



**LAW
INSTITUTE
VICTORIA**

Transport Accident Act Common Law Time Limit Protocols

1 September 2022

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1 INTRODUCTION

- 1.1 The TAC, Law Institute of Victoria (LIV) and Australian Lawyers Alliance (ALA) are signatories to the Transport Accident Act Common Law Protocols - 1 July 2016 (the 'Common Law Protocols') and the Transport Accident Act Supplementary Common Law Protocols dated 1 January 2020 (the 'Supplementary Common Law Protocols'). The Transport Accident Act Common Law Time Limit Protocols (the 'Time Limit Protocols') are applicable to any lawyer committed to the Common Law Protocols and the Supplementary Common Law Protocols.
- 1.2 The Time Limit Protocols are intended to be read in conjunction with the Common Law Protocols and the Supplementary Common Law Protocols. These are intended to provide an additional process for the following scenarios:
 - 1.2.1 Extension of time requests for serious injury applications lodged within the 6 year limitation period;
 - 1.2.2 Notification within the 6 year limitation period of intention to lodge a Serious Injury application;
 - 1.2.3 Notification outside the 6 year limitation period of intention to lodge a Serious Injury application;
 - 1.2.4 Serious injury applications lodged outside the 6 year limitation period.
- 1.3 The Time Limit Protocols will replace any previous Waiver policy. The TAC is committed to accommodating reasonable requests to extend time provided there is an explanation for the delay and there is reasonable cooperation with the TAC in providing information. The Time Limit Protocols are intended to protect the interests of Plaintiffs while also ensuring the timely and efficient progress of extension of time applications/serious injury/common law claims.
- 1.4 The Time Limit Protocols have been agreed between the TAC, LIV and ALA who agree that they and their membership will comply with them and promote their use as the preferred method for delivering common law damages and entitlements to clients.
- 1.5 The Time Limit Protocols will apply to all applications and/or notifications submitted to the TAC on or after 1 November 2022.

2 OBJECTIVES

- 2.1 The Time Limit Protocols share the Introduction, Objectives and Guiding Principles of the Common Law Protocols and the Supplementary Common Law Protocols.
- 2.2 The TAC, the client and the client's lawyer endeavor to resolve extension of time applications/serious injury/common law claims including applications lodged outside the 6 year limitation period pursuant to these Protocols before resorting to Originating Motions and/or Writs, resulting in decreased court proceedings.
- 2.3 Additional objectives of the Time Limit Protocols are:
 - 2.3.1 Ensuring that all extension of time applications, serious injury applications and common law applications (including those with Time Limit issues) are considered under the Protocols;

- 2.3.2 Consistent management of serious injury applications that have been lodged outside the 6 year limitation period where processes are not covered by the Common Law Protocols or the Supplementary Common Law Protocols; and
- 2.3.3 Clarity about legal costs and disbursements associated with processes not covered by existing Protocols.
- 2.3.4 Ensuring that all parties comply with the *Civil Procedure Act*.

3 DEFINITIONS

3.1 The following definitions apply to key terms within the Time Limit Protocols:

3.2 Time Limit

- 3.2.1 According to the *Limitation of Actions Act 1958* an action for damages for personal injury should be brought:
- within 6 years of the date of the injury; or
 - within 6 years of a minor turning 18.

3.3 Minor

- 3.3.1 A Minor is a person who was less than 18 years of age at the date of the transport accident.

4 SERIOUS INJURY APPLICATIONS LODGED WITHIN THE 6 YEAR LIMITATION PERIOD

4.1 In circumstances where a compliant application pursuant to the Common Law Protocols or Supplementary Common Law Protocols has been received by the TAC within the 6 year limitation period, the TAC undertakes that it will not rely upon any defence pursuant to the *Limitation of Actions Act 1958* in any subsequent common law claim provided:

- 4.1.1 The TAC indemnifies the prospective defendant/s; or
- 4.1.2 The TAC is the defendant pursuant to s.94(7) or s.96; and
- 4.1.3 The client files and serves an Originating Motion within 28 days of confirmation of the TAC's denial of serious injury pursuant to clause 13 of the Common Law Protocols; and
- 4.1.4 The client files and serves a Writ within 28 day of receipt of certification that the Common Law Protocols have concluded pursuant to clause 16.6 of the Common Law Protocols.

5 NOTIFICATION WITHIN THE 6 YEAR LIMITATION PERIOD OF INTENTION TO LODGE A SERIOUS INJURY APPLICATION

5.1 The client's lawyer will notify the TAC in the prescribed form that the client intends to lodge a serious injury application pursuant to the Common Law Protocols or Supplementary Common Law Protocols prior to the expiration of 6 years from the date of the transport accident or prior to a minor turning 24 years of age, but where the Serious Injury Application will be lodged after the expiration of the time limit. The client's lawyer will advise the TAC of an estimated date by which the serious injury application will be lodged but no more than 6 months after notification.

- 5.2 Within 21 days of receipt of the above notification the TAC will either:
- 5.2.1 Confirm in writing that the notification has been accepted and that the TAC will not rely upon any defence pursuant to the *Limitation of Actions Act* 1958 in any subsequent common law claim provided:
 - 5.2.1.1 The TAC indemnifies the prospective defendant/s; or
 - 5.2.1.2 The TAC is the defendant pursuant to s.94(7) or s.96; and
 - 5.2.1.3 The timelines in 5.1 and 5.5 are complied with; and
 - 5.2.1.4 The client files and serves an Originating Motion within 28 days of confirmation of the TAC's denial of serious injury pursuant to clause 13 of the Common Law Protocols; and
 - 5.2.1.5 The client files and serves a Writ within 28 day of receipt of certification that the Common Law Protocols have concluded pursuant to clause 16.6 of the Common Law Protocols.
 - 5.2.2 Advise the client's lawyer that the prescribed form is incomplete and notification cannot be accepted until the prescribed form has been completed in full.
- 5.3 The TAC's failure to meet the timeframe pursuant to clause 5.2 will result in a deemed undertaking by the TAC that it will not rely upon any defence pursuant to the *Limitation of Actions Act* (1958) in any subsequent common law claim (subject to 5.5 below) provided the client files and serves a Writ within 28 day of receipt of certification that the Common Law Protocols have concluded pursuant to clause 16.6 of the Common Law Protocols.
- 5.4 The parties agree that an Originating Motion will not be issued unless it is done so in accordance with the Common Law Protocols.
- 5.5 The client's lawyer is permitted to seek a further 3 month extension of time (or a timeframe agreed to by the TAC) within which to submit the serious injury application pursuant to the Common Law Protocols or Supplementary Common Law Protocols.
- 5.5.1 The request for an extension of time must be received by the TAC before the expiry of the estimated date provided pursuant to clause 5.1;
 - 5.5.2 The request for an extension of time should provide reasons for the delay in making the serious injury application and advise the date by which the serious injury application will be lodged but no more than 9 months after notification.
- 5.6 In the event that a serious injury application is not received within the timeframes specified in Clause 5.1 and 5.5 the undertaking provided by the TAC pursuant to clause 5.2 or 5.3 is revoked.

6 NOTIFICATION OUTSIDE THE 6 YEAR LIMITATION PERIOD OF AN INTENTION TO LODGE A SERIOUS INJURY APPLICATION

- 6.1 The client's lawyer will notify the TAC in the prescribed form that the client intends to lodge a serious injury application pursuant to the Common Law Protocols or Supplementary Common Law Protocols more than 6 years after the date of the transport accident or after a minor has turned 24. The client's lawyer will advise an estimated date by which the serious injury application will be lodged but no more than 6 months after notification.

- 6.2 Within 21 days of receipt of the above notification the TAC will either:
- 6.2.1 Confirm in writing that the notification has been accepted and that the TAC will not rely upon any additional prejudice incurred from the date that the notification was received until 28 days after the Common Law Protocols have concluded, in any subsequent legal proceedings provided:
 - 6.2.1.1 The TAC indemnifies the prospective defendant/s; or
 - 6.2.1.2 The TAC is the defendant pursuant to s.94(7) or s.96; and
 - 6.2.1.3 The timelines in 6.1 and 6.5 are complied with; and
 - 6.2.1.4 The client files and serves an Originating Motion within 28 days of confirmation of the TAC's denial of serious injury pursuant to clause 13 of the Common Law Protocols; and/or
 - 6.2.1.5 The client files and serves a Writ within 28 day of receipt of certification that the Common Law Protocols have concluded pursuant to clause 16.6 of the Common Law Protocols.
 - 6.2.2 Advise the client's lawyer that the prescribed form is incomplete and notification cannot be accepted until the prescribed form has been completed in full.
- 6.3 The TAC's failure to meet the timeframe pursuant to clause 6.2 will result in a deemed undertaking by the TAC that it will not rely upon any additional prejudice incurred from the date that the notification was received until 28 days after the Common Law Protocols have concluded pursuant to clause 16.6 of the Common Law Protocols, in any subsequent legal proceedings (subject to 6.5 and 6.6 below).
- 6.4 The parties agree that an Originating Motion will not be issued unless it is done so in accordance with the Common Law Protocols.
- 6.5 The client's lawyer is permitted to seek a further 3 month extension of time (or a timeframe agreed to by the TAC) within which to submit the serious injury application pursuant to the Common Law Protocols.
- 6.5.1 The request for an extension of time must be received by the TAC before the expiry of the estimated date provided pursuant to clause 6.1.
 - 6.5.2 The request for an extension of time should provide reasons for the delay in making the serious injury application and advise the date by which the serious injury application will be lodged but no more than 9 months after notification.
- 6.6 In the event that a serious injury application is not received within the timeframes specified in Clauses 6.1 and 6.5 the undertaking provided by the TAC pursuant to clause 6.2 or 6.3 is revoked.

7 SERIOUS INJURY APPLICATION LODGED OUTSIDE THE 6 YEAR LIMITATION PERIOD OPERATION IN ACCORDANCE WITH CLAUSE 5 OR CLAUSE 6

- 7.1 Following lodgment of a notification pursuant to clause 5 or 6 a client's lawyer must submit a serious injury application in accordance with the Common Law Protocols or Supplementary Common Law Protocols.
- 7.2 In addition to the serious injury application in accordance with the Common Law Protocols or Supplementary Common Law Protocols, a client's lawyer must provide the following to the TAC

at the time of lodging the application:

- 7.2.1 A list of all proposed Defendants (if not already provided);
 - 7.2.2 A written explanation based on the evidence at hand from the client's lawyer addressing the extent to which, having regard to the delay, there is any prejudice to the Defendant;
 - 7.2.3 A paragraph/s addressing the delay in lodging the serious injury application and providing reasons for the delay within the affidavit provided pursuant to clause 6.3.10 of the Common Law Protocols; or
 - 7.2.4 An affidavit sworn by the Plaintiff addressing the delay in lodging the serious injury application and providing reasons for the delay.
- 7.3 The Plaintiff's affidavit should address the relevant factors as outlined in s.23A(3) of the *Limitation of Actions Act 1958* as follows:
- the length of and reasons for the delay on the part of the Plaintiff;
 - the extent, if any, to which the defendant had taken steps to make available to the Plaintiff means of ascertaining facts which were or might be relevant to the cause of action of the plaintiff against the Defendant;
 - the duration and extent of any disability of the Plaintiff arising on or after the date of the accrual of the cause of action (supporting material should be provided to the TAC);
 - the extent to which the Plaintiff acted promptly and reasonably once they knew that the act or omission of the Defendant, to which the injury of the Plaintiff was attributable, might be capable at that time of giving rise to an action for damages;
 - the steps, if any, taken by the Plaintiff to obtain medical, legal or other expert advice and the nature of any such advice they may have received.

8 INFORMATION EXCHANGE

- 8.1 In addition to the exchange of information pursuant to clause 6.3.6 of the Common Law Protocols, the client's lawyer must provide any material relevant to the Time Limit.
- 8.2 In addition to the exchange of information pursuant to clause 7.2.1 of the Common Law Protocols, the TAC must also exchange any material relevant to the Time Limit including but not limited to file notes and correspondence that notify or contemplate the potential for a common law claim.
- 8.3 In circumstances where liability is not admitted by the TAC in accordance with clause 7.2.2.4 of the Common Law Protocols, the client's lawyer must also provide a draft Statement of Claim within 28 days of receipt of the TAC's response pursuant to clause 7.2.2.4 of the Common Law Protocols.
- 8.4 When the TAC makes a serious injury decision pursuant to clause 13 of the Common Law Protocols or clause 5.4.1 of the Supplementary Common Law Protocols the TAC will also advise the client's lawyer whether the TAC intends to rely upon the limitation defence in any future legal proceedings.

8.5 The parties agree that an Originating Motion will not be issued unless the serious injury application has been denied in accordance with the Common Law Protocols.

8.6 In circumstances where the TAC grants a serious injury certificate pursuant to the Common Law Protocols or the Supplementary Common Law Protocols and advises that the TAC intends to rely upon the limitation defence in any future legal proceedings, the parties agree that in accordance with the *Civil Procedure Act* there is value in participating in a common law protocols conference pursuant to clause 16.1 of the Common Law Protocols. The parties agree that a Writ will not be issued until certification that the conference has concluded without resolution has been issued pursuant to clause 16.6 of the Common Law Protocols.

9 ADDITIONAL PROVISIONS FOR TRANSPORT ACCIDENTS ARISING IN THE COURSE OF EMPLOYMENT

9.1 Clauses 4, 5, 6, 7, 8 and 10 of the Time Limit Protocols apply to any serious injury application lodged in the accordance with clauses 18.1 and 18.5 of the Common Law Protocols.

10 LEGAL COSTS AND DISBURSEMENTS

10.1 The legal costs and disbursements outlined in Chapter 21 of the Common Law Protocols also apply to the Time Limit Protocols.

10.2 No additional legal costs or uplifts are claimable pursuant to the Time Limit Protocols.