



30 September 2011

77.13  
RB;rp

Mr Nick Parmeter  
Director, Civil Justice Division  
Law Council of Australia  
GPO Box 1989  
Canberra ACT 2612

Dear Nick

### **Model Limitation Period for Personal Injury Actions**

I write in response to your request for comments on the LCA's position paper on a Model Limitation Period for Personal Injury Actions in Australia.

These comments represent the joint view of the Law Society and the Bar Association.

The comments and philosophy contained in paragraphs 26 – 32 are endorsed.

The limitation procedures applicable in South Australia appear to work well and we would be hesitant to move to a national model unless benefits could be demonstrated and some of the concerns contained in the paper addressed.

### **Date of discoverability**

The effect of the proposal would in certain circumstances extend the limitation periods currently applicable in South Australia. Further concepts such as "decisive facts" and "sufficiently serious" would require plaintiffs in South Australia to plead in far more detail that they are currently obliged to.

### **Subjective test**

Although the proposal is for a subjective test, the concept of what a plaintiff "ought to have known or discovered through reasonable enquiry" would appear to be objective. Constructive knowledge has a tendency to breed uncertainty. It would be our strong preference to make the test entirely subjective as in the South Australian model which has provided certainty. Further there needs to be a nexus between the knowledge, actual loss and the negligence alleged to have caused the loss. The test as proposed would appear to be too broad.

## **Extensions**

The proposal increases the number of factors presently considered when determining whether to grant an extension of time in South Australia.

The effect on the insurance industry in relation to this proposal needs to be considered because premiums have been raised on risks assessed on a probability of claims being brought within a three year period and the possibility of an extension being granted. This might be addressed by ensuring that there can be no retrospective application of the power to extend.

## **Child Sexual Abuse cases**

We agree that these types of cases fall into a special category and that limitation periods need to be more generous. The proposal that there be some consideration of whether the plaintiffs' injuries arose from an intentional tort comprising a criminal act is supported.

## **Minority and disability**

We agree with the proposal.

## **No long stop period**

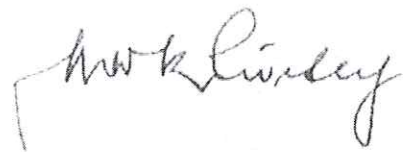
We agree with the proposal that there is no basis for the introduction of a "no long stop period".

We thank you for the opportunity to comment and trust that these comments are of some assistance.

Yours sincerely



Ralph Böning  
**PRESIDENT**  
**LAW SOCIETY OF SOUTH AUSTRALIA**



Mark Livesey QC  
**PRESIDENT**  
**SOUTH AUSTRALIAN BAR ASSOCIATION**