Fatal Accidents Act. However, the Commission note that a specific provision may be required to avoid double compensation under the Fatal Accidents Act.

Appendix A: Submissions received

During the inquiry, the Commission received a number of written submissions and also met with a number of key stakeholders.

Written submissions

Submissions were received from the following interested parties both before the publication of the Discussion Paper and in response to it:

Shire of Ashburton, Neil Hartley and Shire President Kerry White

Richard Naisbitt

Griffith University, Rudolf Ondrich; Emily Muir, Dr Kieran Tranter

The Asbestos Diseases Society of Australia Inc. and Slater & Gordon Lawyers,
Laine McDonald

Slater & Gordon and Asbestos Diseases Society of Australia, Tricia Wong

Arthur William Musk

Construction Forestry Mining Energy Union WA Branch, Elizabeth Hill

State School Teachers' Union WA, Liz Carbone

Georgina Egloff-Barr

Donald Chequer

Beverley Joan Rowe

Colleen Venning

Laurel June Kuehne

Walter James Poulter

Lynette Tait

Asbestos Injury Compensation Fund, Narreda Grimley

Insurance Council of Australia, Tom Lunn

James Hardie, Bruce Potts

Law Society, Karina Hafford

Cancer Council Western Australia, Angela Hayward

Rod Carey, Senior Associate SRB Legal

Minister for Transport, Dean Nalder MLA

Hon Rick Mazza MLC, Shane Hart

Hon Nick Goiran MLC

Hon Kate Doust MLC

Insurance Commission of Western Australia, Janice Gardiner

Meetings and oral submissions

In undertaking the project, members of the Commission and Marsden Jacob Associates (on behalf of the Commission) met with a number of key stakeholders.

The following groups provided input through meetings and discussions:

- personal injury lawyers (Slater & Gordon and Maurice Blackburn)
- insurance companies and government insurance regulators (WorkCover WA and the Insurance Commission of Western Australia)
- groups representing asbestos sufferers and other plaintiffs (Asbestos Diseases Society of Australia Inc. and the Cancer Council of Western Australia)
- members of the judiciary and legal profession (the Chief Justice, the Law Society of Western Australia, the Western Australian Bar Association, the Chief Judge of the District Court and the Australian Lawyers Alliance)
- companies and associated liable companies (CSR, James Hardie and the Asbestos Injuries Compensation Fund)
- the office of the Honourable Kate Doust MLC
- trade unions (Unions WA).

The information provided by stakeholders was invaluable in the preparation of this final report. The Commission is very grateful to all stakeholders who took the time to provide submissions and undertake discussions.



LAW REFORM COMMISSION
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