

Copyright is retained by the Queensland Law  
Reform Commission.

---

**REVIEW OF THE *LIMITATION OF ACTIONS ACT*  
1974 (QLD)**

**INFORMATION PAPER**

**WP No 49**

**Queensland Law Reform Commission  
April 1997**

The short citation for this Information Paper is QLRC WP 49  
Published by the Queensland Law Reform Commission, April 1997  
Copyright is retained by the Queensland Law Reform Commission.

ISBN: 0 7242 7726 9

Printed by: The Print People

**REVIEW OF THE *LIMITATION OF ACTIONS ACT*  
1974 (QLD)**

**INFORMATION PAPER**

**WP No 49**

**Queensland Law Reform Commission  
April 1997**



**COMMISSIONERS**

**Chairperson:** The Hon Justice P de Jersey

**Deputy Chairperson:** Mr P M McDermott

**Members:** Mr W G Briscoe  
Ms P A Cooper  
Dr J A Devereux  
Mr P D McMurdo QC  
Mrs D A Mullins

**SECRETARIAT**

**Secretary:** Ms S P Fleming

**Director:** Ms C E Riethmuller

**Legal Officers:** Ms J M Butner  
Ms J M Daley

**Administrative Officers:** Ms M L Basile  
Ms A C Thompson

The Commission's premises are located on the 7th Floor, 50 Ann Street, Brisbane. The postal address is PO Box 312, Roma Street, Qld 4003. Telephone (07) 3247 4544. Facsimile (07) 3247 9045.

E-mail address: [law\\_reform\\_commission@jag.qld.gov.au](mailto:law_reform_commission@jag.qld.gov.au).



# CONTENTS

1.	THE REVIEW .....	1
2.	CALL FOR SUBMISSIONS .....	1
3.	WHAT IS A STATUTE OF LIMITATION? .....	2
4.	THE PURPOSE OF LIMITATION PERIODS .....	2
	(a) Fairness .....	2
	(b) Certainty .....	3
	(c) Public policy .....	3
5.	THE LAW IN QUEENSLAND .....	5
	(a) Existing limitation periods .....	5
	(b) Commencement of the limitation period .....	7
	(c) Extension of limitation period .....	8
	(i) Recommencing the limitation period .....	8
	(ii) Deferring commencement of the limitation period .....	8
	(iii) Extending the limitation period .....	9
6.	PROBLEMS WITH THE EXISTING LAW .....	10
	(a) Latent damage .....	10
	(b) Inconsistency .....	11
	(c) Complexity .....	12
	(d) Incomprehensibility to litigants .....	12
7.	OPTIONS FOR REFORM .....	13
	(a) Modification of existing legislation .....	13
	(b) The date of the act or omission .....	14
	(c) A discovery based system .....	15
	(d) Compulsory insurance .....	17
8.	HOW TO MAKE A SUBMISSION .....	18
	APPENDIX .....	20





## **1. THE REVIEW**

The Attorney-General has requested the Queensland Law Reform Commission, as part of its Fifth Program, to review the *Limitation of Actions Act 1974 (Qld)*, with a view to potential amendment in order to:

- give due recognition to the enhanced capacity of the medical profession to indicate the cause of disease and injury arising from events occurring outside current limitation periods for the bringing of actions;
- overcome difficulties caused by the general rule that a limitation period commences when the cause of action accrues;
- provide for situations of latent damage to property or latent loss or damage resulting from reliance on negligent advice;
- simplify the legislation by providing for a limitation period of general application.

This paper has been produced to provide further information to interested people on the issues the Commission envisages will need to be addressed during the course of the review, and to assist people in making submissions. It gives a brief summary of the current law, and highlights some of the difficulties which may arise under the law as it is at present. The paper also outlines approaches which have been proposed or adopted in some other comparable jurisdictions and indicates some possible options for reform in Queensland. It does not represent the final view of the Commission.

At the end of the review the Commission will report to the Attorney-General on what it considers to be the most appropriate reforms, if any, to the existing law.

## **2. CALL FOR SUBMISSIONS**

In order to assist it in making its recommendations, the Commission seeks input from members of the public, from relevant professions and from organisations and individuals with an interest or expertise in the area.

The Commission invites submissions on the issues raised in this paper, and on other issues which respondents consider relevant to the review, including alternative methods of addressing problems resulting from the present law.

Details of how to make a submission are provided on pages 18-19 of this paper.

### **3. WHAT IS A STATUTE OF LIMITATION?**

A statute of limitation is legislation which sets time limits for bringing court proceedings. The time within which a person (the plaintiff) must commence an action to enforce a right is called the "limitation period". The length of the limitation period generally depends on the nature of the claim.

If proceedings are commenced after the expiration of the limitation period specified for a claim of that particular kind, the person against whom they are brought (the defendant) may plead as a defence that the proceedings are "statute barred".

An action which fails because the plaintiff commenced it outside the relevant limitation period is not decided on the merits. The plaintiff may or may not have had a valid claim. The defendant will be able to resist the claim simply on the ground that the limitation period has expired. A limitation period protects a defendant, whether or not the defendant would otherwise have been able to defend the claim.

### **4. THE PURPOSE OF LIMITATION PERIODS**

The purpose of a limitation period is to discourage a plaintiff from taking an unreasonable length of time to commence proceedings to enforce a right or rights claimed by the plaintiff.

The imposition of limitation periods has been justified on a number of grounds based on fairness, certainty and public policy.

#### **(a) Fairness**

It is argued that it is not fair that a potential defendant should be subject to an indefinite threat of being sued.

Delay in bringing proceedings may unfairly prejudice a defendant's ability to contest the plaintiff's claim. The longer the time which elapses before the action is commenced, the harder it will be for a defendant to disprove the plaintiff's allegations: evidentiary problems are likely to increase as time passes. It may not be possible to trace witnesses, or those who can be found may no longer have a sufficiently clear recollection of events. Written records may have been lost or destroyed.

Although plaintiffs may also be affected by deterioration of evidence over the passage of time, it can be argued that a potential defendant is in a more vulnerable position than a plaintiff. This is because the plaintiff decides when

---

to commence proceedings, and can use the time before the claim is brought to collect evidence, while the defendant may not even be aware that he or she is at risk of being sued and is therefore unlikely to take any steps to preserve the necessary evidentiary material. It can also be argued that, because it is the plaintiff whose interests have been harmed, the plaintiff is likely to have a clearer recollection of events and that, because of the prejudicial effect of delay on the defendant's case, the plaintiff's evidence is likely to be preferred to the defendant's.

**(b) Certainty**

It is also argued that there should be a time when people can feel confident about arranging their affairs in the knowledge that a claim can no longer be brought against them.

This is not just an argument in favour of fairness for the defendant. Modern conditions and technology have resulted in substantially increased awards of damages for compensation. The threat of open-ended liability for manufacturers, businesses, professional advisers and other potential defendants means that they are unable to calculate with any degree of certainty their potential degree of exposure. Limitation periods allow more accurate assessment of potential liability and are therefore in the overall economic interest. Otherwise, the burden of insuring against and defending unlimited claims will inevitably be passed on to society through higher insurance premiums and increased costs for goods and services:<sup>1</sup>

... it will be often just as unfair to make the shareholders, ratepayers or taxpayers of today ultimately liable for a wrong of the distant past, as it is to refuse a plaintiff the right to reinstate a spent action arising from that wrong.

In other words:<sup>2</sup>

A reasonable limitations system can relieve the society of a cost burden which simply is not justified in terms of the benefits which would be conferred on a tiny group of claimants by keeping defendants vulnerable to claims.

**(c) Public policy**

It is generally recognised that the public has an interest in resolving disputes as quickly as possible. Limitation periods help to maintain peace in society by ensuring that disputes do not drag on indefinitely.

---

<sup>1</sup> *Brisbane South Regional Health Authority v Taylor* (1996) 139 ALR 1 per McHugh J at 9.

<sup>2</sup> Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations*, September 1986, 32.

It is also generally recognised that limitation periods help improve the administration of justice. The longer the delay before a claim is brought, the more likely it is that the quality of the evidence will have deteriorated. It will be considerably more difficult for a court to achieve a just resolution of the dispute if the reliability of the evidence has been affected by the passage of time. This, in turn, will reflect on the public perception of the judicial system. There is also the question of the burden imposed on the court system by the need to adjudicate claims which have been made tenuous by the length of time which elapsed before proceedings were commenced. Further, since the law is constantly evolving to meet changing societal conditions and cultural values, it will be harder to measure the conduct of the defendant against the standards prevailing at the time when the alleged infringement of the plaintiff's rights took place.

In the common law world, the origin of legislation imposing limitation periods can be traced back for centuries. The policy underlying the enactment of limitation legislation is based on the considerations outlined above:<sup>3</sup>

A limitation period should not be seen therefore as an arbitrary cut-off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated.

However, despite the reasons for enacting limitation periods, the result may be injustice for some plaintiffs, where the delay in commencing the action is not caused by any fault on the plaintiff's part. For example, the plaintiff may not have been aware of the injury, or may not have been able to establish the identity of the defendant within the relevant limitation period.

It has been noted that:<sup>4</sup>

... in encouraging the timely resolution of disputes, a limitations system must strike a proper balance among the interests of potential claimants, potential defendants and society at large. Potential claimants have an interest in obtaining a remedy for injury from legally wrongful conduct; potential defendants have an interest in being protected from endless claims; and society at large has an interest in providing a range of remedies for injury from wrongful conduct and an orderly and fair process for determining when it is appropriate to award them.

It is not an easy balance to achieve.

---

<sup>3</sup> *Brisbane South Regional Health Authority v Taylor* (1996) 139 ALR 1 per McHugh J at 9.

<sup>4</sup> Alberta Law Reform Institute, Report No 55: *Limitations*, December 1989, 16.

---

## 5. THE LAW IN QUEENSLAND

### (a) Existing limitation periods

In Queensland, the limitation periods within which various kinds of actions must be commenced are set out in the *Limitation of Actions Act 1974* (Qld). However, this Act does not apply to actions which are specifically excluded by the Act itself<sup>5</sup> or to actions for which a limitation period is fixed by some other Act.<sup>6</sup>

The Act provides a number of different limitation periods:

- Twelve years
- an action to recover land<sup>7</sup>
  - an action to recover money secured by a mortgage or other charge on property, or to recover proceeds of the sale of land<sup>8</sup>
  - a foreclosure action in respect of mortgaged personal property<sup>9</sup>
  - an action in respect of claims to the personal estate of a deceased person, or to a share or interest in the estate, whether under a will or on intestacy<sup>10</sup>
  - an action upon a specialty<sup>11</sup>
  - an action upon a judgment<sup>12</sup>

---

<sup>5</sup> For example the Act does not apply to criminal proceedings: see *Limitation of Actions Act 1974* (Qld) s 6(3)(a).

<sup>6</sup> For example a family provision application under s 41 of the *Succession Act 1981* (Qld), an application under s 126 of the *Land Title Act 1994* (Qld) to prevent a caveat lodged with the Registrar of Titles from lapsing or an application under s 100 of the *Vocational Education, Training and Employment Act 1991* (Qld) for the recovery of wages owing to an apprentice. A statutory provision requiring notice of a claim to be given within a specified time may also have the effect of imposing a limitation period: see for example *Motor Accident Insurance Act 1994* (Qld) s 37(4).

<sup>7</sup> Section 13.

<sup>8</sup> Section 26(1).

<sup>9</sup> Section 26(2).

<sup>10</sup> Section 28.

<sup>11</sup> Section 10(3).

<sup>12</sup> Section 10(4).

- Six years
- an action founded on simple contract, quasi-contract or tort, where the damages claimed do not consist of or include damages in respect of personal injury<sup>13</sup>
  - an action to enforce a recognisance<sup>14</sup> or an award where the agreement to arbitrate is not under seal<sup>15</sup>
  - an action to recover a sum recoverable under an enactment, other than a penalty or forfeiture<sup>16</sup>
  - an action for an account<sup>17</sup>
  - an action to recover arrears of rent<sup>18</sup>
  - an action to recover arrears of interest due under a mortgage or other charge<sup>19</sup>
  - an action by a beneficiary against a trustee for a non-fraudulent breach of trust or to recover trust property where the property has come into the possession of the trustee in the absence of fraud<sup>20</sup>
- Three years
- an action for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or otherwise) in which the damages claimed consist of or include damages for personal injury or for injury resulting from the death of any person<sup>21</sup>

---

13 Section 10(1)(a).

14 Section 10(1)(b).

15 Section 10(1)(c).

16 Section 10(1)(d).

17 Section 10(2).

18 Section 25.

19 Section 26(5).

20 Section 27(2).

21 Section 11.

Two years • an action to recover a penalty or forfeiture<sup>22</sup>

In an action for contribution between tortfeasors, the limitation period is the lesser of

- a period of two years from the date when the right of action for contribution arose; or
- a period of four years from the expiration of the limitation period for the principal action.<sup>23</sup>

There is no limitation period for an action by a beneficiary under a trust for fraudulent breach of trust by the trustee or for the recovery of trust property in the possession of the trustee, or previously received by the trustee and converted to the trustee's use.<sup>24</sup>

#### (b) Commencement of the limitation period

The Act generally provides that the time specified as the limitation period for a particular kind of claim will start to run when the cause of action arises or accrues.

A cause of action is a factual situation which gives rise to the right to sue: it consists of every fact which it is necessary for the plaintiff to prove to succeed in the action.<sup>25</sup>

The Act specifies the dates on which certain actions are deemed to accrue.<sup>26</sup> Otherwise, the time at which a cause of action accrues depends on the nature of the action. For example, in an action for breach of contract, the cause of action generally accrues at the date of the alleged breach.<sup>27</sup> The action will therefore be barred six years after the breach, even if the loss for which the plaintiff is seeking compensation took place at a later time.<sup>28</sup> If the cause of action is a tort which requires proof of damage, such as negligence or nuisance, the limitation period begins when the

---

<sup>22</sup> Section 10(5).

<sup>23</sup> Section 40.

<sup>24</sup> Section 27.

<sup>25</sup> *Read v Brown* (1888) 22 QBD 128 per Lord Esher MR at 131. See also *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 per Wilson J at 245.

<sup>26</sup> See sections 5(7)(d), 5(7)(f), 10(2), 10(4), 14-19, 25, 26(5).

<sup>27</sup> See for example *Howell v Young* (1826) 5 B & C 259, 108 ER 97; *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 QB 197 at 203; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384.

<sup>28</sup> *Howell v Young* (1826) 5 B & C 259, 108 ER 97.

damage occurs,<sup>29</sup> even if the damage is not immediately obvious to the plaintiff.<sup>30</sup> However, if the cause of action is a tort for which it is not necessary to prove damage, such as trespass, the cause of action accrues when the wrongful act which constitutes the tort is committed.<sup>31</sup>

### **(c) Extension of limitation period**

Part 3 of the *Limitation of Actions Act 1974* (Qld) includes several provisions which are intended to relieve the harsh effect which the imposition of a limitation period may have in some situations.

#### **(i) Recommencing the limitation period**

One method by which the specified limitation period is extended in certain circumstances is by changing the date when the cause of action accrues, so that a new limitation period starts running.<sup>32</sup>

#### **(ii) Deferring commencement of the limitation period**

If a person is under a disability - for example, minority - when the cause of action accrues, the limitation period does not begin to run until the person ceases to be under the disability or dies, whichever happens first.<sup>33</sup> In other words, the time in which an action may be brought is extended by deferring the date on which the limitation period begins. Similarly, the limitation period for an action based on fraud or mistake is deferred until the plaintiff discovers the fraud or mistake or, with reasonable diligence, could have discovered it.<sup>34</sup>

---

<sup>29</sup> See for example *Davie v New Merton Board Mills Ltd* [1959] AC 604.

<sup>30</sup> See for example *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 at 778; *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1.

<sup>31</sup> See for example *Dawson v Commonwealth* (1994) 12 WAR 29.

<sup>32</sup> Section 35(1).

<sup>33</sup> Section 29.

<sup>34</sup> Section 38.



---

**(iii) Extending the limitation period**

A plaintiff who is claiming damages for personal injury in an action for negligence, trespass, nuisance or breach of duty<sup>35</sup> may apply to have the limitation period extended.<sup>36</sup> The plaintiff must show that:

- a material fact of a decisive character relating to the right of action was not within the plaintiff's means of knowledge until some time after the commencement of the final year of the limitation period specified by the Act; and
- there is evidence to establish the right of action apart from a defence based on the expiration of the limitation period.

"Material facts" include:<sup>37</sup>

- the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;
- the identity of the person against whom the right of action lies;
- the fact that the negligence, trespass, nuisance or breach of duty caused personal injury;
- the nature and extent of the personal injury caused by the negligence, trespass, nuisance or breach of duty;
- the extent to which the personal injury was caused by the negligence, trespass, nuisance or breach of duty.

Material facts are of a "decisive character" only if a reasonable person knowing those facts and having taken appropriate advice about them would regard them as showing that:<sup>38</sup>

- an action would (apart from the expiration of the limitation period) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify bringing the action;

---

<sup>35</sup> Whether the duty is imposed by contract or by statute or otherwise.

<sup>36</sup> Section 31.

<sup>37</sup> Section 30(a).

<sup>38</sup> Section 30(b).

- the plaintiff ought, in his or her own interest, and taking his or her circumstances into account, bring the action.

The court may, if it is satisfied about these matters, order that the limitation period be extended to a year after the date when the plaintiff became aware of the material fact.<sup>39</sup>

This provision does not change the date on which the cause of action accrues or defer the commencement of the limitation period. It gives a plaintiff who can demonstrate that he or she was unaware of a material fact additional time in which to commence proceedings, thus extending the length of the limitation period itself.

A similar application may also be made if the plaintiff is claiming damages for negligence, trespass, nuisance or breach of duty in respect of injury resulting from the death of any person,<sup>40</sup> or if the action involves a claim for damages for personal injury which has survived on the death of the injured person for the benefit of the person's estate.<sup>41</sup>

## 6. PROBLEMS WITH THE EXISTING LAW

### (a) Latent damage

The limitation period for some causes of action begins to run when the plaintiff incurs loss or damage. This means that, because some kinds of damage are not immediately apparent, the limitation period may commence before the plaintiff is aware that the damage has been done. If the damage remains hidden for a considerable length of time, the limitation period may have expired before the plaintiff realises what has happened.

In some situations, the *Limitation of Actions Act 1974* (Qld) allows an action to be brought after the expiration of the limitation period if the loss or damage complained of by the plaintiff consists of or includes personal injury.<sup>42</sup>

---

<sup>39</sup> This is a discretionary power. The court is not obliged to exercise it even though the statutory conditions are met unless, in all the circumstances of the case, justice is best served by so doing. See *Brisbane South Regional Health Authority v Taylor* (1996) 139 ALR 1 per Dawson J at 2 and McHugh J at 10.

<sup>40</sup> Section 31.

<sup>41</sup> Section 32.

<sup>42</sup> Sections 31, 32. See pages 9-10 above.

However, other kinds of damage may also be difficult to detect. For example, the damage caused by defective work or materials in building construction may not be discovered for some time. Similarly, damage resulting from negligent design or inspection may also remain hidden until the limitation period has expired.

In some jurisdictions, this problem has been overcome in relation to defective buildings by categorising the damage to the plaintiff as economic loss which does not crystallise until the defect becomes obvious and the value of the property is affected.<sup>43</sup> Although there is no authoritative Australian decision on this point, the distinction between ordinary physical damage to property and economic loss resulting from the diminution of value of property has received some recognition.<sup>44</sup> According to this approach, the cause of action does not accrue until the damage becomes sufficiently obvious to cause the value of the building to deteriorate.

Similarly, loss caused by negligent advice may not crystallise until a significant period of time after the advice has been given and acted upon. For example, if a person receives negligent advice about the value of property, and lends money secured against the purported value of that property, damage resulting from reliance on the negligent advice may not become apparent until some date in the future when the limitation period may have expired. In this situation also, it has been held that the cause of action will not arise until the existence of the loss becomes ascertainable.<sup>45</sup>

These developments in case law protect against injustice arising from a situation in which a claim may be statute barred before a plaintiff even knows of its existence. However, the direction of case law may change in the future. Further, the protection currently given by case law is provided at the expense of potential defendants, who may face the prospect of open-ended liability.

## (b) Inconsistency

The rule that the limitation period commences when the cause of action accrues may result in inconsistency. It has already been noted that different causes of action accrue at different times.<sup>46</sup> Since the same factual situation may give rise to more than one cause of action, there may be more than one applicable limitation period.

---

<sup>43</sup> See for example *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641 (Canada); *Invercargill City Council v Hamlin* [1996] AC 624 (PC) (New Zealand).

<sup>44</sup> See for example *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 per Deane J at 503-505; *Hawkins v Clayton* (1988) 164 CLR 539 per Deane J at 587-588, Mason and Wilson JJ concurring.

<sup>45</sup> See for example *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514.

<sup>46</sup> See page 7 above.

For example, it is generally recognised that liability in tort and contract can co-exist.<sup>47</sup> However, while a cause of action in contract accrues at the time when the contract is breached, a cause of action in a tort such as negligence or nuisance does not accrue until damage occurs. This means that in some situations - for example, where a client incurs a loss as a result of negligent advice from a professional person - the cause of action in negligence is likely to accrue later than the cause of action for breach of contract.

As a result, the limitation period for a negligence claim may still be running after a claim for breach of contract has become statute barred.<sup>48</sup>

### (c) Complexity

The aim of a statutory limitation scheme is to provide a reasonable period of time for a plaintiff to discover the infringement to his or her rights and to bring a claim for a remedy. However, the fact patterns of individual disputes often vary widely, and it is difficult to determine what is a "reasonable" limitation period of general application.

The Queensland legislation attempts to overcome this problem by providing a number of different limitation periods for different causes of action.<sup>49</sup> The result of this approach is to make the scheme more complex:<sup>50</sup>

If the number of limitation rules is small, the system may be easy to understand and efficient to operate, but the danger is that the mechanical application of its broad rules to cases on the fringe of a category of remedial claims may produce injustice. Increasing the number of rules and the number of categories of claims will tailor the system, but each increase will make the system more complex and less efficient to operate because of the difficulty in determining which cases fall into which statutory categories.

### (d) Incomprehensibility to litigants

The object of limitations law is to encourage plaintiffs to commence proceedings within a reasonable time. However, a litigant would be entitled to question the relevance of

---

<sup>47</sup> *Esso Petroleum Co Ltd v Mardon* [1976] QB 801; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384; *Aluminium Products (Qld) Pty Ltd v Hill* [1981] Qd R 33; *Bryan v Maloney* (1995) 182 CLR 609; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

<sup>48</sup> See for example *Wright v Borzi* [1979] Qd R 179.

<sup>49</sup> The existing limitation periods are set out on pages 5-7 above.

<sup>50</sup> Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations*, September 1986, 48.

arguments about the classification of a claim to the question of whether or not the claim was brought in a timely fashion:<sup>51</sup>

Whether or not a limitations defence is available to a defendant often depends on how a specific claim before the court is characterized as to type. When this occurs, neither the litigation nor its result can be explained to the litigants in terms which have anything to do with the common sense issue of whether or not the claim was brought as soon as it reasonably could and should have been brought.

## 7. OPTIONS FOR REFORM

While there has been little argument about the basic policies which underlie limitations law, experience has shown that the major problem facing reform in this area is the difficulty in balancing the competing interests which arise, particularly in finding a system which will accommodate both "the significant minority of cases in which the gap between accrual and discovery is relatively long and unpredictable and the majority of cases in which that gap is relatively short and predictable".<sup>52</sup>

Some possible options for reform are outlined below.

### (a) Modification of existing legislation

One option for removing the problems associated with the present law would be to try to amend the existing legislation. However, given that most of the perceived problems result from concepts entrenched in the present legislation, that is a course which is unlikely to be successful.

It has been observed that:<sup>53</sup>

Attempts to amend Acts which:

- (1) assign claims to different categories;
- (2) allot different time periods of fixed duration to those categories;  
and
- (3) provide for the commencement of time periods at the date of accrual of claims,

---

<sup>51</sup> Alberta Law Reform Institute, Report No 55: *Limitations*, December 1989, 25.

<sup>52</sup> Alberta Law Reform Institute, Report No 55: *Limitations*, December 1989, 30.

<sup>53</sup> NJ Mullany, "Reform of the Law of Latent Damage" (1991) 54 *Modern Law Review* 349 at 381.

lead to unnecessarily technical, complex and cumbersome legislation. This strategy must be abandoned if the problems of latent damage and, indeed, of limitation law generally are to be solved in a simple and logical fashion.

**(b) The date of the act or omission**

The New Zealand Law Commission has recommended a scheme based on the principle that the limitation period should run from the date of the defendant's act or omission, rather than from the date of the accrual of the cause of action.<sup>54</sup>

The Commission proposed that its recommended scheme be of general application.<sup>55</sup> The scheme would provide:

- a standard three year limitation period commencing on the date of the act or omission which is the subject of the claim; and
- an extension of the limitation period if the plaintiff shows that the act or omission on which the claim is based occurred before the plaintiff turned eighteen, that the plaintiff was incapable of bringing the claim because of a physical or mental condition or that the plaintiff did not gain knowledge of certain matters of fact until after the date of the act or omission on which the claim is based.

The extension provision would not create an open-ended liability. The scheme would impose an ultimate limitation period of fifteen years from the date of the act or omission on which the claim is based. This would mean that, for example, a plaintiff who did not become aware of the right of action until fourteen years after the allegedly wrongful conduct of the defendant would have one year in which to commence proceedings before the defendant could rely on a limitations defence. Except in certain circumstances, a right of action discovered after more than fifteen years would be statute barred. The scheme includes special provisions extending the ultimate limitation period if, for example, the defendant has fraudulently concealed information relevant to the claim or has committed a fraudulent breach of trust.

The Commission believed that this scheme, which has not yet been implemented,<sup>56</sup> would be much clearer than an accrual based system with differing limitation periods for different kinds of action.

---

<sup>54</sup> New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (1988).

<sup>55</sup> However, in New Zealand, claims for compensation for personal injury are generally covered by the *Accident Rehabilitation and Compensation Insurance Act 1992* (NZ).

<sup>56</sup> However, a ten year limitation period has been imposed on claims arising from the construction, alteration, demolition or removal of any building. The limitation period commences on the date of the act or omission on which the claim is based: see *Building Act 1991* (NZ) s 91.

However, the scheme would not overcome all the problems of an accrual based scheme.

There would, for example, be excessive reliance on the extension provisions. Because of the time which often elapses between the allegedly wrongful conduct of the defendant and the loss or damage to the plaintiff becoming apparent, in many situations the standard limitation period would elapse before the plaintiff was aware that he or she had a right to sue.

Reliance on the date of the defendant's act or omission as the trigger for starting the limitation period could also, in some situations, produce the result that the limitation period would commence before the cause of action was complete. This would happen, for example, in a negligence action where the conduct complained of predated the occurrence of loss or damage. It seems incongruous for a limitation scheme to provide that time begins to run against a plaintiff even before the plaintiff is entitled to commence proceedings.

Further, it is not beyond dispute that an approach based on the date of the defendant's act or omission would be more certain than an accrual based system. Although in many cases the date will be obvious, there are likely to be situations which lead to argument about what constituted the act or omission in particular cases.

### **(c) A discovery based system**

Recent Canadian developments in limitation law have adopted an alternative strategy.<sup>57</sup> Instead of imposing a set limitation period triggered by either accrual of the right of action or the defendant's conduct, with provision for extension in certain circumstances, the new approach subjects all claims to a "discovery" limitation period.

The discovery limitation period would be relatively short. Legislation recently passed in Alberta provides for a discovery period of two years. A similar period has been proposed in Ontario. The concept of a discovery period is based on the principle of knowledge. The period would begin to run only when the plaintiff had discovered or ought to have discovered that:

- the injury has occurred;
- the injury was to some degree attributable to the conduct of the defendant; and
- the injury is sufficiently serious to warrant commencing a proceeding.

---

<sup>57</sup> See for example *Limitations Act 1996* (Alberta) Chapter L-15. 1; *Limitations (General) Bill 1992* (Ontario).

With nothing more, the introduction of a general discovery period would create the prospect of open-ended liability for defendants. However, the discovery period is balanced by a longer ultimate period.

In Alberta, for example, a ten year period has been introduced. In Ontario, the proposed basic period is thirty years, with a ten year period in a number of special situations such as cases involving medical negligence or building defects.<sup>58</sup> The ultimate period would begin to run when the claim arose - in the case of a breach of duty, when the conduct alleged to constitute the breach occurred - and would provide an absolute cut off date after which a claim may not be brought, regardless of whether or not the plaintiff was aware that he or she has a right of action.

As with the New Zealand scheme, both the Alberta provisions and the Ontario proposals make special provisions which modify the operation of the basic limitation periods in certain circumstances - for example, where the plaintiff is a minor or has a disability which prevents him or her from bringing proceedings. The Ontario proposals also suspend the limitation period in claims relating to assault and sexual assault during any time when the plaintiff is prevented from commencing the proceeding because of his or her physical, mental or psychological condition. There would be no limitation period if one of the parties to the proceeding had charge of the person assaulted, or was in a position of trust or authority, or was someone on whom the person assaulted was dependent, financially or otherwise.<sup>59</sup>

Unlike the current Queensland legislation, neither the Alberta legislation nor the Ontario proposals would exempt a claim for fraudulent breach of trust from the operation of the scheme. However, the Alberta provisions suspend the ultimate limitation period during any period of time when the defendant fraudulently concealed the fact that the plaintiff had sustained loss or injury. Similarly, the Ontario proposals would suspend the ultimate limitation period if the defendant wilfully concealed the fact that loss or injury has occurred, or that it occurred as a result of an act or omission of the defendant.<sup>60</sup>

---

<sup>58</sup> Many civil law systems presently have lengthy ultimate limitation periods. See JA Jolowicz *Procedural Questions* (International Encyclopaedia of Comparative Law vol xi ) para 61-68. In the Australian Capital Territory a fifteen year ultimate limitation period applies to non-personal injury cases: see *Limitation Act 1985* (ACT) s 40(1). In some Australian jurisdictions a ten year limit applies to actions for damages for economic loss and rectification costs resulting from defective building work. The limitation period commences on the date of completion, the date of issue of occupancy permit or the first occupation of the building: see for example *Building Act 1993* (NT) ss 159-160; *Development Act 1993* (SA) s 73; *Building Act 1993* (Vic) ss 130, 134.

<sup>59</sup> In British Columbia there is no limitation period for certain kinds of actions, including an action based on sexual assault: *Limitation Act* [RSBC 1979] Chapter 236 s 3(3).

<sup>60</sup> Legislation in New South Wales, the Northern Territory and the Australian Capital Territory imposes a limitation period in cases of fraud, fraudulent breach of trust or retention or conversion of trust property, commencing when the beneficiary discovered or might with reasonable diligence have discovered the facts on which the action is based: see *Limitation Act 1969* (NSW) ss 47-48; *Limitation Act 1981* (NT) ss 32-33; *Limitation Act 1985* (ACT) s 27.



The Canadian developments also significantly limit court discretion to alter the limitation period. It was recognised that the introduction of an ultimate limitation period may prevent some deserving claims from being made. It was suggested that this result would be justified on the basis that, at the expiration of the ultimate period, there would be few remaining potential plaintiffs and that.<sup>61</sup>

By this time the cost burden imposed on potential defendants, and through them on the entire society, of maintaining records and insurance to secure protection from a few possible claims will have become higher than can reasonably be justified relative to the benefits which might be conferred on a narrow class of possible claimants.

However, some diseases such as asbestosis and mesothelioma have a latency period which may exceed even thirty years, and there are cases involving latent property damage where more than fifteen years elapses before the damage becomes apparent. Moreover, there may be other situations - for example, cases involving child sexual abuse - where the injury is not latent, but where a variety of other factors explain the delay in bringing the claim.

Inclusion of a limited judicial discretion to extend in exceptional circumstances and within defined limits the period in which claims may be brought may be a more appropriate solution.

#### (d) Compulsory insurance

A further alternative may be the introduction of compulsory insurance for those involved in certain activities - for example, the building and construction industry.<sup>62</sup>

In recent years, Victoria, South Australia and the Northern Territory have all enacted new building legislation based on the National Model Building Act (which was drafted on the instructions of the Standing Committee of Attorneys General). The legislation in each of the three jurisdictions imposes a ten year limitation period on actions for damages for economic loss and rectification costs resulting from defective building work<sup>63</sup> and makes it compulsory for certain building practitioners to carry professional indemnity insurance.<sup>64</sup>

---

<sup>61</sup> Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations*, September 1986, 156.

<sup>62</sup> See for example *Queensland Building Services Authority Act 1991* (Qld) s 68(1), which makes it compulsory for a building contractor to pay an insurance premium to the Queensland Building Services Authority before commencing residential construction work.

<sup>63</sup> The limitation period commences on the date of completion, the date of issue of occupancy permit or the first occupation of the building: see *Building Act 1993* (Vic) ss 130, 134; *Development Act 1993* (SA) s 73; *Building Act 1993* (NT) ss 159-160.

<sup>64</sup> See *Building Act 1993* (Vic) ss 135-137A; *Development Act 1993* (SA) s 100; *Building Act 1993* (NT) s 61.

The legislation in Victoria, South Australia and the Northern Territory has been the subject of some criticism.<sup>65</sup> For example, some commentators have pointed out that the legislation does not make it compulsory for all persons who may potentially be found liable for defective building work to carry insurance; that generally, the legislation does not make it compulsory for building practitioners to take out insurance for the whole of the ten year limitation period; that some insurance required to be carried is unavailable or difficult to obtain from the insurance market; and that the minimum level of insurance required is too low to meet major claims.

It has been suggested that, if all persons engaged in the building and construction industry were required to carry insurance, there would be no need for an ultimate limitation period and that plaintiffs affected by latent design or building defects would be able to bring proceedings within a prescribed time after discovering the damage without any prejudice to the defendant.<sup>66</sup>

This argument fails to take into account the fact that insurance costs are ultimately passed on to consumers in the form of increased charges; that insurance claims are sometimes rejected on the ground of non-disclosure by the insured (or for some other breach of the terms of the policy); that there is nothing to prevent an insured from settling an insurance claim with an insurer in a way that effectively reduces the amount the insured can on-pay to the plaintiff or claimant; and that there can be problems when insurers leave the insurance market and cease to exist.

It should also be remembered that an insurer who takes over an action on behalf of an insured defendant is most unlikely to settle a latent damage claim without first being satisfied that there is sufficient evidence of the defendant's liability. Where the period between the plaintiff's claim and the events leading up to the claim is quite lengthy, this evidentiary process will naturally be more difficult and considerably more expensive.

## 8. HOW TO MAKE A SUBMISSION

The Commission would welcome submissions on any or all of the specific matters referred to in this Information Paper or on any other relevant matters. The issues listed in the Appendix may assist respondents to identify areas of concern on which they wish to comment.

Submissions may be made orally or in writing. If you would like your submission to be treated as confidential, please indicate this clearly. However, the content of the

---

<sup>65</sup> See for example R Varghese, "The New Building Control Legislation Limitations on Quantum and Duration of Liability - Truth or Illusion?" (1994) 39 *Australian Construction Law Newsletter* 7.

<sup>66</sup> See for example NJ Mullany, "Reform of the Law of Latent Damage" (1991) 54 *Modern Law Review* 349 at 382-383.

submissions may be subject to release under the *Freedom of Information Act 1992* (Qld).

The Commission will take submissions into account in its consideration of the need for reform.

Contact: Penny Cooper

PO BOX 312

ROMA STREET QLD 4003

Telephone: (07) 3247 4544

Facsimile: (07) 3247 9045

E-mail: [law\\_reform\\_commission@jag.qld.gov.au](mailto:law_reform_commission@jag.qld.gov.au)

Submissions to be received by 13 June 1997.

## APPENDIX

The Commission specifically invites comment from interested individuals and organisations on the following:

1. The problems, if any, resulting from the present legislation;
2. The different limitation periods which currently exist for different causes of action;
3. The present provision that the limitation period commences when the cause of action accrues;
4. The desirability of a basic limitation period which commences:
  - when the act or omission complained of occurs; or
  - when the plaintiff is or should be aware of the right of action;
5. The facts that should be within the knowledge of a plaintiff before a discovery based limitation period is triggered;
6. The appropriate length of a discovery based limitation period;
7. The desirability of an ultimate period after which a plaintiff may not commence proceedings, even if the plaintiff was unaware of the right of action until after the expiration of the period;
8. The causes of action to which an ultimate limitation period should apply;
9. The appropriate length of an ultimate limitation period;
10. The commencement of an ultimate limitation period;
11. The desirability of a residual judicial discretion to alter the limitation period in exceptional situations, such as cases of latent injury, where injustice may result from rigid application of even an ultimate limitation period;
12. The factors to be taken into account in exercising such a discretion;
13. The need for special provisions for cases of assault and sexual abuse;
14. Other types of case which may need special provisions;
15. The desirability of a compulsory insurance scheme for certain potential defendants - for example, those involved in the building and construction industry.