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

DISCUSSION PAPER

WP No 50

Queensland Law Reform Commission
December 1997

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HOW TO MAKE COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues and on the preliminary proposals in this Discussion Paper.

Written comments and submissions should be sent to:

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Oral submissions may
be made by telephoning: (07) 3247 4544

Closing date: Friday, 27 February 1998

It would be helpful if comments and submissions addressed specific issues or preliminary recommendations in the Discussion Paper.

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SUMMARY OF PRELIMINARY RECOMMENDATIONS

In this Discussion Paper, the Queensland Law Reform Commission makes the following preliminary recommendations:

- 1. The general principle that the limitation period commences on the date when the cause of action accrues should be replaced.**
(page 44)

- 2. For common law claims, there should be a limitation period of general application which is the lesser of:**
 - (a) three years after the date on which the plaintiff first knew or, in the circumstances, ought to have known:**
 - (i) that the injury had occurred;**
 - (ii) that the injury was attributable to the conduct of the defendant;**
 - (iii) that the injury, assuming liability on the part of the defendant, warranted bringing a proceeding;**

 - or**
 - (b) fifteen years after the date on which the conduct, act or omission giving rise to the claim occurred.**
(pages 60-61)

- 3. There should be a judicial discretion to extend the limitation period in the interests of justice if the prejudice to the defendant in having to defend an action after the expiration of the limitation period, and the general public interest in the finality of litigation, are outweighed by other factors.**

The exercise of the discretion should not be restricted to claims for personal injury.

In determining whether to exercise the discretion, the court should consider all the circumstances of the case, including:

- **the length of and reasons for delay on the part of the plaintiff;**
- **the extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;**
- **the nature of the plaintiff's injury;**
- **the position of the defendant, including the extent to which the defendant could have been expected to be aware that claims might arise long after the acts or omissions in question;**
- **the conduct of the defendant which resulted in the harm of which the plaintiff complains;**
- **the conduct of the defendant after the cause of action arose, including:**
 - (a) **the extent, if any, to which the defendant took steps to make available to the plaintiff means of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant; and**
 - (b) **any other conduct of the defendant which contributed to the plaintiff's delay in bringing the action;**
- **the duration of any disability of the plaintiff arising on or after the date on which the injury became discoverable;**
- **the extent to which the plaintiff acted properly and reasonably in the circumstances once the injury became discoverable;**

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- the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice received.
(pages 69-70)
4. In a claim for contribution between tortfeasors, the limitation period should be the lesser of:
- three years after the date when the person claiming contribution knew, or in the circumstances ought to have known, the information necessary to bring the claim; and
 - fifteen years after the earlier of:
 - the date when the person claiming contribution was made a defendant in the principal action; or
 - the date when the person claiming contribution incurred liability through settlement of the principal action.
(page 76)
5. Provisions equivalent to sections 75 and 76 of the *Limitation Act 1969* (NSW) should be included in Queensland limitation legislation.
(page 79)
6. The proposed legislation should not affect the ability of a court of equitable jurisdiction to refuse relief on equitable grounds.
(page 87)
7. The operation of the limitation period proposed by the Commission should be suspended during the minority of the plaintiff.
(page 92)
8. “Disability” should be defined as the lack of capacity to understand the nature and foresee the effects of decisions about a claim, or to communicate those decisions.
(page 95)

- 9. The limitation period should be suspended during any period of time that the plaintiff is under a disability.**

[\(page 96\)](#)
- 10. Both the three year limitation period commencing when the plaintiff knew or, in the circumstances should have known, the information necessary to make the claim and the fifteen year alternative limitation period commencing on the date of the defendant's act or omission should be suspended during any period when the plaintiff is under a disability.**

[\(page 98\)](#)
- 11. The suspension of the limitation period in favour of a plaintiff who is under a disability should not be affected by the appointment of a substitute decision-maker.**

[\(page 99\)](#)
- 12. Because claims brought by "stolen children" as a result of their removal from their families can be adequately dealt with under the general provisions of the proposed scheme, there should not be a specific provision in relation to such claims.**

[\(page 104\)](#)
- 13. Because the general recommendations provide adequately for claims by survivors of childhood sexual abuse arising out of that abuse, there should not be a specific provision in relation to such claims.**

[\(page 114\)](#)
- 14. The provisions relating to successive disabilities should be retained.**

[\(page 117\)](#)
- 15. There should not be a specific provision in relation to war or warlike operations, but cases where commencement of proceedings within the limitation period has been prevented by war or circumstances arising out of war should be dealt by the exercise of judicial discretion.**

[\(page 119\)](#)

16. Where:

- **an action is based upon the fraud of the defendant or the defendant's agent or of a person through whom he or she claims or his or her agent; or**
- **the defendant or any other person named above fraudulently conceals:**
 - (a) the fact that injury has occurred; or**
 - (b) that the injury was caused or contributed to by the conduct of the defendant; or**
- **the defendant or any other person named above knowingly misleads the plaintiff as to the appropriateness of a proceeding as a means of remedying the injury**

the alternative limitation period for a claim should be suspended.

[\(page 122\)](#)

17. There should be no limitation period for claims for fraudulent breach of trust.

[\(page 124\)](#)

18. It is not necessary to extend the existing scope of the suspension of the limitation period on the ground of mistake.

[\(page 125\)](#)

ADDITIONAL ISSUES FOR DISCUSSION

There are some issues raised in this Discussion Paper on which the Commission has not expressed a preliminary view or made a preliminary recommendation. The Commission seeks comments on the following questions:

1.
 - Are there any problems which arise from the procedural nature of Queensland limitation law?
 - Should Queensland limitation law continue to merely bar the remedy, or should it extinguish the underlying right?
 - If it should continue to merely bar the remedy, should the existing exceptions to the general rule be continued?
 - What are the advantages or disadvantages resulting from the change to the nature of New South Wales limitation law?
[\(page 13\)](#)
2. Should equitable claims generally be subject to the proposed limitation legislation?
[\(page 85\)](#)
3.
 - Should the operation of limitation legislation continue to be suspended in favour of people who are in prison?
 - If so, should all convicted prisoners be regarded as under a disability, or only those whose property is subject to management by the Public Trustee?
 - Is there any reason to distinguish between a prisoner who has been convicted, and one who is awaiting trial?
[\(page 116\)](#)
4.
 - Should actions for the recovery of land be subject to the general limitation period proposed by the Commission?

2

- **Should there continue to be special rules for such claims?**
(page 127)
- 5.
- **Should actions for the redemption of mortgaged personalty be subject to limitation legislation?**
 - **Should actions concerning**
 - (a) **mortgaged realty;**
 - (b) **mortgaged personalty****be subject to the general scheme proposed by the Commission?**
 - **If not, what limitation period should apply?**
 - **For the purposes of limitation legislation, should there be any distinction between legal mortgages and equitable mortgages?**
(page 131)
6. **Should the new legislation apply to:**
- **causes of action which have accrued at the time the new legislation comes into force?**
 - **proceedings which are pending when the new legislation comes into force?**
 - **causes of action which, when the new legislation comes into force, are statute-barred under the old legislation?**
 - **cases which have been resolved by judgment or compromise under the old legislation?**
(pages 136-137)

CHAPTER 1

INTRODUCTION

1. TERMS OF REFERENCE

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.

The terms of reference do not include limitation periods for matters which are specifically excluded by the *Limitation of Actions Act 1974* (Qld),¹ or to actions for which a limitation period is fixed by some other Act.²

The Attorney-General has requested that the reference be completed within twelve months of its commencement.

2. BACKGROUND

The nature, purpose and effect of limitation legislation are explained in Chapter 2 of this Discussion Paper.

¹ For example, the Act does not apply to criminal proceedings: see *Limitation of Actions Act 1974* (Qld) s 6(3)(a).

² 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).

Limitation legislation is generally seen as the province of litigation lawyers, of little interest or concern for ordinary members of the community. However, it involves significant and sometimes competing issues of public policy and has the potential to substantially affect the outcome of disputes which end in court action between the parties.

It has been observed that:³

The topic of limitation periods was for many years a neglected area of the law, often being regarded as a rather dull and technical subject lacking in practical importance. In recent years new developments, especially in the area of latent damage, have attracted considerable attention, and the importance of limitation periods has again been recognised.

3. TIME FRAME FOR THE REFERENCE

The terms of reference were finalised at the beginning of April 1997.

Because of the short time frame for the reference, the opportunity for consultation will also be limited. However, it is the intention of the Commission to provide the greatest possible opportunity for public input into the reference within the available time.

In April 1997 the Commission published and distributed an Information Paper⁴ for consultation purposes. The closing date for submissions was 13 June 1997.

The submissions received in response to the Information Paper have been of great assistance to the Commission in identifying relevant issues and have been taken into account in the preparation of this Discussion Paper. There will be a further opportunity for public comment following the distribution of this paper.

The Commission expects to present its final Report to the Attorney-General by June 1998.

³ A McGee, *Limitation Periods* (2nd ed 1994) 2-3.

⁴ Queensland Law Reform Commission, Working Paper No 49: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997).

4. INFORMATION PAPER

The Commission's Information Paper was produced in order to provide information to interested people on the issues the Commission envisaged would need to be addressed during the course of the review, and to assist people in making submissions. The Information Paper gave a brief summary of the current law, and highlighted some of the difficulties which, in the view of the Commission, may arise under the law as it is at present. The paper also outlined approaches which have been proposed or adopted in some other comparable jurisdictions and indicated some possible options for reform in Queensland.

The Information Paper was widely distributed to relevant organisations and interested individuals.

5. CALL FOR SUBMISSIONS

The Information Paper invited submissions on matters referred to in the paper, or on any other relevant matters. To assist respondents to identify areas of concern on which they wished to comment, the Appendix to the Information Paper listed a number of specific issues. The Commission also placed advertisements in the national, state and regional press advising of the availability of the Information Paper and calling for submissions.

23 written submissions were received. A list of respondents is set out in the Appendix to this Paper.

6. THE PURPOSE OF THIS DISCUSSION PAPER

The purpose of this Discussion Paper is to encourage further public input by presenting a more detailed analysis of the existing law and of the issues raised by it.

The paper examines the nature and purpose of limitation law, and summarises the existing legislation in Queensland and in other Australian jurisdictions. Reference is made to recent developments and recommendations for reform in Canada, New Zealand and Western Australia. The Commission puts forward for discussion its preliminary recommendations for the general reform of limitation law in Queensland. On a number of specific issues, the Commission has not expressed a preliminary view, but seeks input from interested individuals and organisations.

The Commission invites submissions on the issues discussed in this paper, and on other matters which respondents consider relevant to the reference.

Details of how to make a submission are set out at the beginning of this paper. The closing date for submissions is Friday 27 February 1998.

CHAPTER 2

LIMITATION LEGISLATION

1. 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.⁵

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”.⁶

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.

2. 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

⁵ The limitation periods imposed by the *Limitation of Actions Act 1974* (Qld) are set out on pp 25-27 below.

⁶ The effect of the expiration of a limitation period is discussed at pp 7-11 below.

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:⁷

... 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:⁸

⁷ *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 per McHugh J at 553.

⁸ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 32.

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.

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.

3. THE NEED TO BALANCE COMPETING INTERESTS

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:⁹

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 legislation, 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.

⁹ *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 per McHugh J at 553.

It has been noted that:¹⁰

... 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.

4. CLASSIFICATION OF LIMITATION LEGISLATION

There are two kinds of limitation legislation. Statutory provisions which impose time limits for bringing civil actions are generally classed as either procedural or substantive. The distinction between procedural and substantive limitation periods is based on the effect of the expiration of the limitation period.

(a) Procedural

Limitation provisions traditionally state that an action “shall not be brought” after the relevant limitation period has expired. Legislation expressed in these terms has the effect, after the limitation period has expired, of cutting off resort to the courts for enforcement of a claim. It bars access to a remedy which may have been available if litigation were successful. However, the expiration of the limitation period does not extinguish the right on which the claim is based:¹¹

Statutes of limitation which operate to prevent the enforcement of independently existing rights of action ... are typically described as denying a remedy while not destroying or extinguishing an underlying right.

The right itself is still recognised by the law, and a plaintiff who has alternative means (within the law) of asserting the right is entitled to use those means to enforce it.¹²

This kind of limitation legislation is classified as procedural.

(b) Substantive

¹⁰ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 16.

¹¹ *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 per Mason CJ at 19.

¹² See *C & M Matthews Ltd v Marsden Building Society* [1951] Ch 758; *Allen v Waters & Co* [1935] 1KB 200.

Some limitation provisions generally operate to automatically extinguish the right on which a claim is based, once the limitation period for bringing proceedings to enforce the claim has expired.

The reason for enacting legislation which has this effect is that, given that the purpose of a limitation statute is to prevent claimants from suing after the specified period of time has elapsed, it is “both more realistic and theoretically sound” for the legislation to provide that the right no longer exists after the limitation period has expired, rather than to merely bar the remedy.¹³ It is considered undesirable, by leaving a claim in existence without the support of a court ordered remedy, “to leave settled expectations open for ever afterwards to disturbance by accident or by contrivance”.¹⁴

This kind of limitation legislation is classified as substantive.

5. THE RELEVANCE OF THE PROCEDURAL/SUBSTANTIVE DISTINCTION

The procedural/substantive differentiation has a number of important consequences. It is relevant to the following issues:

(a) Pleading and proof

If the limitation law is procedural, the onus is on a defendant to plead that an action is statute-barred. If the defendant does not plead the Act the action may proceed even though it is out of time. In Queensland, for example, the Rules of the Supreme Court require a defendant to plead the expiration of a procedural limitation period in order to rely on it as a defence.¹⁵ If the defence is not pleaded, a court will not, of its own motion, refuse a remedy, even though it is obvious that the proceedings have been commenced out of time.¹⁶

There is some difference of opinion as to who bears the onus of proof once the limitation issue has been raised. Windeyer J in *Australian Iron & Steel Ltd v*

¹³ Ontario Law Reform Commission, *Report on Limitation of Actions* (1969) 126-127.

¹⁴ New South Wales Law Reform Commission, Report No 3: *Report on the Limitation of Actions* (October 1967) para 14.

¹⁵ RSC O 22 r 14.

¹⁶ *Commonwealth of Australia v Mewett* (1995) 59 FCR 391 per Lindgren J at 419.

Hoogland,¹⁷ relying on the judgment of Dixon J in *Cohen v Cohen*¹⁸ and the cases cited therein, indicated (obiter) that the burden of proving that an action is within time would lie with the plaintiff. However, the Full Court of the Supreme Court of Victoria has held that, once the issue has been raised, if the accruing of the cause of action in time is no part of the cause of action, the plaintiff need not allege or prove it.¹⁹

On the other hand, if the limitation period is substantive, compliance is an essential element of the plaintiff's case and it should be for the plaintiff to plead compliance and to establish that the action was brought within time. However, this position can be reversed by statute. In New South Wales, for example, the defendant is required to plead the limitation defence,²⁰ even though the legislation provides that expiration of the limitation period extinguishes the right on which the claim is based²¹ and is therefore substantive.²² The requirement has been held not to change the substantive nature of the limitation periods provided by the Act.²³

(b) Waiver

If the limitation period is procedural, the defendant may waive the right to rely on the limitation defence.²⁴

However, if the limitation period is substantive, it would appear to be a precondition to the existence of the court's jurisdiction that the action be brought within time. Accordingly, the expiration of the limitation period would be incapable of being waived by the defendant.²⁵ It has been observed that there is a noticeable lack of authority as to whether the expiration of a limitation period which is substantive in character is capable of being ignored by the court.²⁶

17 (1962) 108 CLR 471.

18 (1929) 42 CLR 91.

19 *Pullen v Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27.

20 *Limitation Act 1969* (NSW) s 68A.

21 *Id.*, ss 63-68.

22 See pp 7-8 above.

23 *Commonwealth of Australia v Dixon* (1988) 13 NSWLR 601 per Hope JA at 609.

24 *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 per Mason CJ at 405-406.

25 *Id.*, per Brennan J at 425-426.

26 Australian Torts Reporter, Vol 1 at 10,103.

(c) Estoppel

A defendant may be estopped from relying on a procedural limitation defence. For example, the defendant's conduct may lead the plaintiff to assume that the defendant will not rely on a limitation defence, and to act, or refrain from acting in relation to the claim, on the basis of that assumption.²⁷

However, if the court's jurisdiction is conditional upon the commencement of proceedings within a specified time (that is, if the limitation period is substantive) and a defendant cannot waive the time requirement, it may also be that the defendant cannot be estopped from relying on a limitation defence.

(d) Extension of the limitation period

An application for extension of the limitation period may be made after the original limitation period has actually expired. This may happen if, for example, the plaintiff has suffered latent injury which does not manifest itself until after the expiration of the limitation period.

Expiration of a procedural limitation period does not pose a problem: the cause of action continues to exist and it is only the remedy which is barred.²⁸ Extension of the limitation period therefore does not involve the revival of a right which has been extinguished.

However, if the limitation period is substantive rather than merely procedural, expiration of the limitation period extinguishes the underlying right with the result that there is no remaining right to be enforced even if the period is extended. The New South Wales Act deals with this situation by providing that, where a court makes an order extending a limitation period, the prior expiration of the limitation period has no effect for the purposes of the Act.²⁹ It has been held that the effect of the legislative scheme in New South Wales is to postpone the absolute extinguishment of the right of action until the expiration of the period in which application may be made for an extension of time to commence proceedings or until the defendant pleads extinguishment, whichever is later.³⁰

²⁷ See for example *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394.

²⁸ See *Reeves v Thomas Borthwick and Sons* (unrept, Demack J, Supreme Court of Queensland, 16 August 1996), where it was held that, since the underlying right survived the expiration of the limitation period and was not extinguished by the refusal of an application for an extension of time, a second application could be made provided that the requirements of the Act were satisfied.

²⁹ *Limitation Act 1969* (NSW) s 61.

³⁰ *Commonwealth of Australia v Mewett* (1995) 59 FCR 391 per Cooper J at 403 and Lindgren J at 421.

(e) Choice of law rules

In disputes involving interjurisdictional elements, the court determining the dispute will apply its own procedural law, but will apply the substantive law which governs the dispute according to the principles of private international law. As a result, there has been extensive litigation in relation to the classification of potentially applicable limitation law.

The question of choice of law rules has now been dealt with by a co-operative approach involving all Australian jurisdictions. Each State and Territory agreed to enact legislation providing that, if the substantive law of another Australian jurisdiction governs a claim before a court within the enacting jurisdiction, a limitation law of that other jurisdiction is to be regarded as part of that jurisdiction's substantive law and applied accordingly.³¹

6. ARGUMENTS FOR AND AGAINST THE DISTINCTION

The designation as procedural of limitation statutes which bar the remedy but do not extinguish the underlying right has not been without criticism. Two members of the High Court of Australia have expressed the view that the existence and extent of a remedy are commonly accepted as an incident and measure of a right and that the unavailability of a remedy will, in most cases, be far more significant than the theoretical persistence of the underlying right. Moreover, the effect of the expiration of a limitation period is to confer a right on a defendant which, if exercised, has important substantive consequences - namely, allowing the defendant to plead the limitation period as an absolute defence.³²

Proponents of the view that limitation law should be substantive rather than procedural have emphasised that, in practical terms, the distinction is of little effect. The New South Wales Law Reform Commission concluded that:³³

³¹ *Limitation Act 1985* (ACT) s 5; *Choice of Law (Limitation Periods) Act 1993* (NSW) s 5, *Limitation Act 1969* (NSW) s 78(2); *Choice of Law (Limitation Periods) Act 1994* (NT) s 5; *Choice of Law (Limitation Periods) Act 1996* (Qld) s 5, *Limitation of Actions Act 1974* (Qld) s 43A(2); *Limitation of Actions Act 1936* (SA) s 38A; *Limitation Act 1974* (Tas) s 32C; *Choice of Law (Limitation Periods) Act 1993* (Vic) s 5; *Choice of Law (Limitation Periods) Act 1994* (WA) s 5.

³² See *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 per Mason CJ and Deane J. However, these comments were made in the context of a case involving choice of law rules and the question of the classification of limitation legislation for the purpose of choice of law rules is now the subject of legislation. See note 31 above.

³³ New South Wales Law Reform Commission, Report No 3: *Report on the Limitation of Actions* (October 1967) para 323.

... it is a useful reform to extinguish the right when the cause of action for its enforcement is barred and thus abolish a number of complicated rules of law which have little practical importance but stand merely as an occasional embarrassment to the student, the lawyer and the citizen.

However, as already noted, a number of important consequences flow from the classification of limitation legislation.³⁴ Although the recommendations of the New South Wales Law Reform Commission were implemented by the *Limitation Act 1969* (NSW), no other Australian jurisdiction has followed suit. More recently the New Zealand Law Commission and the Law Reform Commission of Western Australia have recommended against such a change.

The New Zealand Commission expressed the view that limitation legislation should be generally directed to limitation defences against the seeking of a court remedy, and only incidentally to matters of right and title.³⁵ The Western Australian Commission endorsed this approach and noted that it is consistent with recent developments in limitation law in Canada.³⁶ It recommended that the running of a period of limitation should continue to bar the remedy and not the right.³⁷ The Commission observed that:³⁸

This will preserve the important principle that a defendant may choose not to rely on a limitation defence and instead defend the action on other grounds. In such a case the plaintiff's action can proceed even though the limitation period has expired, and if the requirements for estoppel are satisfied the defendant would be prevented from reverting to his strict legal rights and relying on the Limitation Act.

7. THE QUEENSLAND POSITION

Queensland limitation legislation follows the traditional pattern. The *Limitation of Actions Act 1974* (Qld) is generally procedural: that is, it operates to bar the remedy but not to extinguish the right. There are, however, two exceptions to this general proposition. First, the right or title of the plaintiff is extinguished if an action for the recovery of land (including a redemption action) is not brought within the relevant

³⁴ See pp 8-11 above.

³⁵ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 102-103.

³⁶ *Limitations Act 1996* (Alberta).

³⁷ However, the Commission's general recommendation did not apply to actions for the recovery of land.

³⁸ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 191.

limitation period.³⁹ Similarly, in certain circumstances, expiration of the limitation period for an action to recover chattels extinguishes the plaintiff's title to the chattels.⁴⁰

8. THE COMMISSION'S PRELIMINARY VIEW

This Commission has considered whether there should be any change to the *Limitation of Actions Act 1974* (Qld) to alter the nature and classification of the provisions of that Act imposing time limits for bringing civil actions. The Commission's preliminary view, in light of the factors discussed on pages 8-11 above, is that there should not be such a change. However, rather than make a preliminary recommendation, the Commission wishes to give further consideration to the matter in the light of submissions it receives.

The Commission invites submissions on the following issues:

- **Are there any problems which arise from the procedural nature of Queensland limitation law?**
- **Should Queensland limitation law continue to merely bar the remedy, or should it extinguish the underlying right?**
- **If it should continue to merely bar the remedy, should the existing exceptions to the general rule be continued?**
- **What are the advantages or disadvantages resulting from the change to the nature of New South Wales limitation law?**

³⁹ *Limitation of Actions Act 1974* (Qld) s 24(1).

⁴⁰ *Id.*, s 12(2).

CHAPTER 3

THE LAW IN OTHER AUSTRALIAN JURISDICTIONS

1. INTRODUCTION

All States and Territories in Australia have limitation legislation which prescribes the maximum time in which actions may be brought. Except in the case where the running of time is suspended, or an application is successfully made for an extension of time in which to commence an action, the effect in all jurisdictions is to “statute bar” proceedings commenced outside the prescribed period. In New South Wales, this operates substantively to extinguish the cause of action. In all other jurisdictions, the cause of action remains, but may not be enforced through the courts.

Generally, actions in tort and on simple contracts must be brought within 6 years, except in the Northern Territory where actions must be commenced within 3 years. There are exceptions to these rules which are explored below.

2. NEW SOUTH WALES

(a) General

Actions for the enforcement of simple contracts⁴¹ or for account must be commenced within six years.⁴² For a contract under seal the period is twelve years.⁴³ Actions for tortious claims must generally be commenced within six years.⁴⁴ However, personal injury actions accruing on or after 1 September 1990 must be commenced within three years.⁴⁵ Actions for the recovery of land must be commenced within twelve years,⁴⁶ except for recovery of crown land where the prescribed period is thirty years.⁴⁷

⁴¹ *Limitation Act 1969* (NSW) s 14 (1)(a).

⁴² *Id.*, s 15.

⁴³ *Id.*, s 16.

⁴⁴ *Id.*, s 14 (1)(b).

⁴⁵ *Id.*, s 18A.

⁴⁶ *Id.*, s 27(2).

⁴⁷ *Id.*, s 27(1).

(b) Extension provisions

There are three sets of provisions in the New South Wales limitation legislation governing extension of the limitation period. One set of provisions applies to causes of action for personal injury accruing prior to 1 September 1990.⁴⁸ Another set applies to actions for personal injury accruing on or after 1 September 1990.⁴⁹ The third set deals with actions for personal injury whenever arising, provided there was latent injury involved.⁵⁰

(i) Actions for personal injury accruing before 1 September 1990

In relation to the first set of provisions, an extension of time may be granted provided that a material fact of a decisive character relating to the cause of action was not within the plaintiff's means of knowledge until after the commencement of the final year of the limitation period.⁵¹ There is authority for the view that, if the fact relied upon to justify the grant of an extension was not within the plaintiff's means of knowledge at that time, it is irrelevant whether the fact was, or was not, within the plaintiff's means of knowledge by the time the application for extension was made.⁵²

(ii) Actions for personal injury accruing on or after 1 September 1990

In relation to actions accruing on or after 1 September 1990, a court may extend the limitation period for a period not exceeding five years where it is "just and reasonable" to do so.⁵³ In assessing whether it is just and reasonable, the court must have regard to:

- the length of and reasons for the delay;
- the extent to which, having regard to the delay, there is or may be prejudice to the defendant by reason that evidence that would have been available if the proceedings had been commenced within the limitation period is no longer available;
- the time at which the nature and extent of the injury became known to

⁴⁸ Id, ss 57-60.

⁴⁹ Id, ss 60A-60E.

⁵⁰ Id, ss 60F-60J.

⁵¹ Id, ss 58(2), 59(2).

⁵² *Broken Hill Pty Co Ltd v Waugh* (1988) 14 NSWLR 360 at 370.

⁵³ *Limitation Act 1969* (NSW) ss 60C, 60D.

the plaintiff;

- the time at which the plaintiff became aware of a connection between the injury and the defendant's act or omission;
- any conduct of the defendant which induced the plaintiff to delay bringing the action;
- the steps (if any) taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice the plaintiff may have received;
- the extent of the plaintiff's injury or loss.⁵⁴

(iii) Actions in which the personal injury is latent

The court may extend the limitation period indefinitely if the plaintiff can show that he or she was unaware of the fact, nature, extent or cause of the injury, disease or impairment before the expiration of the limitation period.⁵⁵ The plaintiff must make an application to extend the period of limitation within three years of when the plaintiff became aware (or ought to have become aware) of the fact, nature, extent or cause of the injury.⁵⁶ These requirements are mandatory and not directory.⁵⁷ The test as to whether a person did not know that personal injury had occurred, or was unaware of the nature and extent of the personal injury or the connection between the personal injury and the defendant's acts or omissions has been held to be a subjective and not an objective test.⁵⁸

Notwithstanding the above extension provisions, the maximum time in which an action may be commenced in New South Wales is thirty years.⁵⁹

⁵⁴ Id, s 60E(1).

⁵⁵ Id, s 60G(2), 60H(2); *Electricity Commission of New South Wales v Plumb* (1992) 27 NSWLR 364 per Handly JA at 372.

⁵⁶ *Limitation Act 1969* (NSW) s 60I(1)(b).

⁵⁷ *Dedousis v The Water Board* (1994) 181 CLR 171.

⁵⁸ *Harris v Commercial Minerals Ltd* (1996) 186 CLR 1.

⁵⁹ *Limitation Act 1969* (NSW) s 51.

3. VICTORIA

(a) General

Actions for the enforcement of simple contracts⁶⁰ or for account must be commenced within six years.⁶¹ For a contract under seal the limitation period is fifteen years.⁶² Actions for tortious claims must be commenced within six years,⁶³ except actions for personal injuries consisting of a disease or disorder contracted by any person. In these cases, the limitation period is still six years, but time does not begin to run until the date on which the plaintiff first knew that he or she had suffered the injury and that the injury was caused by the defendant.⁶⁴ Actions for the recovery of land must be commenced within fifteen years,⁶⁵ except actions for recovery of crown land where no limitation period applies.⁶⁶ There is no limitation period prescribed in respect of land owned by the Public Transport Corporation.⁶⁷

(b) Extension provisions

A court may extend the limitation period for an indefinite period, but only in respect of actions which include damages for personal injuries. The Court may grant such an extension where it is “just and reasonable so to do”.⁶⁸ There is no requirement as to ignorance of a material fact, and an applicant is not required to provide evidence establishing a prima facie case.⁶⁹ The matters to be considered in deciding whether to grant an extension of time include:⁷⁰

- the length of and reasons for the delay on the part of the plaintiff;

⁶⁰ *Limitation of Actions Act 1958 (Vic)* s 5(1)(a).

⁶¹ *Id.*, s 5(2).

⁶² *Id.*, s 5(3).

⁶³ *Id.*, s 5(1)(a).

⁶⁴ *Id.*, s 5(1A).

⁶⁵ *Id.*, s 8.

⁶⁶ *Id.*, s 7.

⁶⁷ *Id.*, s 7(A).

⁶⁸ *Id.*, s 23A(2).

⁶⁹ *Taylor v Western General Hospital* [1986] VR 250.

⁷⁰ *Limitation of Actions Act 1958 (Vic)* s 23A(2).

- the extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;
- 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 of any disability of the plaintiff arising on or after the date the cause of action accrued;
- the extent to which the plaintiff acted promptly and reasonably once he or she knew the act or omission of the defendant, to which the injury 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 the plaintiff may have received.

4. AUSTRALIAN CAPITAL TERRITORY

(a) General

Actions for the enforcement of simple contracts⁷¹ or for account must be commenced within six years.⁷² For a contract under seal the period is twelve years.⁷³ Actions for tortious claims must be commenced within six years.⁷⁴ There is no limitation period prescribed for claims relating to land.⁷⁵

(b) Extension provisions

The extension provisions are similar to those in the Victorian legislation. They apply only to actions for personal injury. The only additional factor which must be considered by the court in deciding whether to allow an application for extension is

⁷¹ *Limitation Act 1985 (ACT)* s 11.

⁷² *Id.*, s 12.

⁷³ *Id.*, s 13.

⁷⁴ *Id.*, s 11.

⁷⁵ *Id.*, s 5(a).

the conduct of the defendant after the cause of action accrued to the plaintiff.⁷⁶

5. SOUTH AUSTRALIA

(a) General

Actions for the enforcement of simple contracts⁷⁷ or for account must be commenced within six years.⁷⁸ For a contract under seal the period is fifteen years.⁷⁹ Actions for tortious claims must be commenced within six years,⁸⁰ except for actions for personal injuries where the applicable limit is three years.⁸¹ Actions for the recovery of land must be commenced within fifteen years.⁸²

(b) Extension provisions

The court may extend the time for:

- instituting an action;
- doing any act or taking any step in an action;
- doing any act or taking any step with a view to instituting an action.⁸³

An extension of time may be granted only if, in all the circumstances, it is just to do so,⁸⁴ and provided that one of two circumstances is met.

The court must be satisfied that either:

- facts material to the plaintiff's case were not ascertained by him or her until

⁷⁶ Id, s 36.

⁷⁷ *Limitation of Actions Act 1936 (SA)* s 35(a).

⁷⁸ Id, s 35(b).

⁷⁹ Id, s 34.

⁸⁰ Id, s 35(c).

⁸¹ Id, s 36(1).

⁸² Id, s 4.

⁸³ Id, s 48(1).

⁸⁴ Id, s 48(3).

some point of time occurring twelve months before the expiration of the limitation period or occurring after the expiration of that period and the action was commenced within twelve months after the ascertainment of those facts by the plaintiff;⁸⁵ or

- the plaintiff's failure to institute an action within the limitation period resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of the representations or conduct and any other relevant circumstances.⁸⁶

The High Court of Australia considered the meaning of "facts material to the plaintiff's case" in *Sola Optical Australia Pty Ltd v Mills*.⁸⁷ It held that a fact does not need to have a bearing on a plaintiff's decision to commence proceedings in order to be "material". The Court held that a fact is material to a plaintiff's case "if it is both relevant to the issues to be proved if the plaintiff is to succeed in obtaining an award of damages sufficient to justify bringing the action and is of sufficient importance to be likely to have a bearing on the case".⁸⁸

As to whether a court would consider it just to extend the limitation period, Bray CJ has suggested that there are five paramount matters to be considered.⁸⁹

- the length of the delay;
- the explanation for the delay;
- the hardship to the plaintiff if the action is dismissed and the cause of action left statute-barred;
- the prejudice to the defendant if the action is allowed to proceed notwithstanding the delay;
- the conduct of the defendant in the litigation.

Two additional factors were considered relevant in *Lovett v Le Gall*.⁹⁰

⁸⁵ Id, s 48(3)(b)(i).

⁸⁶ Id, s 48(3)(b)(ii).

⁸⁷ (1987) 163 CLR 628.

⁸⁸ Id, 636.

⁸⁹ *Ulowski v Miller* [1968] SASR 277.

⁹⁰ (1975) 10 SASR 479.

- the conduct of the plaintiff; and
- the nature, importance and circumstances surrounding the ascertainment of the new material facts.

There is a special provision in South Australia allowing a person bringing an action for which the limitation period is less than twelve months to bring that action up to twelve months from the time when the cause of action arose.⁹¹

6. NORTHERN TERRITORY

(a) General

Actions for the enforcement of simple contracts⁹² or for account must be commenced within three years.⁹³ For a contract under seal the period is twelve years.⁹⁴ Actions for tortious claims must be commenced within three years.⁹⁵ There is no limitation period in respect of claims for land.

(b) Extension provisions

The extension provisions in the Northern Territory are very similar to those in the South Australian legislation. In addition to the factors declared in South Australia to be paramount in deciding whether it is just to grant an extension, Kearney J in *Forbes v Davies*⁹⁶ suggested that a court should also consider the extent to which, having regard to the delay, the evidence is likely to be less cogent than if the action had been brought within the time allowed.

⁹¹ *Limitation of Actions Act 1936* (SA) s 47(1). There are exceptions to this rule outlined in s 47(2).

⁹² *Limitation Act 1981* (NT) s 12(1)(a).

⁹³ *Id.*, s 13.

⁹⁴ *Id.*, s 14(1).

⁹⁵ *Id.*, s 12(1)(b).

⁹⁶ (1994) *Aust Torts Reps* 61, 392 (81-279).

7. TASMANIA

(a) General

Actions for the enforcement of simple contracts⁹⁷ or for account must be commenced within six years.⁹⁸ For a contract under seal the limitation period is twelve years.⁹⁹ Actions for tortious claims must be commenced within six years,¹⁰⁰ except for actions for personal injury, which must be commenced within three years.¹⁰¹ Actions for the recovery of land must be commenced within twelve years,¹⁰² except for recovery of crown land where the prescribed period is thirty years.¹⁰³

(b) Extension provisions

A court may extend the time for bringing a personal injuries action or a dependency claim for such period as the court thinks necessary, provided the extension does not exceed six years from when the cause of action accrued.¹⁰⁴ The court must be satisfied that, in all the circumstances, it is just and reasonable to permit the extension of time.¹⁰⁵ In *Marr v Green*,¹⁰⁶ Green CJ suggested that the primary enquiry should be directed to the specific issue of the reason for the applicant's failure to commence proceedings in time, rather than the general issue of how diligently the claim was pursued during that period.

⁹⁷ *Limitation Act 1974* (Tas) s 4(1)(a).

⁹⁸ *Id.*, s 4(2).

⁹⁹ *Id.*, s 4(3).

¹⁰⁰ *Id.*, s 4(1)(a).

¹⁰¹ *Id.*, s 5(1).

¹⁰² *Id.*, s 10(2).

¹⁰³ *Id.*, s 10(1).

¹⁰⁴ *Id.*, s 5(3).

¹⁰⁵ *Id.*, s 5(3).

¹⁰⁶ (1994) *Aust Torts Reps* 61, 374 (81-277).

8. WESTERN AUSTRALIA

(a) General

Actions for the enforcement of simple contracts¹⁰⁷ or for account must be commenced within six years.¹⁰⁸ For a contract under seal the limitation period is twenty years.¹⁰⁹ Actions for tortious claims must be commenced within six years.¹¹⁰ Actions for the recovery of land must be commenced within twelve years.¹¹¹

(b) Extension provisions

The only type of claim for which the limitation period may be extended is an action in respect of personal injury or death caused by the inhalation of asbestos. In this case, the limitation period begins to run from the date when the plaintiff knew, or might reasonably have been able to ascertain, that he or she was suffering from a significant injury which was due, in whole or in part, to the acts or omissions of an identified person.¹¹²

9. SUSPENSION OF THE LIMITATION PERIOD¹¹³

The legislation in all jurisdictions provides that, if the plaintiff is suffering from a disability, then the limitation period is suspended. The principal difference between the various provisions relates to whether the disability must exist at the time of the accrual of the cause of action, or whether a supervening event can postpone the operation of the legislation. The former is the case in Tasmania, Victoria and Western Australia. In all other jurisdictions, the latter approach applies.

In all jurisdictions, the limitation period will be suspended if the plaintiff is a minor, or is suffering from a mental illness which substantially affects the plaintiff's ability to

¹⁰⁷ *Limitation Act 1935* (WA) s 38(1)(c)(v).

¹⁰⁸ *Id.*, s 38(1)(c)(ii), (iii).

¹⁰⁹ *Id.*, s 38(1)(e)(i).

¹¹⁰ *Id.*, s 38(1)(c)(vi).

¹¹¹ *Id.*, s 4.

¹¹² *Id.*, s 38A(6), (9).

¹¹³ See generally RD Balkin and JLR Davis, *Law of Torts* (2nd ed 1996) 812-814.

manage his or her own affairs.¹¹⁴ In the Northern Territory, the Australian Capital Territory and New South Wales, the fact that the plaintiff is physically impaired may also suspend the limitation period.¹¹⁵ Undergoing a term of imprisonment will, in New South Wales and the Northern Territory,¹¹⁶ suspend the operation of the limitation legislation. Finally, in New South Wales, Victoria and the Australian Capital Territory, the fact that a plaintiff is engaged in war will suspend the running of time.¹¹⁷

In all jurisdictions except South Australia and Western Australia, time may be postponed if:

- the plaintiff's action is based upon the fraud of the defendant or of an agent of the defendant; and
- facts relevant to the right of action were deliberately concealed from the plaintiff.

In these circumstances, time does not commence to run until the plaintiff has, or with reasonable diligence could have, discovered the fraud or concealment.¹¹⁸

¹¹⁴ *Limitation Act 1985* (ACT) s 8(3)(b); *Limitation Act 1969* (NSW) s 11(3); *Limitation Act 1981* (NT) s 4(1); *Limitation of Actions Act 1936* (SA) s 45(2); *Limitation Act 1974* (Tas) s 2(2), 3; *Limitation of Actions Act 1958* (Vic) s 3(2), (3); *Limitation Act 1935* (WA) s 40.

¹¹⁵ *Limitation Act 1985* (ACT) s 8(3)(b); *Limitation Act 1969* (NSW) s 11(3)(b); *Limitation Act 1981* (NT) s 4(1).

¹¹⁶ *Limitation Act 1969* (NSW) s 11(3)(b)(ii); *Limitation Act 1981* (NT) s 4(1).

¹¹⁷ *Limitation Act 1985* (ACT) s 8(3)(b)(ii); *Limitation Act 1969* (NSW) s 11(3)(b)(iii), *Limitation of Actions Act 1958* (Vic) s 23(2).

¹¹⁸ *Limitation Act 1985* (ACT) s 33; *Limitation Act 1969* (NSW) s 55; *Limitation Act 1981* (NT) s 42; *Limitation of Actions Act 1936* (SA) s 25; *Limitation Act 1974* (Tas) s 32; *Limitation of Actions Act 1958* (Vic) s 27; *Limitation Act 1935* (WA) s 27.

CHAPTER 4

THE *LIMITATION OF ACTIONS ACT 1974* (QLD)

1. EXISTING LIMITATION PERIODS

The *Limitation of Actions Act 1974* (Qld) (the Act) sets out the general limitation periods within which various kinds of civil actions must be commenced. However, the Act does not apply to actions which are specifically excluded by the Act itself¹¹⁹ or to actions for which a limitation period is fixed by some other Act.¹²⁰

The Act provides a number of different limitation periods:

- | | | |
|--------------|---|--|
| Twelve years | ■ | an action to recover land ¹²¹ |
| | ■ | an action to recover money secured by a mortgage or other charge on property, or to recover proceeds of the sale of land ¹²² |
| | ■ | a foreclosure action in respect of mortgaged personal property ¹²³ |
| | ■ | 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 ¹²⁴ |
| | ■ | an action upon a specialty ¹²⁵ |
| | ■ | an action upon a judgment ¹²⁶ |
| Six years | ■ | an action founded on simple contract, quasi-contract or tort, where the damages claimed do not consist of or |

¹¹⁹ See note 1 above.

¹²⁰ See note 2 above.

¹²¹ *Limitation of Actions Act 1974* (Qld) s 13.

¹²² *Id*, s 26(1).

¹²³ *Id*, s 26(2).

¹²⁴ *Id*, s 28.

¹²⁵ *Id*, s 10(3).

¹²⁶ *Id*, s 10(4).

- include damages in respect of personal injury¹²⁷
- an action to enforce a recognisance¹²⁸ or an award where the agreement to arbitrate is not under seal¹²⁹
 - an action to recover a sum recoverable under an enactment, other than a penalty or forfeiture¹³⁰
 - an action for an account¹³¹
 - an action to recover arrears of rent¹³²
 - an action to recover arrears of interest due under a mortgage or other charge¹³³
 - 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 fraud¹³⁴
- 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 person¹³⁵
- Two years
- an action to recover a penalty or forfeiture.¹³⁶

¹²⁷ Id, s 10 (1)(a).

¹²⁸ Id, s 10 (1)(b).

¹²⁹ Id, s 10 (1)(c).

¹³⁰ Id, s 10 (1)(d).

¹³¹ Id, s 10(2).

¹³² Id, s 25.

¹³³ Id, s 26(5).

¹³⁴ Id, s 27(2).

¹³⁵ Id, s 11.

¹³⁶ Id, s 10(5).

In an action for contribution between joint tortfeasors, the limitation period is the lesser of:¹³⁷

- 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.

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.¹³⁸

2. 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.¹³⁹

The Act specifies the dates on which certain actions are deemed to accrue.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² If the cause of action is a tort which requires proof of damage, such as negligence or nuisance, the limitation period

¹³⁷ Id, s 40.

¹³⁸ Id, s 27(1).

¹³⁹ *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.

¹⁴⁰ See for example *Limitation of Actions Act 1974* (Qld) ss 14-19.

¹⁴¹ 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.

¹⁴² *Howell v Young* (1826) 5 B & C 259, 108 ER 97.

begins when the damage occurs,¹⁴³ even if the damage is not immediately obvious to the plaintiff.¹⁴⁴ 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.¹⁴⁵

3. EXTENSION OF THE LIMITATION PERIOD

Part 3 of the *Limitation of Actions Act 1974* (Qld) includes several provisions which allow plaintiffs additional time to bring their actions in certain circumstances.

(a) 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.¹⁴⁶

(b) 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.¹⁴⁷ 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.¹⁴⁸

(c) Extending the limitation period

A plaintiff who is claiming damages for personal injury in an action for negligence,

¹⁴³ See for example *Davie v New Merton Board Mills Ltd* [1959] AC 604.

¹⁴⁴ 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.

¹⁴⁵ See for example *Dawson v Commonwealth* (1994) 12 WAR 29.

¹⁴⁶ See for example *Limitation of Actions Act 1974* (Qld) s 35(1).

¹⁴⁷ *Id.*, s 29.

¹⁴⁸ *Id.*, s 38.

trespass, nuisance or breach of duty¹⁴⁹ may apply to have the limitation period extended.¹⁵⁰ 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:¹⁵¹

- 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:¹⁵²

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

¹⁴⁹ Whether the duty is imposed by contract or by statute or otherwise.

¹⁵⁰ *Limitation of Actions Act 1974 (Qld)* s 31.

¹⁵¹ *Id.*, s 30(a).

¹⁵² *Id.*, s 30(b).

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.¹⁵³

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,¹⁵⁴ 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.¹⁵⁵

¹⁵³ 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) 186 CLR 541 per Dawson J at 544 and McHugh J at 554.

¹⁵⁴ *Limitation of Actions Act 1974* (Qld) s 31.

¹⁵⁵ *Id.*, s 32.

CHAPTER 5

PROBLEMS WITH THE EXISTING LAW

In the Information Paper,¹⁵⁶ the Commission identified a number of problems with the existing provisions of the *Limitation of Actions Act 1974* (Qld). These problems are discussed below, in the light of comments received in response to the paper.

1. LATENT DAMAGE

The limitation period for an action generally commences when the cause of action accrues.¹⁵⁷ However, in some cases a potential plaintiff may not have the opportunity to realise that the cause of action has accrued. For example, the limitation period in an action for breach of contract commences when the breach occurs.¹⁵⁸ However, it may be some time before the plaintiff becomes aware that the breach has taken place. In such a situation, the limitation period will be running, even though the plaintiff is unaware of what has happened. Similarly, in an action for negligence or nuisance, where the limitation period commences when the plaintiff incurs loss or damage, the plaintiff may not be aware that he or she has been injured and that the limitation period is therefore running.¹⁵⁹ Some kinds of damage are not immediately apparent. If the damage remains hidden for a considerable length of time, the limitation period may have even expired before the plaintiff realises what has occurred.

One of the submissions received by the Commission in response to the Information Paper expressed the view that “probably the most important consideration is whether, by reason of the time that has elapsed, a fair trial is possible” and concluded that “some significant basis would need to be found to justify an expansion of the existing limitation regime”.¹⁶⁰ However, the importance of ensuring that the interests of potential defendants are not prejudiced by the passage of time must be balanced against the need to ensure that potential plaintiffs are not denied the possibility of bringing an action because they have not had the opportunity to become aware of relevant facts.

In some situations, the *Limitation of Actions Act 1974* (Qld) allows an action to be

¹⁵⁶ Queensland Law Reform Commission, Working Paper No 49: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997) 10-13.

¹⁵⁷ See pp 27-28 above.

¹⁵⁸ See note 141 above.

¹⁵⁹ See notes s 143, 144 above.

¹⁶⁰ Submission 12.

brought after the expiration of the limitation period if the loss or damage complained of by the plaintiff consists of or includes personal injury.¹⁶¹ The plaintiff may apply to the relevant court to have the limitation period extended. The criteria which the plaintiff must satisfy are set out on page 29 of this Discussion Paper. They include that a material fact of a decisive character 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. The limitation period may be extended to a year after the date when the plaintiff became aware of the material fact. This means that the plaintiff must apply for an extension of the limitation period within a year of becoming aware of the material fact.

Apart from this requirement, there is no ultimate time limit after which proceedings may not be commenced. This is of particular relevance in some kinds of case - for example, those involving claims for insidious diseases such as asbestosis or mesothelioma, which have particularly long latency periods before they are detected and diagnosed, or for the cumulative effects of long-term exposure to toxic substances.

However, the granting of an extension of the limitation period is not automatic. The court's power to extend the limitation period is a discretionary one. Even though the plaintiff has met all the statutory conditions, the court is not obliged to grant an extension unless, in all the circumstances of the case, justice is best served by so doing.¹⁶²

The extension provisions are complex and extremely technical and have been a fertile source of litigation. Their drafting and difficulty of interpretation and application have been the subject of extensive judicial criticism. The English legislation from which they are derived - and which has since been repealed - was described as having "a strong claim to the distinction of being the worst drafted Act on the statute book".¹⁶³ Equivalent provisions in the New South Wales legislation - which have also been repealed - were criticised by the High Court of Australia for their "complexity and obscurity".¹⁶⁴ The New South Wales Law Reform Commission observed that "key terms in the statutory formula ... probably defy definition in such a way as to create real certainty about the operation of these provisions of the

¹⁶¹ *Limitation of Actions Act 1974* (Qld) ss 31, 32.

¹⁶² *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 per Dawson J at 544 and McHugh J at 554.

¹⁶³ *Smith v Central Asbestos Co Ltd* [1973] AC 518 per Lord Reid at 529.

¹⁶⁴ *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 per Murphy ACJ at 238. See also per Deane J at 250 and per Dawson J, with whom Brennan J agreed, at 253.

legislation”.¹⁶⁵ More recently, the present Chief Justice of Queensland has commented on their “ambiguity in the expression of concepts”.¹⁶⁶

Further, the extension provisions apply only where the loss or damage incurred by the plaintiff consists of or includes personal injury. There is no mechanism for extending the limitation period where the plaintiff claims to have suffered other kinds of injury - for example, property damage or economic loss. However, these 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. The restricted application of the extension provisions can lead to harsh results. One respondent to the Information Paper commented:¹⁶⁷

One aspect of the scheme of the Act that I have always found difficult to understand is why the extension provisions in section 31 of the Act are limited to personal injuries actions. It seems to me that if it is appropriate to allow an extension, or at least a discretion to extend, when a material fact of a decisive character becomes known to a plaintiff after the relevant time, then such extension ought to be available to plaintiffs in all classes of actions. I cannot see a reason for singling out personal injuries actions.

Two submissions commented on the extent to which courts have had to be “pro-active” and to rely on “judicial creativity” to create mechanisms to circumvent the possibly harsh consequences for potential plaintiffs of otherwise arbitrary time limits.¹⁶⁸

In some jurisdictions, courts have overcome the problem 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.¹⁶⁹ 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.¹⁷⁰ According to this approach, the cause of action does not accrue until the damage

¹⁶⁵ New South Wales Law Reform Commission, Report No 50: *Limitation of Actions for Personal Injury Claims* (October 1986) 19.

¹⁶⁶ *Wood v Glaxo Australia Pty Ltd* [1994] 2 Qd R 431 per Macrossan CJ at 436.

¹⁶⁷ Submission 14.

¹⁶⁸ Submissions 3, 9.

¹⁶⁹ 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).

¹⁷⁰ 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 CJ and Wilson J concurring.

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.¹⁷¹

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 and, in any event, the desirability of depending on judicial creativity is questionable. 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.

2. CATEGORISATION OF CLAIMS

Under the existing legislation, different kinds of actions are subject to different limitation periods.¹⁷² The limitation periods for different kinds of actions may also start to run at different times.¹⁷³ In order to determine the applicable limitation period, it is therefore necessary to identify the kind of action which is being brought in any particular case.

If the factual situation of the case gives rise to more than one cause of action, there may be more than one applicable limitation period. For example, it is generally recognised that liability in tort and contract can co-exist.¹⁷⁴ 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.

¹⁷¹ See for example *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514.

¹⁷² See pp 25-27 above.

¹⁷³ See pp 27-28 above.

¹⁷⁴ *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.

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.¹⁷⁵ This situation inevitably leads to argument about the appropriate classification of a claim.

A number of submissions commented on the need for a more uniform approach. One respondent noted:¹⁷⁶

There can be no doubt that the more limitation periods there are, the more difficult it is for any practitioner to advise their client, let alone for any individual to know his or her rights.

Another observed that:¹⁷⁷

There is very little rational unity to the range of limitation periods prescribed in the present legislation.

Another expressed the view that:¹⁷⁸

Many of the substantial limitation periods beyond three years provided for by the Act are more referable to “by-gone” days rather than the present era when commercial decisions as to conducting litigation are made much more promptly.

These submissions pointed to simplicity and greater certainty for both lawyers and clients as advantages of uniform limitation periods. A possible additional benefit may be a reduced risk of litigation against solicitors for failing to initiate action within the limitation period, leading in turn to a reduction of solicitors’ liability insurance premiums, which could be passed on to the consumers of legal services.¹⁷⁹

3. 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.

¹⁷⁵ See for example *Wright v Borzi* [1979] Qd R 179.

¹⁷⁶ Submission 13.

¹⁷⁷ Submission 3.

¹⁷⁸ Submission 21.

¹⁷⁹ *Ibid.*

The Queensland legislation attempts to overcome this problem by providing a number of different limitation periods for different causes of action.¹⁸⁰ The result of this approach is to make the scheme more complex:¹⁸¹

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.

One respondent to the Information Paper felt that changing the existing system would “bring an added dimension of difficulty to lay understanding of the limitations regime”. The respondent added that:¹⁸²

In any event, it is perhaps unrealistic to expect that ordinary litigants will have any real understanding of the limitation regime. Whilst in an ideal world one would expect the community to be familiar with such a basic area of the law, I doubt that the ordinary citizen has anything beyond the vaguest notion of limitation periods.

It is difficult to see, however, that making the legislative scheme less complex would create an “added dimension of difficulty”. And while it is no doubt true that many members of the community are unaware of the existence and implications of limitation periods, that fact does not justify a system which is so complicated that they would be unlikely to understand if they were aware.

4. LACK OF RELEVANCE TO POLICY OBJECTIVES

The object of limitations law is to encourage plaintiffs to commence proceedings within a reasonable time. However, a litigant may well be entitled to question the relevance of arguments about the classification of a claim to the question of whether or not the claim was brought in a timely fashion:¹⁸³

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.

¹⁸⁰ The existing limitation periods are set out on pp 25-27 above.

¹⁸¹ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 48.

¹⁸² Submission 12.

¹⁸³ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 25.

CHAPTER 6

COMMENCEMENT OF THE LIMITATION PERIOD

1. INTRODUCTION

The purpose of limitation legislation is to define the time limit within which proceedings must be commenced. The date on which the limitation period commences is of particular importance. In order for the system to work fairly and effectively, the commencement date must be both readily ascertainable and certain. It must also give the potential plaintiff sufficient time to obtain the information necessary to initiate the action.

2. EXISTING LEGISLATION

The *Limitation of Actions Act 1974* (Qld) 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.¹⁸⁴

The Act specifies the dates on which certain actions are deemed to accrue.¹⁸⁵ Otherwise, the time at which a cause of action accrues is determined by the common law. The decided cases provide different accrual dates for different kinds of actions. For example, in an action for breach of contract, the cause of action generally accrues at the date of the alleged breach.¹⁸⁶ If the cause of action is a tort which requires proof of damage, such as negligence or nuisance, the limitation period begins when the damage occurs.¹⁸⁷ 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.¹⁸⁸ The

¹⁸⁴ *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.

¹⁸⁵ See for example *Limitation of Actions Act 1974* (Qld) ss 14-19.

¹⁸⁶ 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.

¹⁸⁷ See for example *Davie v New Merton Board Mills Ltd* [1959] AC 604.

¹⁸⁸ See for example *Dawson v Commonwealth* (1994) 12 WAR 29.

common law rules relating to the accrual of particular causes of action are detailed and complex.¹⁸⁹

3. PROBLEMS WITH AN ACCRUAL BASED SYSTEM

(a) The date of accrual

The rule that a limitation period commences when the cause of action accrues creates a number of problems.

First, it is sometimes difficult to determine when the cause of action accrued. Although the law may be reasonably certain, its application to individual situations is not always so clear.

Negligence actions based on the effects of insidious diseases provide a good illustration. Mesothelioma, for example, is a fatal form of lung cancer, caused by the inhalation of particles of asbestos. Although the particles cause changes to the tissue of the lungs, these changes may not produce any immediate symptoms, and a significant period of time may pass before the malignancy develops. In a recent case, Derrington J of the Supreme Court of Queensland described the progress of the disease in this way:¹⁹⁰

The asbestos fibres move to the peripheral part of the lung where they impinge on the walls of the small airways and gradually move through the lung tissue until a large number reach the pleural surface. Once there they will irritate other pleura until through some unknown physiological process there is a malignant transformation in one or more mesothelial cells which form part of the pleura. It is at this point that the mesothelioma can be said to commence. Until then there are no physiological changes in that form or even precursors of it, but there may be physiological changes constituting an increased risk of the later development of it.

In that case, the plaintiff had, in the course of his employment, been exposed to long-term low doses of asbestos, starting in the 1950s. He did not consult his general practitioner about damage to his lungs until August 1995, when he complained of a cough and shortness of breath. Subsequent medical examinations revealed the presence of mesothelioma, which was diagnosed in November 1995. It was estimated that the final stage of malignant transformation was likely to have occurred some twelve to eighteen months prior to the diagnosis, that is between May and November 1994.

¹⁸⁹ For a summary of these rules see Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 71-82.

¹⁹⁰ *Martindale v Burrows* [1997] 1 Qd R 243 at 245.

The plaintiff sought a declaration that his cause of action accrued during that time, when the tissue changes brought about by the asbestos particles became malignant. As indicated above, a cause of action in negligence accrues when the loss or damage in question is incurred. The issue to be decided was therefore at what point in time the plaintiff's injury was sustained. In holding that the cause of action accrued when the ingestion of the asbestosis began to cause changes to the condition of the lungs, Derrington J said:¹⁹¹

Here, there was an ongoing established injury, imperceptible in its beginning and incremental nature, that has led to a cumulative result which was then perceptible and identifiable. In turn that has then proceeded to its further development, either of its own accord after ignition or by the further traumatic stimulus from the plaintiff's continuing ingestion of asbestos. The harm done to him in causing the changes to his body that would lead to such a result amounted to an injury.

...

It does not follow that if it is established that the condition has developed into mesothelioma, there will have been no relevant injury until the commencement of that development. The appearance of that condition establishes that the earlier morbid changes were indeed so serious as to be productive of mesothelioma at the later stage and were not merely potentially so. This means that the early changes did cause harm substantial enough to amount to injury at law.

On the other hand, the cause of action in such cases cannot arise until some actual injury has occurred. The potentiality of injury or harm is, by itself, insufficient to found a cause of action. Vulnerability to injury or the potential for harm does not constitute an injury.¹⁹² Accordingly, where inhalation of asbestos has led to pleural thickening of the lung which has caused no physical discomfort or disability and has only the potential for more serious developments, the physiological changes do not at that time constitute an injury because of the lack of any established harm.¹⁹³

There are other situations where it is equally difficult to pinpoint the date when the cause of action accrued. For example, a plaintiff may claim damages for personal injury for "nervous shock" resulting from the defendant's negligent behaviour. Damages of this kind are available only if the injury suffered by the plaintiff amounts to a recognised psychiatric condition.¹⁹⁴ However, a considerable period of time may elapse between the act which gives rise to the emotional trauma and the

¹⁹¹ Id, 245-246.

¹⁹² *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 per Mason CJ, Dawson, Gaudron and McHugh JJ at 526-527.

¹⁹³ *Battaglia v James Hardy & Co Pty Ltd* (unrept, Vincent J, Supreme Court of Victoria, 12 March 1987); *Papadopoulos v James Hardy & Co Pty Ltd* (unrept, Kaye J, Supreme Court of Victoria, 12 February 1988).

¹⁹⁴ *Mount Isa Mines v Pusey* (1970) 125 CLR 383; *Hinz v Berry* [1970] 2 QB 40; *McLoughlin v O'Brian* [1983] 1 AC 410.

development of a secondary reaction. The question thus arises as to whether the cause of action accrues at the time of the traumatic incident or at the time when the psychiatric illness manifests itself. It has been observed that:¹⁹⁵

The latter alternative may present problems in pinpointing the date of accrual of the cause of action similar to those apparent in the disease cases; yet, although there is no real authority on the point, rationally this must be the alternative the law adopts. If liability is dependent on proof of a recognisable psychiatric illness, the limitation period cannot begin to run until such damage is suffered.

(b) Co-existing causes of action

A second problem with the application of the accrual rule is that different causes of action accrue at different times. For example, an action for breach of contract accrues when the contract is breached, while a negligence action does not accrue until loss or damage has been sustained.¹⁹⁶ Since the same factual situation can give rise to more than one cause of action, there may be more than one accrual date. Even if the limitation periods for the different causes of action are the same length, if the causes of action accrue at different times then the limitation periods will expire at different times. In other words, where different causes of action co-exist, there may be more than one applicable limitation period. Where this happens, it is inevitable that disputes will arise about the correct categorisation of the claim and the relevant limitation period. The Alberta Institute of Law Research and Reform noted:¹⁹⁷

With respect to harm, there is no functional reason consistent with limitations policy to distinguish between claims based on contract, tort, statute or duties of care based on any of the three. However, the accrual rules do recognise these distinctions, and because the applicable limitation period for a claim under the limitations system at law begins with the accrual of the claim, so does that system.

(c) Unfairness

A third problem arises because the accrual rule may be unfair to either the plaintiff or the defendant, depending on the circumstances of the case. For example, in an action for negligence, the cause of action accrues when the loss or damage takes place.¹⁹⁸ However, because some kinds of damage are not immediately obvious, the limitation period may have commenced before the plaintiff has had an

¹⁹⁵ NJ Mullany and PR Handford, *Tort Liability for Psychiatric Damage* (1993) 262.

¹⁹⁶ See pp 27-28 above.

¹⁹⁷ Alberta Institute of Law Research and Reform, Report for the Discussion No 4: *Limitations* (September 1986) 92.

¹⁹⁸ See p 27 above.

opportunity to discover that the damage has been done. If the damage remains hidden for a considerable length of time, the limitation period may have actually expired before the plaintiff realises what has happened. This situation is clearly unfair to the plaintiff. On the other hand, the damage may not occur until a significant time after the defendant's allegedly negligent act. If the cause of action in a claim based on "nervous shock" does not accrue until the onset of a recognisable psychiatric illness, the defendant faces the prospect of liability for an indefinite period:¹⁹⁹

"Delayed shock" is not an uncommon phenomenon and post-traumatic stress disorder, for example, may not manifest itself for as long as 30 years after the traumatic event. When in such a case the specified limitation period is then added a situation arises which runs contrary to one of the central policy aims of limitation law - that actions should have a finite life and not surface to haunt defendants years after their tortious conduct.

(d) Development of new rules of categorisation

A fourth problem is caused by the sometimes harsh results of the application of the accrual rule, which may lead courts to develop new rules of categorisation to overcome that harshness. Examples of this situation are provided by cases involving claims for latent property damage where, to avoid denying a plaintiff the possibility of redress because the limitation period for an action based on negligence has expired, courts have categorised the plaintiff's claim as a claim for economic loss, for which the cause of action does not accrue until the loss has crystallised.²⁰⁰

4. SUBMISSIONS

In the Information Paper,²⁰¹ the Commission invited comments on the present provision that the limitation period commences when the cause of action accrues. Nine of the submissions specifically addressed this issue. Of these, only three were in favour of retaining a limitation system based on the accrual rule. One respondent expressed the view that there were not "pronounced difficulties" with the present rule, sufficient to replace the rule with a different kind of triggering mechanism.²⁰² The remaining submissions favoured a new approach. One respondent referred to

¹⁹⁹ NJ Mullany and PR Handford, *Tort Liability for Psychiatric Damage* (1993) 262.

²⁰⁰ See p 33 above.

²⁰¹ Queensland Law Reform Commission, Working Paper No 49: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997).

²⁰² Submission 21.

situations of latent injury.²⁰³ Another pointed to the injustice which could arise for plaintiffs, and observed:²⁰⁴

... many plaintiffs, particularly those bringing claims for property damage and economic loss, often find that they have no remedy at the same time that they find out that they have a need to bring a cause of action.

5. THE COMMISSION'S PRELIMINARY VIEW

It has been argued that the problems which arise as a result of the accrual rule raise serious doubts as to whether a limitation system based on such a rule can meet the objectives of ease of ascertainment, certainty and fairness:²⁰⁵

Unfortunately, the accrual rules are extremely complex, they are frequently uncertain, and they often result in a limitation period beginning at a time which is inappropriate insofar as the reasons for and the objectives of a limitation system are concerned.

The accrual rules often produce inappropriate results in terms of limitations policy because, in theory and usual practice, they are not based on that policy. ... When an accrual rule formulated in terms of general law policies is used to establish the commencement time for a limitation period, the period may begin either too soon or too late to satisfy the objectives of limitations policy.

The accrual rules are frequently uncertain because they change with the development of the general law. When that law evolves through judicial decisions, the process depends on specific cases. Cases arise randomly, in different jurisdictions, at different times, and with varying facts. ... Any accrual rule in a transitional stage will be relatively unpredictable.

Despite these problems, the accrual rule does offer some advantages. These advantages were summarised by the Law Reform Commission of Western Australia:²⁰⁶

- (1) It provides some certainty, in the sense that the rules as to when the cause of action accrues are generally well settled, having been developed by the common law over the last hundred years. However, it has to be acknowledged that the rules do not always make it possible to determine exactly when the cause of action accrued on the facts of a particular case.

²⁰³ Submission 8.

²⁰⁴ Submission 9.

²⁰⁵ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 88-89.

²⁰⁶ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 96-97.

- (2) It is logical, because the limitation period commences at the moment when the cause of action is complete. This is the point when it becomes possible, at least theoretically, to commence proceedings.
- (3) It has the ability to adapt to changing circumstances. It is apparent that in recent years Australian courts have moved towards the recognition of a rule that in most negligence cases the cause of action accrues when the damage becomes discoverable, a position already adopted in Canada and arguably in New Zealand. This has helped to overcome the problem that arises in latent damage cases: that the plaintiff may lose the right to sue before becoming aware of its existence.
- (4) It provides an element of uniformity between Australian jurisdictions. All other States and Territories, like Western Australia, adopt the principle of limitation periods running from the date of accrual. Though the length of the limitation period may differ, limitation periods for particular causes of action are often the same from one jurisdiction to another, and the adoption of the accrual rule adds an additional layer of uniformity.

However, the Western Australian Commission also recognised that there are important disadvantages inherent in the accrual rule.²⁰⁷

The question which arises for consideration is whether the advantages of the accrual rule sufficiently outweigh the disadvantages to warrant keeping the rule in either its existing or an amended form.

One possible reform would be to broaden the existing extension provisions to include claims for property damage and economic loss.²⁰⁸ Another would be to defer the commencement of the limitation period for claims which depend on proof of damage until the time when the damage becomes discoverable. However, changes of this kind would do little to reduce the complexity of the existing legislative scheme. There would still be different limitation periods for different kinds of claims; there would still be uncertainty about overlapping causes of action with different accrual dates; and there would still be argument about the categorisation of claims.

One commentator has observed that:²⁰⁹

Attempts to amend Acts which:

- (1) assign claims to different categories;
- (2) allot different time periods of fixed duration to those categories; and

²⁰⁷ Id, 97-98.

²⁰⁸ The existing extension provisions are discussed at pp 28-30 above.

²⁰⁹ NJ Mullany, "Reform of the Law of Latent Damage", (1991) 54 *Modern Law Review* 349, 381.

- (3) provide for the commencement of time periods at the date of accrual of claims,

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.

Many of the problems with the present legislation relate to the accrual date as the commencement of the limitation period. In the view of the Commission, these problems will not be overcome without a change in the basic structure of the present limitations scheme.

6. PRELIMINARY RECOMMENDATION

It is the preliminary recommendation of the Commission that the general principle that the limitation period commences on the date when the cause of action accrues should be replaced.

CHAPTER 7

ALTERNATIVE APPROACHES

1. INTRODUCTION

Developments in some overseas jurisdictions with legal systems similar to those which exist in the Australian States and Territories have focussed on alternative approaches to the date of the accrual of the cause of action as the commencement of the limitation period. The Law Reform Commission of Western Australia has also recently re-examined the reliance of existing limitations systems on the accrual date.

2. CANADA

Significant changes to limitations law have been implemented or proposed in two Canadian provinces. In Alberta, the Alberta Law Reform Institute published a report in 1989 recommending that the accrual system be replaced by a system based on a principle of discoverability.²¹⁰ Legislation implementing the Institute's recommendations was enacted in 1996.²¹¹ Similar legislative changes were proposed in Ontario in 1992.²¹²

(a) Alberta

The Alberta Law Reform Institute rejected the accrual rule in favour of serving the interests of potential plaintiffs who may not have sufficient knowledge to commence proceedings within the traditional limitation period. However, the Institute's report also recognised the interests of potential defendants in repose - the certainty that after a specified period of time, proceedings cannot be commenced, whether or not the plaintiff has the requisite knowledge. The Institute summarised its recommendations in this way:²¹³

The first basic principle is knowledge. ... The principle of knowledge involves building in discovery by the claimant to set the limitations clock ticking. The limitation period does not begin to run until the claimant knows of the claim, that is, until he has "discovered" or "ought to have discovered" (i) that the injury had occurred, (ii) that it was to some degree attributable to the conduct of the defendant, and (iii) that it was sufficiently serious to have warranted commencing a proceeding.

²¹⁰ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989).

²¹¹ *Limitations Act 1996* (Alta). However, the legislation has not yet come into operation.

²¹² *Limitations Bill 1992* (Ont).

²¹³ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 1-2.

After discovery, the claimant has ... years within which to seek redress in a civil judicial proceeding. This ... period constitutes the “**discovery limitation period**”.

The second basic principle is repose. It ... serves the interests of defendants by providing an absolute cut off date ... within which the claimant must seek a remedial order. The ... period applies irrespective of whether the claimant has knowledge of the claim. The principle of repose facilitates longterm planning by persons subject to potential claims. ... This ... period constitutes the “**ultimate limitation period**”.

The defendant is entitled to a limitations defence when either the discovery limitation period or the ultimate limitation period expires, whichever occurs first. ...

Together, ... these dual principles - knowledge and repose - provide a fair balance between the interests of claimants and defendants, both individually and collectively, and satisfy the interests of society at large.

Other considerations guiding the Institute in formulating its recommendations were the need for comprehensibility and simplicity. The Institute expressed the view that limitation legislation should be as comprehensible as possible for everyone - whether a lawyer or not - affected by it, and that the legislative provisions should express fundamental principles designed to be applicable in most cases, rather than attempting to achieve technical solutions for rare cases.²¹⁴

The Institute believed that its recommendations would benefit defendants as well as plaintiffs, because in many cases plaintiffs with the necessary knowledge would have to bring their actions sooner, and because there would be a finite period after which an action could not be brought.²¹⁵

The Institute’s recommendations were substantially implemented by the *Limitations Act 1996* (Alta). The Act provides that a defendant is entitled to immunity from liability in respect of a claim, unless the claimant (plaintiff) commences proceedings within:²¹⁶

- (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
 - (i) that the injury²¹⁷ for which the claimant seeks a remedial order had occurred,
 - (ii) that the injury was attributable to conduct of the defendant, and
 - (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

²¹⁴ Id, 31.

²¹⁵ Id, 35.

²¹⁶ *Limitations Act 1996* (Alta) s 3(1).

²¹⁷ “Injury” is defined in s 1(f) to mean personal injury, property damage, economic loss, non-performance of an obligation, or in the absence of any of the former, the breach of a duty.

or

(b) 10 years after the claim arose,

whichever period expires first.

The Act defines when a claim arises:²¹⁸

- (a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions arises when the conduct terminates or the last act or omission occurs;
- (b) a claim based on a breach of duty²¹⁹ arises when the conduct, act or omission occurs;
- (c) a claim based on a demand obligation arises when a default in performance occurs after a demand for performance is made;
- (d) ...
- (e) a claim for contribution arises when the claimant for contribution is made a defendant in respect of, or incurs a liability through the settlement of, a claim seeking to impose a liability upon which the claim for contribution can be based, whichever first occurs.

The Act also specifies when time begins to run against a successor in title,²²⁰ a principal,²²¹ and a personal representative of a deceased person as successor in title of a claim.²²²

The operation of the ultimate limitation period is suspended in certain circumstances. Factors which will suspend the limitation period are that:

- the defendant has fraudulently concealed the occurrence of the injury;²²³
- the plaintiff is a person under disability;²²⁴ and

²¹⁸ *Limitations Act 1996 (Alta)* s 3(3).

²¹⁹ “Duty” is defined in s 1(d) as “any duty under the law”; “law” is defined in s 1(g) to mean “the law in force in the Province” and includes statutes, judicial precedents and regulations.

²²⁰ *Limitations Act 1996 (Alta)* s 3(2)(a).

²²¹ *Id.*, s 3(2)(b).

²²² *Id.*, s 3(2)(c).

²²³ *Id.*, s 4(1).

²²⁴ *Id.*, s 5(1). A “person under disability” is defined in s 1(i) to include a minor who is not under the actual custody of a parent or guardian and an adult who is unable to make reasonable judgments in respect of matters relating to the claim.

- the claim is against a parent or guardian of the plaintiff and the cause of action arose while the plaintiff was a minor.²²⁵

Unlike the present Queensland legislation,²²⁶ the Alberta legislation does not exempt a claim for fraudulent breach of trust from the scheme. The imposition of a limitation period in such cases was based on the following recommendation of the Alberta Law Reform Institute:²²⁷

We do not see any fundamental difference between, for example, a breach of promises made under contract, and a breach of conditions imposed by trust. The discovery limitations period we propose is based on the discovery limitations principle that comes from equity and applies to breach of trust cases under the existing law. It will give trust beneficiaries a reasonable period of time within which to pursue their claims. ... We do not think that [a fixed period of two years from discovery] will unduly burden trust beneficiaries any more than it will persons entitled to a remedy for other reasons. The ultimate limitation period ... will give trustees the same protection that it gives to other potential defendants.

... Where the trustee has fraudulently concealed the fact of the injury the ultimate limitation period would be suspended indefinitely. Furthermore, a breach of fiduciary duty that is continuous would give rise to successive claims. Again, the effect would be to suspend the ultimate limitation period indefinitely.

(b) Ontario

The *Limitations Bill 1992* (Ont) was based on principles similar to those which underlie the Alberta legislation.

It provided for two limitation periods - a two year discovery period²²⁸ and an ultimate period of thirty years.²²⁹ However, the thirty year period was reduced to ten years in a number of special situations such as cases involving medical negligence²³⁰ or building defects.²³¹

The Bill provided for the ultimate limitation period to be suspended in certain

²²⁵ *Limitations Act 1996* (Alta) s 5(2).

²²⁶ See p 27 above.

²²⁷ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 37.

²²⁸ *Limitations Bill 1992* (Ont) cl 4.

²²⁹ *Id.*, cl 15(2).

²³⁰ *Id.*, cl 15(3), (4). However, by virtue of cl 15(5), these provisions do not apply if the claim is based on "the leaving of a foreign object having no therapeutic or diagnostic purpose in the body of the person with the claim".

²³¹ *Id.*, cl 15(6).

circumstances, such as disability of the plaintiff, or conduct by the defendant which wilfully concealed the occurrence of the injury or misled the plaintiff as to the appropriateness of litigation as a remedy.²³² It made special provision for claims based on assault or sexual assault by suspending the discovery period during any time the plaintiff was incapable of commencing the proceeding because of his or her physical, mental or psychological condition.²³³ There was no limitation period in a proceeding arising from a sexual assault if at the time of the assault one of the parties to the assault had charge of the plaintiff, or was in a position of trust or authority in relation to the plaintiff or was someone on whom the plaintiff was dependent, whether financially or otherwise.²³⁴

The Bill also made allowance for the situation where the parties to a dispute attempt to resolve it by mediation. It provided that if the plaintiff and defendant agreed to submit the claim to an independent third party for resolution, the discovery limitation period would be suspended from the date of the agreement to undergo mediation until the date the claim was resolved or one of the parties terminated or withdrew from the mediation agreement.²³⁵

3. NEW ZEALAND

The New Zealand Law Commission published a report on limitation of actions in 1988.²³⁶

The general thrust of the Commission's recommendations was the enactment of:²³⁷

a new statute of wide application and having three central features -

- (a) a defence based on a standard three year limitation period, but subject to

²³² Id, cl 15(7).

²³³ Id, cl 9(1). Clause 9(2) created a presumption that, unless otherwise proved, a plaintiff with a claim based on an assault was incapable of commencing the proceeding earlier than it was commenced if, at the time of the assault, one of the parties to the assault had an intimate relationship with the plaintiff or was someone on whom the plaintiff was dependent, whether or not financially. Clause 9(3) created a presumption that, unless otherwise proved, a plaintiff with a claim based on a sexual assault was incapable of commencing the proceeding earlier than it was commenced.

²³⁴ Id, cl 16(h).

²³⁵ Id, cl 10.

²³⁶ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988).

²³⁷ Id, viii-ix.

- (b) extensions in certain specified circumstances, in particular where the claimant shows absence of knowledge of essential facts relevant to the claim, but generally subject to
- (c) a further defence based on a “long stop” limitation period of 15 years.

The Commission proposed that the legislation:²³⁸

provide for the defendant's act or omission (on which a claim is based) to be the standard commencement date: it is relatively easily and objectively fixed, within the knowledge of the party who must plead it, and will apply in the vast majority of cases.

The Commission further recommended that, in addition to the standard period, there should be a “compensatory” period:²³⁹

representing the time passing between the date of occurrence of the act or omission on which the claim is based and the date on which the claimant gained (or reasonably should have gained) knowledge of any of the following facts:

- (a) the occurrence of the act or omission;
- (b) the identity of the person responsible;
- (c) the act or omission has caused harm;
- (d) that the harm is significant.

The standard limitation period would also be subject to extension if the act or omission on which the claim was based occurred before the plaintiff attained the age of eighteen years or if the plaintiff was incapable of, or substantially impeded in, managing his or her affairs with respect to the act or omission on which the claim was based for any period or periods of at least twenty-eight days. In the former situation, the limitation period would be extended until the plaintiff turned twenty-one - that is, the plaintiff would be allowed the standard limitation period after reaching the age of majority in New Zealand. In the latter situation, the limitation period would be extended by the length of time the plaintiff was incapacitated.²⁴⁰

The Commission's recommendations also provided for extension of the long stop limitation period in three situations - fraud or conversion by defendant trustees; deliberate concealment by the defendant; and the infancy of the plaintiff.²⁴¹

²³⁸ Id, 61.

²³⁹ Id, 65.

²⁴⁰ Id, 86-87.

²⁴¹ Id, 103.

4. WESTERN AUSTRALIA

The Law Reform Commission of Western Australia considered in detail the schemes outlined above.

In relation to the Alberta model, the Commission noted that, in the light of recent case law concerning latent damage to buildings and reliance on professional advice,²⁴² the Alberta model was “far from revolutionary”.²⁴³ It concluded that, although the opportunity for dispute over matters such as classification of the nature of a claim was not completely eliminated, it was substantially reduced.²⁴⁴ The Commission expressed the view that.²⁴⁵

The chief consequence of adopting legislation based on the Alberta model is that the Limitation Act can be much simpler. Instead of a greater or lesser number of limitation periods running from accrual, there is one basic period running from the point of discovery, thus eliminating disputes about which limitation period applies. No separate extension provisions are necessary, since the basic period and the extension period have been fused into one. A long stop period, running from when the cause of action arose, provides balance to the scheme by ensuring that there is a point at which the action is finally barred, thus providing protection for the interests of defendants.

In addition to the benefits of fairness and comprehensibility which the Alberta Law Reform Institute adopted from equitable limitation principles,²⁴⁶ the Law Reform Commission of Western Australia identified the following advantages in the Alberta approach:²⁴⁷

- It would allow the adoption of one standard period, plus a long stop provision;
- The standard period could be shorter than under the traditional system, since it would not be necessary to allow time for discovery;
- Since there would be less need to discriminate between different causes of action and fewer classification problems, cases would not turn on technical issues such as classification and the application of the relevant accrual rule.

²⁴² See pp 33-34 above.

²⁴³ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 151.

²⁴⁴ Id, 148-149.

²⁴⁵ Id, 150.

²⁴⁶ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 23.

²⁴⁷ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 150-151.

However, the Commission also highlighted a number of potential problems with the scheme.²⁴⁸

- The long stop period may rule out deserving claims. Even with a long stop period of thirty years as proposed in Ontario, there are some forms of latent disease which may not have been discovered within this time. The shorter period in Alberta would preclude not only these claims, but also claims for property damage which does not become manifest within ten years.²⁴⁹ There are other situations where, although the injury may not be latent, other factors may justify delay in bringing the claim.²⁵⁰
- The long stop period may start running before the cause of action is complete. If, as in the Alberta and Ontario schemes, the long stop period commences running at the date of the breach of duty, even though damage is not suffered until some time later, the ultimate limitation period for a cause of action such as negligence, which requires proof of damage, will commence before the cause of action has accrued.
- Identifying the point of discovery may not be simple.
- The discovery principle is inappropriate in certain cases. The application of a new regime to cases which raise questions of title to real property, for example, would involve substantive issues of real property law. The Ontario scheme excluded such claims.²⁵¹ In Alberta, only the ten year ultimate limitation period applies.²⁵²

In relation to the recommendations of the New Zealand Law Commission, the Western Australian Commission observed:²⁵³

It is in tort actions where proof of damage is an essential ingredient of the cause of action that the difference between the proposed rule and the accrual system makes most impact. Under the act or omission rule, in a negligence case the limitation period will start to run at the point of the defendant's negligent act or omission, even though the time gap between that negligence and the resulting damage may be considerable. This will affect not only the property damage and economic loss cases

²⁴⁸ Id, 152-155.

²⁴⁹ See for example *Invercargill City Council v Hamlin* [1996] AC 624 (PC) (New Zealand), where the damage remained latent for 17 years.

²⁵⁰ See p 111 below.

²⁵¹ *Limitations Bill 1992* (Ont) cl 2(a).

²⁵² *Limitations Act 1996* (Alta) s 3(4).

²⁵³ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 159-160.

in which under the present rule the limitation period only starts to run when the damage becomes discoverable, but also personal injury cases in which time now runs from the suffering of damage, whether discoverable or not.

The Commission favourably noted the following features of a limitation system based on the act or omission of the defendant:²⁵⁴

- It is simple and easily understood, especially by lay persons to whom the notion of accrual would be well-nigh incomprehensible.
- Because the limitation period commences at a particular point in time, there is some degree of certainty. However, the Commission also acknowledged that the date of the act or omission would not always be certain, and that there would be further uncertainty because of extension provisions.
- It removes the problem of different limitation periods in alternative actions in tort and contract, since in either case the limitation period would run from the breach of duty.

However, the Commission also identified a number of serious objections.²⁵⁵

- Though the point at which the act or omission occurs may be clear in many cases, there are others in which it will be uncertain.
- There would be too many cases in which it was necessary to rely on the extension provisions to give the plaintiff a right to sue. The imbalance between the standard period and the extension provisions would be particularly apparent in cases involving latent personal injury. Personal injury cases are not a problem in New Zealand, because in that country the right to sue for damages at common law has been replaced by a statutory compensation scheme. However, the act/omission alternative is not suitable for implementation in a jurisdiction where tort claims are still made for personal injury, unless it deals satisfactorily with such cases.
- In a claim based on a cause of action which requires proof of damage, the limitation period would commence before the cause of action was complete and, therefore, presumably before the action could be brought. The Commission considered this situation to be anomalous and undesirable, even if the extension provisions applied.

The Commission advocated the enactment of new legislation based, in the interests of simplicity and fairness, on a uniform approach to all causes of action. It concluded that such an approach was needed not only to eliminate the complexities

²⁵⁴ Id, 160-161.

²⁵⁵ Id, 161-162.

of existing legislation, but also to deal appropriately with new problems as they arise.²⁵⁶

The Commission recommended that, with some minor exceptions, all claims should be subject to two limitation periods:²⁵⁷

- a discovery limitation period of three years commencing when the plaintiff has the necessary knowledge, based on the criteria set out in the Alberta legislation;²⁵⁸ and
- an ultimate limitation period of fifteen years.

As in Alberta, the claim would be time-barred once either limitation period had expired. However, unlike the Alberta scheme, the court would have a discretion to permit the action to proceed in certain exceptional cases.²⁵⁹

The Commission noted that its recommended discoverability rule would not differ dramatically from the approach already adopted in many jurisdictions - either by common law or statute - in areas such as claims for personal injuries, latent property damage or economic loss, or fraud. It observed:²⁶⁰

The Commission's recommendation for the adoption of a discoverability rule of general application simply generalises these individual instances and ensures that the approach of the law to the problem of latent damage is uniform in all situations.

...

In cases where the damage is immediately apparent - as, for example, in most cases of breach of contract - the discoverability approach would operate in the same way as the existing accrual rule: the limitation period would commence running on the date of the breach. However, in cases where the damage is latent, the rule would ensure that the limitation period would not commence running until the plaintiff became aware, or should reasonably have become aware, of the existence of a cause of action. Where there is overlapping liability in contract and tort, if the damage is not immediately discoverable the limitation period would not commence until it becomes discoverable, whether the cause of action is contract or tort.

²⁵⁶ Id, 163.

²⁵⁷ Id, 171-172, 176.

²⁵⁸ See p 46 above.

²⁵⁹ The desirability of including a residual judicial discretion in a limitation scheme is discussed in Chapter 8 of this Discussion Paper.

²⁶⁰ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 173-174.

5. SUBMISSIONS

Eight of the submissions received by the Commission in response to the Information Paper commented on possible alternatives to the present commencement date for a limitation period. Of those eight, five preferred the alternative provided by the Canadian model, based on a discoverability approach.²⁶¹

One respondent wrote:²⁶²

... the most urgent reform required in respect of the law relating to limitation of actions is a reform providing that the limitation period in respect of any cause of action does not commence to run until loss or damage is manifested in some tangible way, which is either observable by the potential plaintiff, or would have become observable by the plaintiff had the plaintiff acted with reasonable care.

Another commented that:²⁶³

... it is desirable that the plaintiff should have a right of action when the plaintiff discovers that the act has resulted in the injury. ... We should look at the limitation period as an aid to consumer protection rather than looking at the cost burden imposed on potential defendants.

Two respondents favoured the New Zealand approach of the act or omission as the commencement of the limitation period.²⁶⁴

However, one submission objected to both of these alternatives. The principal ground of objection was the prejudicial effect of delay on the quality of evidence available at the hearing of a trial, and the consequent doubt about the reliability of the outcome. While acknowledging that, in certain circumstances, defendants may face open-ended liability under the existing scheme, the respondent:²⁶⁵

... would not want litigation lawyers forced to become akin to archeologists forced to conduct searches in vain through archives and remnants of records hoping against hope to find a piece of evidence which either supports the plaintiff's claim (and can therefore justify payment/settlement) or does not support the plaintiff's claim (and can therefore form the basis of a defence).

The respondent also argued that, since both alternatives involved two levels of limitation periods and some additional exceptions, they would hardly serve to greatly

²⁶¹ Submissions 3, 6, 8, 9, 15.

²⁶² Submission 3.

²⁶³ Submission 6.

²⁶⁴ Submissions 13, 18.

²⁶⁵ Submission 12.

simplify the existing regime.

6. THE COMMISSION'S PRELIMINARY VIEW

The Commission's preliminary view is that, for common law claims,²⁶⁶ there should be a limitation period of general application²⁶⁷ which is the lesser of two alternative periods - a specified time after the plaintiff was, or in the circumstances ought to have been, in possession of sufficient information to be able to commence proceedings, and a longer period after which, in all but the most exceptional cases, the plaintiff should not be able to commence proceedings. The Commission believes that this approach would benefit both plaintiffs and defendants.

For example, if the claim is founded on simple contract, quasi-contract or tort and does not consist of or include personal injury, the limitation period is currently at least six years.²⁶⁸ However, in many cases, the plaintiff will be aware of all the information necessary to commence proceedings within a much shorter space of time. In such cases, the limitation period will start to run as soon as the plaintiff has the relevant information. Because the plaintiff will have to bring his or her action within a specified time of obtaining the information, the limitation period will be significantly reduced.

In those rarer cases where the plaintiff is unaware of the fact of the injury, or is unable to discover information necessary to bring the claim, the limitation period will not commence until the plaintiff is or, in the circumstances ought to have been, aware of the information. However, the alternative limitation period will mean that defendants are not exposed to potentially open-ended liability. A claim will generally be statute-barred at the expiration of the alternative period, even if the plaintiff did not know the relevant information.

(a) The length of the limitation period

To a large extent, decisions about the length of limitation periods are arbitrary. However, in coming to its preliminary conclusions, the Commission has been guided by some of the limitation periods which presently exist in Queensland and other Australian jurisdictions, and by recent developments and recommendations in Australia and elsewhere.

²⁶⁶ Equitable claims are considered in Chapter 10 of this Discussion Paper.

²⁶⁷ Situations in which there may be a need for special limitation periods are considered in Chapters 11 and 12 of this Discussion Paper.

²⁶⁸ See pp 25-26 above.

It is now widely accepted that a limitation period of six years or more, which has its origins in an era when transport and communication took considerably more time than they do today, is no longer necessary or appropriate.²⁶⁹ One of the submissions received by the Commission in response to the Information Paper commented:²⁷⁰

... 12 and 6 year limitation periods, which relate to property, were fixed in days when the world moved at a slower pace. Given the current explosion of communications technology, there seems to be no reason why limitation periods for actions relating to property need to be longer than any other limitation period.

Further, existing limitation periods were set on the basis that the limitation period would commence when the cause of action accrued, and it was necessary to include in those periods an allowance for the plaintiff to become aware of the cause of action. If, however, the limitation period does not commence until the plaintiff has acquired the necessary information, there is no longer any need to incorporate such an allowance into the limitation period.²⁷¹

... the length of a fixed limitation period under [an accrual based system] was designed to give a claimant sufficient time to discover, to attempt to settle, and to assert his claim. ... We feel that a limitation period running from discovery should usually be shorter than one running from accrual for, although enough time must be given to attempt to settle the dispute and, if necessary, to bring the claim, no time need be allowed for discovery.

One of the submissions received by the Commission in response to the Information Paper suggested that the limitation period should expire twelve months after discovery.²⁷² However, in the view of the Commission, such a short limitation period may have the unintended effect of inducing a plaintiff to commence proceedings prematurely when the dispute may have been able to be settled. The Commission agrees with the Alberta Institute of Law Research and Reform, which observed:²⁷³

A limitation period threatening such an immediate bar could encourage the hasty commencement of litigation which, with more time available, might be compromised. Limitation systems are designed to encourage the early litigation of controversies which must, unfortunately, be litigated; they are not designed to encourage litigation.

269 Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 184.

270 Submission 13.

271 Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 131.

272 Submission 13.

273 Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 129-130.

The Alberta Institute considered that a period of either two or three years would be reasonable,²⁷⁴ finally recommending a two year period.²⁷⁵ However, two years is not a familiar concept in the context of Australian limitation law. In the view of the Commission a three year period, which is at present the limitation period for claims involving personal injuries in most Australia jurisdictions²⁷⁶ would be more acceptable. Three years is the existing limitation period under the Commonwealth *Trade Practices Act 1974*.²⁷⁷ It is also the period recommended by the Law Reform Commission of Western Australia.²⁷⁸

Similarly, the length of the alternative period is also arbitrary. It must allow plaintiffs sufficient time to gain the necessary knowledge to bring proceedings, without unfairly prejudicing the right of defendants to a fair trial.

In Alberta, an action is generally statute-barred after ten years.²⁷⁹ The legislation proposed in Ontario would have imposed a limit of thirty years, which was reduced to ten in certain circumstances.²⁸⁰ One of the submissions received by the Commission advocated an ultimate limitation period of forty years to provide for victims of insidious diseases such as asbestosis or mesothelioma.²⁸¹ However, in the view of the Commission, while ten years may not be sufficient, a general limitation period of thirty or forty years is unrealistic and, if applied in every case, would be unnecessarily harsh on the majority of defendants.²⁸²

The New Zealand Law Commission,²⁸³ the Alberta Law Reform Institute²⁸⁴ and the

²⁷⁴ Id, 130, 147.

²⁷⁵ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 34.

²⁷⁶ See Chapter 3 above.

²⁷⁷ *Trade Practices Act 1974* (Cth) s 82(2).

²⁷⁸ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 171-172.

²⁷⁹ See pp 46-47 above.

²⁸⁰ See p 48 above.

²⁸¹ Submission 8.

²⁸² However, see Chapter 8 of this Discussion Paper for the Commission's preliminary recommendations with respect to exceptional cases.

²⁸³ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 100.

²⁸⁴ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 35.

Law Reform Commission of Western Australia²⁸⁵ have all recommended a period of fifteen years from the date of the act or omission on which the claim is based. This period represents a compromise between a shorter period (for example, ten or twelve years), which might exclude a significant number of meritorious claims, and a longer period of, for example, twenty years. Fifteen years is also the existing period for some claims in England²⁸⁶ and the Australian Capital Territory.²⁸⁷

This Commission believes that a fifteen year period would enable most plaintiffs to commence proceedings but would not be unfair to defendants since, by that time, there would be few remaining claims. A fifteen year period would allow a plaintiff twelve years to obtain the information necessary to bring an action, and a further three years to commence proceedings. However, many plaintiffs would acquire the relevant information in less than twelve years, and would then have to bring their action within three years of the date of discovery of the information. In these cases, the limitation period would have already expired before the end of the fifteen year period. A significant number of other claims would have been either settled or abandoned inside fifteen years.

(b) The extent of the plaintiff's knowledge

The Commission has already expressed its preliminary view that there should be alternative limitation periods, and that one of these periods should start to run when the plaintiff knew or, in the circumstances ought to have known, certain information. This gives rise to the question of the approach to be adopted in determining what the plaintiff should have known.

In considering the incorporation of a constructive knowledge test into modern discovery rules, the Alberta Institute of Law Research and Reform asked:²⁸⁸

But does this test mean what the actual claimant, with his abilities, ought to have discovered, or what a fictional reasonable claimant, perhaps with more or less ability, ought to have discovered?

The Institute concluded:²⁸⁹

²⁸⁵ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 176.

²⁸⁶ *Limitation Act 1980* (UK) s 14B.

²⁸⁷ *Limitation Act 1985* (ACT) s 40.

²⁸⁸ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 119.

²⁸⁹ *Id.*, 124.

... because a discovery rule exists primarily for the benefit of claimants, we believe that the constructive knowledge test should be based on what the actual claimant in a case, in his circumstances and with his abilities, ought reasonably to have discovered.

The New Zealand Law Commission observed:²⁹⁰

... an objective “hypothetical reasonable man” test could well work considerable injustice - undermining the essential thrust of the discoverability extension - if not able to be related to the health, intelligence and social competence of a particular claimant. Further, in a society which is becoming increasingly conscious of the distinctions between different cultural groupings, any objective test invites criticism for being based on monocultural assumptions.

The issue was also raised by one of the respondents to the Information Paper, who brought to the attention of the Commission the situation of a young woman who had been struck by a motor vehicle while crossing a school pedestrian crossing when she was about ten years of age. She received significant head injuries which resulted in mild brain damage and which affected her cognitive capacity. Her intelligence, whilst considerably diminished by her brain injury, was at the lower range of normal, and she was therefore not entitled to have the limitation period suspended by reason of disability. According to the respondent:²⁹¹

It is not uncommon to come across people who have limited education and understanding of the legal system. Often these people have no idea of what they must do to protect their rights ... Often they only seek legal advice many years after the event when a relative or friend with a better understanding of the situation prompts them to move to protect their interest ...

The Commission has therefore formed the preliminary view that the question of whether a plaintiff should have known the relevant facts should be considered in the light of all the circumstances of the particular case.

7. PRELIMINARY RECOMMENDATION

The Commission’s preliminary recommendation is that, for common law claims, there should be a limitation period of general application²⁹² which is the lesser of:

²⁹⁰ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 72.

²⁹¹ Submission 5.

²⁹² However, see Chapters 11 and 12 of this Discussion Paper for a consideration of the need for special limitation periods in certain circumstances.

- (a) three years after the date on which the plaintiff first knew or, in the circumstances, ought to have known:**
- (i) that the injury had occurred;**
 - (ii) that the injury was attributable to the conduct of the defendant;**
 - (iii) that the injury, assuming liability on the part of the defendant, warranted bringing a proceeding;**
- or**
- (b) fifteen years after the date on which the conduct, act or omission giving rise to the claim occurred.**

CHAPTER 8

A RESIDUAL JUDICIAL DISCRETION

1. INTRODUCTION

The existing Queensland legislation permits the court to extend the limitation period in certain circumstances. The extension provisions are discussed in Chapter 4 of this Discussion Paper.²⁹³ The power conferred by these provisions is a discretionary one. 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.²⁹⁴

In the Information Paper,²⁹⁵ the Commission raised the question of whether, if the present accrual based system were to be replaced by a discovery based system together with an ultimate limitation period, a residual judicial discretion to extend the limitation period should be retained.

2. THE LAW IN OTHER AUSTRALIAN JURISDICTIONS

In all Australian jurisdictions, the relevant limitation legislation confers a judicial discretion to extend the limitation period. In New South Wales, Victoria, the Australian Capital Territory and Tasmania the discretion applies only to claims for personal injuries. In Western Australia the discretion is even more limited, applying only to claims for personal injuries caused by the inhalation of asbestos.²⁹⁶

3. ARGUMENTS FOR AND AGAINST A RESIDUAL JUDICIAL DISCRETION

The Law Reform Commission of Western Australia has summarised the advantages and disadvantages of a judicial discretion to override a limitation defence.²⁹⁷

²⁹³ See pp 28-30 above.

²⁹⁴ *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 per Dawson J at 544 and McHugh J at 554.

²⁹⁵ Queensland Law Reform Commission, Working Paper No 49: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997).

²⁹⁶ These provisions are summarised in Chapter 3.

²⁹⁷ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 123.

In the view of that Commission, the major objections to such a discretion are that:

- it would generate too much uncertainty, and it might make liability insurance expensive and difficult to obtain;
- it would lead to divergent approaches among judges in the exercise of the discretion;
- it would undermine the effectiveness of a fixed limitation period as a means of encouraging plaintiffs not to sleep on their rights, and cause a general slowing down of the process of proceeding with claims.

The Commission considered the arguments in favour of a discretion to be that:

- it would be a flexible alternative, allowing judges to balance the numerous factors involved and the relative hardships to the plaintiff and the defendant to achieve a just result;
- it would not necessarily involve a sacrifice of consistency;
- it would not necessarily lead to excessive delay because it would remain in the plaintiff's best interests to pursue a claim expeditiously.

The Alberta Institute of Law Research and Reform opposed a judicial discretion to override the limitation defence on the basis that it would "sacrifice the objectives of a limitations system".²⁹⁸ It recognised that the introduction of an ultimate limitation period²⁹⁹ may prevent some deserving claims from being made. However, it concluded that:³⁰⁰

Within ten years after the occurrence of the events on which the overwhelming majority of claims are based, these claims will have been either abandoned, settled, litigated or become subject to a limitations defence under the discovery rule.³⁰¹ The class of remaining potential claimants will have become very small, but without an ultimate period, the entire society of potential defendants will remain subject to a tiny group of claims. ... 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.

²⁹⁸ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 135.

²⁹⁹ See pp 46-47 above.

³⁰⁰ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 156.

³⁰¹ See pp 45-47 above.

The Western Australian Commission recognised the importance of the arguments put forward by the Alberta Institute, but considered that they failed to take into account that there are exceptional kinds of cases in which the limitation rationales which ordinarily justify the barring of the claim once the limitation period has expired may not apply.³⁰² The Commission identified two kinds of cases in which a claim might be unfairly defeated by the expiration of the ultimate limitation period:³⁰³

- cases involving claims for damage which remains undiscoverable until after the ultimate limitation period has expired;
- cases where factors other than the latency of the injury prevent the plaintiff from bringing the action within the limitation period.

4. RECENT DEVELOPMENTS

(a) Canada

In accordance with the views expressed by the Alberta Institute of Law Research and Reform, the legislation recently enacted in Alberta³⁰⁴ does not include a judicial discretion to extend the limitation period.

Similarly, there was no provision in the proposed Ontario legislation³⁰⁵ for extension of the limitation period by the exercise of judicial discretion. However, the proposed Ontario legislation differed significantly from the Alberta scheme in two important respects. First, it provided for a general ultimate limitation period of thirty years, as opposed to the ten year ultimate limitation period in Alberta.³⁰⁶ Second, it made special provision for certain kinds of action - for example assault and sexual abuse - where a plaintiff may have knowledge of the cause of action but may be prevented from bringing the proceeding for other reasons.³⁰⁷

³⁰² Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 179.

³⁰³ *Id.*, 177-178.

³⁰⁴ *Limitations Act 1996* (Alta).

³⁰⁵ *Limitations Bill 1992* (Ont).

³⁰⁶ *Id.*, cl 15(2).

³⁰⁷ See p 111 below.

(b) Western Australia

The Law Reform Commission of Western Australia noted that, in some jurisdictions, attempts were made to avoid potential injustice arising from the application of limitation periods by nominating particular categories of claim to which special rules applied. However, it rejected this approach. It concluded that:³⁰⁸

What is necessary is a more flexible rule which will allow courts to do justice to plaintiffs in those exceptional cases in which the two general limitation periods do not achieve a fair balance, without destroying the benefits of those rules in terms of giving peace and repose and allowing defendants' lives and business activities to continue free of the worries of potential litigation.

The Commission recommended a narrow discretionary power to enable a court to disregard either the discovery period or the ultimate period in appropriate cases:³⁰⁹

... the court [should be able] to make an order that either limitation period be extended in the interests of justice, but ... this should be possible only in exceptional circumstances, where the prejudice to the defendant in having to defend an action after the normal limitation period has expired, and the general public interest in finality of litigation, are outweighed by other factors.

The Commission recommended that the court should be able to take into account all the circumstances of the case, including the following factors:³¹⁰

- (1) the length of and reasons for delay on the part of the plaintiff;
- (2) the extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;
- (3) the nature of the plaintiff's injury;
- (4) the position of the defendant, including the extent to which the defendant could have been expected to be aware that claims might arise long after the acts or omissions in question;
- (5) the conduct of the defendant which resulted in the harm of which the plaintiff complains;
- (6) the conduct of the defendant after the cause of action arose, including the extent, if any, to which the defendant took steps to make available to the

³⁰⁸ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 180.

³⁰⁹ *Id.*, 182.

³¹⁰ *Id.*, 181-182.

plaintiff means of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

- (7) the duration of any disability of the plaintiff arising on or after the date on which the injury became discoverable;
- (8) the extent to which the plaintiff acted properly and reasonably once the injury became discoverable;
- (9) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice received.

The Commission did not believe it advisable for legislation to attempt to specify what factors should be sufficient to persuade a court to exercise the discretion. However, it pointed to a number of considerations which could provide guidelines, namely that:³¹¹

- the latency of the injury would be relevant but not conclusive;
- generally, the law regards personal injury as a more serious matter than property damage or any other kind of injury;
- those whose business activities involve the production or use of substances which cause insidious diseases can reasonably be expected to take into account the possibility of claims, even many years after the risk-producing activity has ceased, and ensure that records are retained and insurance kept up to date;
- there are important differences between the two general limitation periods and a stronger case may be needed to justify the exercise of the discretion to extend the ultimate period than the discovery period.

5. SUBMISSIONS

The majority of the submissions which considered the issue of a judicial discretion to extend the limitation period were in favour of such a discretion.³¹²

Only one submission, from an association of medical practitioners, argued against a

³¹¹ Id, 182-183.

³¹² Submissions 3, 6, 8, 9, 10, 11, 13, 14, 15, 17, 21, 22.

discretion to extend the limitation period.³¹³

... there should be a definitive end-date to all claims irrespective of mitigating circumstances. If there is no limitation to the potential for plaintiff action then uncertainty and unreasonable costs will creep into the system.

A number of submissions commented that the discretion should be wider than that conferred by the existing legislation,³¹⁴ which applies only to claims for or including damages for personal injury.³¹⁵

6. THE COMMISSION'S PRELIMINARY VIEW

In Chapter 7 of this Discussion Paper, the Commission has made the preliminary recommendation that the limitation period for common law claims should be the lesser of either:

- a three year period from the date when the plaintiff knew or, in the circumstances ought to have known, the information necessary to bring the action;

or

- a fifteen year period from the date when the conduct, act or omission of the defendant which gives rise to the claim occurred.

However, there will inevitably be some cases where even a fifteen year limitation period causes hardship to plaintiffs. For example, some forms of insidious disease - such as mesothelioma - may not manifest themselves for thirty or forty years. There will also be some cases where, even though the plaintiff knows the information necessary to bring the claim, he or she may be prevented by other factors from doing so.³¹⁶

The Commission is therefore of the preliminary view that there should be a residual judicial discretion to extend the limitation period in cases where it is in the interests of justice to do so.

³¹³ Submission 16.

³¹⁴ See pp 28-30 above.

³¹⁵ Submissions 9, 14, 17, 21, 22.

³¹⁶ For example, see the discussion at p 111 below.

(a) Criteria for exercising the discretion

The Commission agrees with the Law Reform Commission of Western Australia that the discretion to extend the limitation period in the interests of justice should be exercised only in exceptional cases, where the prejudice to the defendant in having to defend an action after the normal limitation period has expired, and the general public interest in the finality of litigation, are outweighed by other factors.³¹⁷ The Commission has given careful consideration to the factors recommended by the Western Australian Commission,³¹⁸ as well as those which presently exist in legislation in other Australian jurisdictions.³¹⁹

The criteria specified in the Report of the Law Reform Commission of Western Australia appear to be modelled on those which are presently found in the Victorian legislation, with additional matters included. There are two criteria in the existing New South Wales legislation which, in the view of this Commission, are also worthy of consideration.

First, in New South Wales the court must consider the extent to which, having regard to the delay, there is or may be prejudice to the defendant by reason that evidence that would have been available had proceedings been commenced within the limitation period is no longer available.³²⁰ The equivalent Victorian criterion, also recommended by the Law Reform Commission of Western Australia, is much wider, there being no restriction on the cause of the prejudice to the unavailability of evidence. In other words, the court could consider whether the defendant would be prejudiced by the delay for any reason.³²¹

Second, the New South Wales provision also requires the court to have regard to any conduct of the defendant which induced the plaintiff to delay bringing the action.³²²

It is the preliminary view of the Commission that the interests of justice require that the court should be able to take account of any kind of prejudice caused to the defendant by the delay in bringing proceedings, and that prejudice should not be

³¹⁷ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 180.

³¹⁸ See p 65-66 above.

³¹⁹ See Chapter 3 for a discussion of limitation legislation in other Australian jurisdictions.

³²⁰ *Limitation Act 1969* (NSW) s 60E(1)(b).

³²¹ *Limitation of Actions Act 1958* (Vic) s 23A(3)(b); Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 181.

³²² *Limitation Act 1969* (NSW) s 60E(1)(f).

restricted to evidentiary issues. The Commission is also of the preliminary view that there should be specific reference to conduct of the defendant which may have influenced the plaintiff's delay.

However, it is not the intention of the Commission that the criteria specified in the legislation should be the only factors to be taken into account. Rather, the Commission believes that the court should look at all the circumstances of the case, with particular reference to the matters set out in the legislation.

(b) Actions to which the discretion applies

In Queensland, and in every other Australian jurisdiction apart from South Australia and the Northern Territory, the discretion may be exercised only in relation to actions involving claims for personal injury.³²³

However, as explained in Chapter 5 of this Discussion Paper, there are other kinds of claims where the loss or damage may remain hidden from the plaintiff for a significant period of time.

It is the preliminary view of the Commission that the exercise of the discretion to extend the limitation period should depend upon the extent to which the legislative criteria are satisfied, rather than the nature of the claim.

7. PRELIMINARY RECOMMENDATION

The Commission's preliminary recommendation is that there should be a judicial discretion to extend the limitation period in the interests of justice if the prejudice to the defendant in having to defend an action after the expiration of the limitation period, and the general public interest in the finality of litigation, are outweighed by other factors.

The exercise of the discretion should not be restricted to claims for personal injury.

In determining whether to exercise the discretion, the court should consider all the circumstances of the case, including:

³²³

The existing Queensland provisions are summarised in Chapter 4 of this Discussion Paper. The legislation in other Australian jurisdictions is summarised in Chapter 3.

- **the length of and reasons for delay on the part of the plaintiff;**
- **the extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;**
- **the nature of the plaintiff's injury;**
- **the position of the defendant, including the extent to which the defendant could have been expected to be aware that claims might arise long after the acts or omissions in question;**
- **the conduct of the defendant which resulted in the harm of which the plaintiff complains;**
- **the conduct of the defendant after the cause of action arose, including:**
 - (a) **the extent, if any, to which the defendant took steps to make available to the plaintiff means of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant; and**
 - (b) **any other conduct of the defendant which contributed to the plaintiff's delay in bringing the action;**
- **the duration of any disability of the plaintiff arising on or after the date on which the injury became discoverable;**
- **the extent to which the plaintiff acted properly and reasonably in the circumstances once the injury became discoverable;**
- **the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice received.**

CHAPTER 9

JOINT LIABILITY

1. CONTRIBUTION CLAIMS

(a) Actions for contribution for liability in tort

In some cases, the injury complained of by the plaintiff may be the result of the allegedly wrongful conduct of more than one person acting jointly. However, the plaintiff may elect to commence proceedings against only one defendant. Where the plaintiff sued in tort,³²⁴ the common law did not originally allow for one of the defendants to claim contribution from any other defendant if the plaintiff's action was successful.³²⁵ As a result, one defendant sometimes had to bear the entire burden of the defendants' joint liability to the plaintiff.

However, this situation has now been changed by legislation. In Queensland, where damage is suffered as a result of a tort:³²⁶

any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage ...

(b) Limitation periods in contribution claims

The possibility of a contribution claim raises the question of the limitation period which should apply to the claim. The existing Queensland legislation provides that in a contribution action the limitation period is the lesser of:³²⁷

- a period of two years from the date on which the right of action for contribution accrued; or
- a period of four years from the date of expiration of the limitation period for the principal action.

³²⁴ For example negligence, trespass, nuisance or defamation.

³²⁵ *Merryweather v Nixan* (1799) 8 TR 186. JG Fleming, *The Law of Torts* (8th ed 1992) 259-260.

³²⁶ *Law Reform Act 1995* (Qld) s 6(c). The relevant provisions were originally enacted in the *Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act 1952* (Qld) and were subsequently consolidated with a number of other Acts in the *Law Reform Act 1995* (Qld).

³²⁷ *Limitation of Actions Act 1974* (Qld) s 40(1).

The cause of action in the contribution claim accrues on the date on which the principal claim is settled, or an arbitral award is made or a judgment in a civil action is given (whether or not in the case of a judgment the judgment is subsequently varied as to quantum of damages).³²⁸

(c) Other jurisdictions

(i) Alberta

The general scheme of the Alberta legislation is that the limitation period for a claim will be the lesser of two alternative periods - the discovery period and the ultimate period.³²⁹

The ultimate period for a contribution claim commences at the earlier of:³³⁰

- the date when the claimant for contribution is made a defendant in the principal action; or
- the date when the claimant incurs liability through settlement of the principal action.

The Alberta legislation is based on the recommendations of the Alberta Law Reform Institute.³³¹ Prior to making its recommendations, the Institute considered, but rejected, two alternative commencement dates for the ultimate limitation period:³³²

- Accrual of principal cause of action

This is the earliest time at which the ultimate period could commence. However, in the view of the Institute, this option would be unduly harsh on a claimant for contribution if the original tort claim were brought near the end of the ultimate period applicable to that claim.

- Imposition of liability for principal claim

³²⁸ Id, s 40(2).

³²⁹ See pp 46-47 above.

³³⁰ *Limitations Act 1996* (Alta) s 3(3)(e).

³³¹ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989).

³³² Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 164-169.

The Institute considered this option to be the most satisfactory from a theoretical standpoint, since it is the earliest time at which the cause of action in a contribution claim could accrue, there being no injury to the person seeking contribution until liability in the principal action has been imposed. However, the Institute was concerned that it would unnecessarily extend the operation of the ultimate period.

There is no specific provision in the legislation concerning the commencement of the discovery period, so that the general provision must apply. This would mean that the discovery period for a contribution claim will commence on the date that the claimant for contribution first knew or, in the circumstances, ought to have known:

- that the injury for which the claimant seeks a remedial order had occurred;
- that the injury was attributable to the conduct of the defendant; and
- that the injury warrants bringing a proceeding.

(ii) Western Australia

The Law Reform Commission of Western Australia, in considering the Alberta legislation, reached the following conclusions:³³³

... since the discovery period runs from the date on which the plaintiff knew, or should have known, that he has suffered injury for which the defendant is responsible and which is sufficiently serious to warrant bringing proceedings, it would seem that in a contribution action this point must be the time when the tortfeasor's liability is finally confirmed, either by a court judgment ... or a settlement ...

and

In the case of a settlement, the result would be that the discovery period and the ultimate period would both begin to run from the same point, and so in practice the ultimate period would never be required.

The Commission recommended that the discovery period should run from the time when the tortfeasor's liability is finally confirmed by judgment, settlement or arbitration award. It also recommended that, in cases where the tortfeasor's liability is the subject of court proceedings or an arbitration, the ultimate period should run from the time when the tortfeasor was made a defendant in respect of the principal claim. It made no recommendation in

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Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 296.

relation to the commencement of the ultimate limitation period for a contribution claim in respect of a principal action which had been settled, because it considered that in such a situation the discovery period and the ultimate period would begin to run from the same point.³³⁴

(d) The Commission's preliminary view

This Commission has considered two options in relation to the appropriate limitation period in a contribution claim.

The first option is to retain the existing provisions.

However, in the view of the Commission, this option would not sit well with the general scheme of the Commission's preliminary recommendations. Although it is based on the recommendations of the New South Wales Law Reform Commission,³³⁵ which considered that the four year period gave a person claiming contribution ample time to make enquiries and commence proceedings,³³⁶ the existing legislation makes no specific provision for ensuring that the person claiming contribution has had sufficient time to become aware of the information necessary to bring the claim. Further, the existing limitation period is based partly on the date of accrual of the cause of action, which is inconsistent with the general approach taken by the Commission in this Discussion Paper.³³⁷

A second option would be to adopt the framework of the Alberta provisions.

The Commission carefully considered the analysis of the Alberta legislation in the report of the Law Reform Commission of Western Australia.³³⁸ However, the Commission is not entirely persuaded by the report's interpretation of the relevant provisions.

The Commission's first concern relates to when the discovery limitation period should commence. The Law Reform Commission of Western Australia pinpointed the date of judgment, settlement or arbitration award in the principal action as the appropriate time. However, although the person seeking contribution would be aware at that time that he or she had suffered an injury (that is, liability to the

³³⁴ Ibid.

³³⁵ New South Wales Law Reform Commission, Report No 3: *Report on the Limitation of Actions* (October 1967).

³³⁶ Id, 115-116.

³³⁷ See Chapter 6 above.

³³⁸ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 295-296.

plaintiff in the principal action), this does not necessarily mean that he or she would be in possession of all the information necessary to be able to bring a contribution claim.

The following example illustrates the Commission's concern:

In 1987 A commences proceedings against B, a manufacturer of heavy machinery, for injuries sustained by A when a piece of B's machinery malfunctions. The trial is heard in 1990, and judgment is given against B later that year. B does not appeal against the judgment. In 1995 it is revealed that B had been supplied with substandard components. The supplier of the components, C, was reputable and B had no way of identifying the components as substandard. B wishes to seek contribution from C in relation to the judgment in favour of A.

Under the Western Australian recommendation, the limitation period for the contribution claim would expire at the earlier of:

- three years from the judgment - that is, 1993; or
- fifteen years from when the principal action against B was commenced - that is, 2002.

In other words, time would be running against B, even though B was not in possession of all the information necessary to bring the contribution claim against C. By the time B had discovered the relevant information, the contribution claim would be statute-barred.³³⁹

The Commission's second concern relates to commencement of the ultimate limitation period for a contribution claim in respect of a principal action which has been settled. Under the Alberta legislation, the ultimate period commences at the earlier of settlement of the principal action or commencement of proceedings in the principal action against the person claiming contribution. The Law Reform Commission of Western Australia considered the effect of this provision to be that, where the principal action is settled, the discovery period and the ultimate period would begin to run from the same point.

The Commission agrees that this conclusion may be correct if the principal claim settles prior to the commencement of litigation. However, many claims do not settle until after litigation has commenced. For example:

A commences proceedings against B in 1987 in a lengthy and complex negligence case. The matter finally comes to trial in late 1991. The trial lasts for over six months and the judgment is reserved. In early 1993 A and B reach agreement on

³³⁹

However, an extension may be available through the exercise of judicial discretion. See Chapter 8 above.

the terms of a settlement. B subsequently wishes to commence contribution proceedings against C.

Under the Alberta legislation, the earliest date when the discovery period could commence would be in 1993 when B knew of B's injury (that is, the liability to A which was incurred as a result of the settlement). However, the ultimate period would have commenced in 1987, when A initiated proceedings against B, not when the action was settled.

(e) Preliminary recommendation

It is the Commission's preliminary recommendation that in a claim for contribution between tortfeasors, the limitation period should be the lesser of:

- **three years after the date when the person claiming contribution knew or, in the circumstances, ought to have known the information necessary to bring the claim; and**
- **fifteen years after the earlier of:**
 - **the date when the person claiming contribution was made a defendant in the principal action; or**
 - **the date when the person claiming contribution incurred liability through settlement of the principal action.**

2. OTHER JOINT RIGHTS AND LIABILITIES

(a) Legislation in other Australian jurisdictions

The limitation legislation in New South Wales, the Australian Capital Territory and the Northern Territory contains two additional provisions relating to joint rights and liabilities.

Section 75 of the *Limitation Act 1969* (NSW), on which the provisions in the

Australian Capital Territory³⁴⁰ and the Northern Territory³⁴¹ are modelled, states:

Where, were it not for this Act, two or more persons would have a cause of action jointly and, by this Act, an action on the cause of action is not maintainable by one or more of them, an action on the cause of action is nonetheless maintainable by the other or others of them and judgment may be given accordingly.

The effect of this provision is to ensure that where there are joint plaintiffs, the expiration of the limitation period against one of them does not affect the right of the other plaintiff or plaintiffs to commence proceedings. A situation may arise where, for example, the limitation period for one joint plaintiff is still running, perhaps because that plaintiff has been under a disability such as minority,³⁴² but another joint plaintiff's right of action is statute-barred because the limitation period against that plaintiff has expired.

Similarly, section 76 of the New South Wales Act provides for the situation where an action is statute-barred against one or more of, but not all, joint defendants.³⁴³

Where, were it not for this Act, two or more persons would be liable on a cause of action jointly and, by this Act, an action on the cause of action is not maintainable against one or more of them, an action on the cause of action is nonetheless maintainable against the other or others of them and judgment may be given accordingly.

(b) The Commission's preliminary view

The Commission has given consideration to the question of the effect of limitation legislation on joint rights and obligations in the context of the common law and statutory provisions.

(i) Common law claims

The common law relating to joint rights and liabilities is complex and technical, and the effect of limitation law on the enforcement of joint obligations at common law is also somewhat obscure.

For example, a contract may be based on a joint promise made by two or more persons. Such a joint promise creates a single obligation incumbent upon both or all the promisors. Performance of the obligation by any one of

³⁴⁰ *Limitation Act 1985* (ACT) s 52.

³⁴¹ *Limitation Act 1981* (NT) s 49.

³⁴² See Chapter 11 below.

³⁴³ See also *Limitation Act 1985* (ACT) s 53; *Limitation Act 1981* (NT) s 50.

the joint promisors will discharge them all from their obligations under the contract.³⁴⁴ Conversely, if one joint promisor successfully defends an action for breach of contract on the basis that the promise is unenforceable - for example, because of fraudulent misrepresentation or wrongful repudiation by the plaintiff³⁴⁵ - then the defence will operate to discharge them all.³⁴⁶

However, if one joint promisor successfully defends an action on a ground that applies only to that particular defendant, the defence will not assist the other defendants. Although there is no definitive authority on the issue, it has been suggested that this is the situation which occurs when one of the joint promisors is held not to be liable because of the operation of a statute of limitation.³⁴⁷ In other words, a plaintiff's action against a joint promisor who cannot rely on a statute of limitation may not be affected by the fact that the plaintiff's action against another joint promisor is statute-barred, but the matter is not completely beyond doubt.

(ii) Statutory claims for enforcement of joint obligations

Some aspects of the common law with respect to enforcement of joint obligations have been replaced by statute. However, the law is still complex and, to some extent, uncertain.

For example, under the original common law rule, an action against joint tortfeasors was one and indivisible. There is now legislation which provides that a plaintiff may bring separate actions against joint tortfeasors.³⁴⁸ However, there has been considerable debate as to the extent to which a provision of this kind affects the nature of a joint obligation rather than merely facilitating the enforcement of the joint obligation.³⁴⁹

One consequence of the common law rule was that a release by the plaintiff of one joint tortfeasor would release all the others.³⁵⁰ The High Court of Australia has recently held that a statutory provision allowing separate

³⁴⁴ GL Williams, *Joint Obligations* (1949) 92-93; *Halsbury's Laws of Australia* vol 6, para 110-2950.

³⁴⁵ JW Carter and DJ Harland, *Contract Law in Australia* (2nd ed 1991) 328.

³⁴⁶ GL Williams, *Joint Obligations* (1949) 76.

³⁴⁷ *Id.*, 77.

³⁴⁸ *Law Reform Act 1995* (Qld) s 6(a). See note 326 above.

³⁴⁹ See for example *Thompson v Australian Capital Television Pty Ltd* (1994) 54 FCR 513 per Burchett and Ryan JJ.

³⁵⁰ *Duck v Mayeu* [1892] 2 QB 511.

actions against joint tortfeasors must impliedly abolish this aspect of the rule.³⁵¹

There is no equivalent decision as to whether or not, in light of the statutory right to bring separate actions, a limitation defence available to one joint tortfeasor would assist the remaining joint tortfeasors.

The preliminary view of the Commission is that the law relating to the effect of limitation periods on joint rights and liabilities should be made simpler and more accessible. The Commission believes that the legislative provisions in the New South Wales, Northern Territory and Australian Capital Territory achieve this result.

The Law Reform Commission of Western Australia has recommended that similar provisions should be included in limitation legislation in that State.³⁵²

(c) Preliminary recommendation

It is the preliminary recommendation of the Commission that provisions equivalent to sections 75 and 76 of the *Limitation Act 1969* (NSW) should be included in Queensland limitation legislation.

³⁵¹ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

³⁵² Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 297.

CHAPTER 10

EQUITABLE CLAIMS AND DEFENCES

The Commission has given some preliminary consideration to the questions of whether equitable claims should generally be subject to limitation legislation,³⁵³ and what should be the effect of limitation legislation on equitable defences.

1. EQUITABLE CLAIMS

Although limitation legislation was developed in the context of common law claims, and did not originally apply to claims in equity, it now encroaches to a significant extent on equitable principles.

(a) Existing legislation

Under the existing Queensland legislation, some kinds of equitable claims are made expressly subject to the legislative scheme. For example, section 16(1) of the *Limitation of Actions Act 1974* (Qld) applies to equitable interests in land; section 20 applies to actions to redeem land against a mortgagee in possession; section 26 applies to actions to recover money secured by a mortgage or other charge; and section 27(2) applies to actions in respect of a non-fraudulent breach of trust.

Other equitable claims are made subject to the legislative scheme because they are analogous to a claim at common law.³⁵⁴ It has been observed that, although strict limitation periods are considered to be inappropriate to those remedies which had their origins in courts of equity:³⁵⁵

... a court of equity has a discretion to take account of the expiry of any statutory period of limitation when considering whether to grant an equitable remedy. It might, for example, be a relevant consideration that the plaintiff's common law remedy was time-barred, and that the application for an equitable remedy was an attempt to circumvent this problem.

However, if a claim for equitable relief is not analogous to a common law claim, the limitation legislation will not apply to it. For example, where a defendant received money on behalf of a plaintiff and was intended to account specifically for the proceeds, the action to recover the money was held not to be statute-barred, since

³⁵³ Particular consideration is given to certain kinds of equitable claims in Chapters 11 and 12 of this Discussion Paper.

³⁵⁴ *Limitation of Actions Act 1974* (Qld) s 10(6)(b).

³⁵⁵ A McGee, *Limitation Periods* (2nd ed 1994) 17.

the relationship between the parties was not analogous to that between a debtor and a creditor.³⁵⁶ Claims for specific performance of a contract or for an injunction are therefore outside the scope of the Act, since there is no analogous claim at common law. In Canada³⁵⁷ and in New South Wales,³⁵⁸ where limitation legislation also applies to equitable claims by analogy with the common law, recent court decisions have refused to apply the legislation to equitable claims for breach of fiduciary duty. In the New South Wales Court of Appeal, Kirby P expressed the view that:³⁵⁹

.. it is a mistake of law to assume that an equitable claim, based on an equitable cause of action, not for damages but for equitable compensation, is to be dealt with under ... the *Limitation Act*. It is not. It raises separate and different questions.

(b) The Australian Capital Territory

In the Australian Capital Territory, equitable claims are generally subject to limitation legislation. The *Limitation Act 1985* (ACT) applies to “an action on any cause of action”.³⁶⁰ Although there are some exceptions,³⁶¹ there is no equivalent of the Queensland provision which exempts claims for specific performance, injunctions and other equitable claims which have no analogy at common law.

(c) Developments in other jurisdictions

Recent developments in other jurisdictions have revealed a trend towards including equitable claims in legislative limitation schemes.

(i) New Zealand

The New Zealand Law Commission concluded that the advantages of a general limitations regime would apply to equitable claims as well as to

³⁵⁶ *Cohen v Cohen* (1929) 42 CLR 91.

³⁵⁷ *M (K) v M (H)* (1992) 96 DLR (4th) 289.

³⁵⁸ *Williams v Minister, Aboriginal Land Rights Act 1983 and Another* (1994) 35 NSWLR 497.

³⁵⁹ *Id.*, 509.

³⁶⁰ *Limitation Act 1985* (ACT) s 11(1).

³⁶¹ The Act does not apply to actions for which a limitation period is imposed by other legislation [s 4(a)], or to a cause of action to recover land or an estate or interest in land or to enforce an equitable estate or interest in land [s 5(a)] or to an action in relation to goods that are stolen property unless the person against whom the action is commenced is a purchaser of the goods in good faith or a person claiming the goods through such a purchaser [s 5(b)].

others. It expressed the view that, since equitable relief may be subject to limitation periods by analogy, its recommendation “would not involve any fundamental change to, or unduly limit the effectiveness of equitable remedies”.³⁶² It described attempts to keep equity and its remedies separate from the common law and its remedies as “unhelpful”.³⁶³

In reaching this conclusion, the Commission took into account a submission which argued that, as a matter of principle, equitable remedies should not generally be included in the legislative scheme. The respondent pointed to the variety of policies underlying each remedy available in equity and suggested that the inclusion of equitable remedies would itself involve a major reform of equity - a task more suited to a specific review of equitable remedies. However, the Commission was not persuaded to change its view.³⁶⁴

The recommendation of the New Zealand Law Commission to include all equitable claims in its proposed legislative scheme seems to have been made on the assumption that claims for breach of fiduciary duty were already subject to limitation periods by analogy.³⁶⁵

(ii) Canada

In Alberta, one member of the Alberta Law Reform Institute argued that equitable claims should not be subject to general limitation legislation. The basis of the argument was that:³⁶⁶

to apply fixed limitation periods to claims based in equity that are excepted from the present Alberta Act would be to effect a fundamental policy change that goes further than [the Institute] should recommend.

Referring to the role of limitation legislation in balancing the rights of potential plaintiffs against the rights of potential defendants, the member stated that the effect of subjecting equitable claims to the legislation would be that:³⁶⁷

[The claimant's] right to litigate is denied for no good reason. The repose

³⁶² New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 112.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

³⁶⁵ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 17.

³⁶⁶ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 36.

³⁶⁷ *Ibid.*

deserved by the defendant in equity is fully served by the defence of laches.³⁶⁸ Equity does not arbitrarily end rights by mere delay. Thus, 'balancing' in this context gives the defendant in equity a windfall immunity at the expense of the claimant in equity whose property is unjustly retained by the defendant.

Nonetheless, the majority of the Alberta Law Reform Institute recommended that its proposed limitation scheme apply generally to all claims, whether the claim originated at law or in equity.³⁶⁹ Their view was that:³⁷⁰

We do not see any fundamental difference between, for example, a breach of promises made under contract, and a breach of conditions imposed by trust. The discovery limitations period we propose is based on the discovery limitations principle that comes from equity ... It will give trust beneficiaries a reasonable period of time within which to pursue their claims. True, our recommendations impose a fixed period of 2 years from discovery on the application of this principle. We do not think that this will unduly burden trust beneficiaries any more than it will persons entitled to a remedy for other reasons. The ultimate limitation period we recommend will give trustees the same protection that it gives to other potential defendants.

The recommendation of the majority was implemented in the limitation legislation recently enacted in Alberta.³⁷¹

The proposed Ontario legislation also applied to equitable claims.³⁷² In a number of other Canadian jurisdictions, limitation legislation applies to equitable claims by virtue of a provision which imposes a limitation period on any action which the limitation legislation or any other Act fails to deal with specifically.³⁷³

(iii) Western Australia

The Law Reform Commission of Western Australia, influenced by the desirability of having a single set of limitation principles which applies to every kind of claim and by the extent to which limitation law already applies to equitable claims, also recommended that equitable claims should generally

³⁶⁸ See pp 85-87 below for a discussion of equitable defences.

³⁶⁹ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 3.

³⁷⁰ *Id.*, 37.

³⁷¹ *Limitations Act 1996* (Alta) ss 1-2.

³⁷² *Limitations Bill 1992* (Ont) cl 1, cl 2.

³⁷³ See for example *Limitation of Actions Act 1978* (Sask) s 3(1)(j); *Limitation of Actions Act 1987* (Man) s 2(1)(n); *Statute of Limitations 1988* (PEI) s 2(1)(g); *Limitation of Actions Act 1973* (NB) s 9; *Limitation Act 1979* (BC) s 3(4).

be subject to its proposed legislative scheme.³⁷⁴

2. THE COMMISSION'S PRELIMINARY VIEW

In formulating its preliminary recommendations, the Commission has adopted the approach of simplifying limitation legislation to the greatest possible extent by subjecting claims to a limitation period of general application.

One of the submissions received by the Commission in response to the Information Paper³⁷⁵ commented:³⁷⁶

In a State where law and equity have been administered concurrently for more than 100 years, it is difficult to understand why different principles are applied to equitable as contrasted with common law or statutory causes of action, particularly where the same wrongful conduct may give rise to a cause of action either at law or in equity. Thus, for example, it is difficult to see why a ... limitation period should apply to an action for conversion of money by a person in a fiduciary position, but the same limitation period does not apply (except by analogy, in the court's discretion) if the claim is framed as a claim for breach of trust or breach of fiduciary duty. Conduct which constitutes fraud or duress at common law may also constitute undue influence or unconscionable conduct in equity, and it is not immediately apparent why different limitation periods should apply.

However, the Commission has some reservations as to the appropriateness of this approach in relation to equitable claims.

The Commission has proposed, at page 124 of this Discussion Paper, that claims which are based on a fraudulent breach of trust should be excepted from the scheme. The Commission is concerned that, if equitable claims are generally subject to the scheme, the distinction between a claim for fraudulent breach of trust and some other forms of equitable claim - for example, breach of fiduciary duty or unconscionable conduct - may become blurred and that, as a result, there would be scope for argument about the nature of a claim and whether or not the legislation applied.

On the other hand, it could also be argued that to exclude equitable claims generally from the limitation scheme might equally create a risk of blurring the distinction

³⁷⁴ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 323-324. However, the Commission recommended special provisions in relation to actions to recover land, actions relating to mortgages and actions for the recovery of tax. These issues are discussed in Chapter 12 below.

³⁷⁵ Queensland Law Reform Commission, Working Paper No 49: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997).

³⁷⁶ Submission 3.

between equitable and common law actions, as claims which should be founded on common law causes of action such as contract or tort might instead be brought as claims for equitable relief in order to avoid the imposition of a limitation period.

The issue of the application of limitation legislation to equitable claims such as claims for breach of fiduciary duty is assuming considerable significance in the context of attempts by members of the “stolen generation” and by adult survivors of childhood sexual abuse to claim compensation.³⁷⁷

Consequently, the Commission has decided not to make a preliminary recommendation on this issue. Rather the Commission specifically seeks submissions on whether equitable claims should generally be subject to the legislative scheme.

The Commission seeks submissions on whether equitable claims should generally be subject to the limitation legislation proposed by the Commission.

3. EQUITABLE DEFENCES

Initially, equitable claims were not subject to limitation law. However, this did not mean that a potential defendant would be exposed indefinitely to the risk of litigation. Courts of equitable jurisdiction developed doctrines designed to “effect a balance of justice between parties based upon their conduct, and the effect of that conduct on others”.³⁷⁸

Two of the grounds on which a person seeking equitable relief could be denied a remedy were the doctrines of laches and acquiescence.³⁷⁹

Under the doctrine of laches:³⁸⁰

... a plaintiff seeking an equitable remedy must come to court quickly once he knows that his rights are being infringed. The basis of this principle has been said to be the

³⁷⁷ These claims are considered in Chapter 11 of this Discussion Paper.

³⁷⁸ T Prime and GP Scanlan, *The Modern Law of Limitation* (1993) 220.

³⁷⁹ For a detailed discussion of these doctrines see *Orr v Ford* (1989) 167 CLR 316 per Deane J at 337-341.

³⁸⁰ A McGee, *Limitation Periods* (2nd ed 1994) 36.

prejudice caused to the defendant by the plaintiff's failure to act quickly. One important consequence of this is that it is impossible to set any fixed time limit for the operation of the principle - everything must depend on the damage caused in the particular case.

The Law Reform Commission of Western Australia noted that:³⁸¹

When a defence of laches is raised, it is important to consider the length of the delay and the nature of the acts done during the period of delay which may affect either party. In general, the longer the delay, the easier it will be to infer acquiescence, and the more likely it will be that the defendant has suffered prejudice.

The doctrine of acquiescence is available as a defence to an equitable claim:³⁸²

... where the plaintiff has shown himself indifferent to the violation of his rights. The plaintiff in such circumstances has waived his rights by his conduct, and is estopped from enforcing them. Though acquiescence may be inferred from a plaintiff's delay in instituting an action, it differs from laches in that it may be established by means other than by delay in instituting proceedings. Thus, acquiescence may be established in any case where a plaintiff, by his conduct, evinces an intention to seek no redress in respect of the violation of his rights.

The current Queensland legislation preserves the effect of equitable defences. The *Limitation of Actions Act 1974 (Qld)* provides:³⁸³

Nothing in this Act affects the equitable jurisdiction of a court to refuse relief on the ground of acquiescence or otherwise.

The Alberta Law Reform Institute recommended that a court exercising equitable jurisdiction should have a discretion to deny equitable relief, even though the applicable limitation period under the proposed legislation had not expired.³⁸⁴ The recommendation was implemented in the recently enacted legislation.³⁸⁵ The Alberta provision is to the same effect as the existing Queensland legislation.

The Law Reform Commission of Western Australia expressed the view that such a provision would perform a useful function in retaining important equitable doctrines without prejudicing the general scheme, and recommended that a similar provision

³⁸¹ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 299-300.

³⁸² T Prime and GP Scanlan, *The Modern Law of Limitation* (1993) 221.

³⁸³ *Limitation of Actions Act 1974 (Qld)* s 43.

³⁸⁴ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 36.

³⁸⁵ *Limitations Act 1996 (Alta)* s 10.

should be adopted in Western Australia.³⁸⁶

4. THE COMMISSION'S PRELIMINARY VIEW

The Commission agrees that, in relation to equitable claims that fall within the proposed legislation, retention of the equitable defences would not prejudice the scheme. The Commission believes that it would be desirable to maintain the flexibility provided by allowing a court of equitable jurisdiction to dismiss such claims on the basis of the equitable defences, even though the relevant limitation period had not expired.

5. PRELIMINARY RECOMMENDATION

It is the Commission's preliminary recommendation that the proposed legislation should not affect the ability of a court of equitable jurisdiction to refuse relief on equitable grounds.

³⁸⁶

Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 330.

CHAPTER 11

PARTICULAR PLAINTIFFS

There are some circumstances which may give rise to the need for special consideration to be given to the position of the plaintiff. The plaintiff may have been prevented from obtaining the information necessary to bring a claim, or may have been in a situation where, even though he or she was aware of the relevant facts, circumstances existed which prevented the commencement of proceedings. The implications of these circumstances for the application of limitation law are discussed below.

1. MINORITY

Although an action may be commenced by or on behalf of a person under the legal age of majority,³⁸⁷ there is a presumption that a minor is not competent to make reasoned judgments about decisions relating to the claim.³⁸⁸ In many jurisdictions limitation legislation makes provision for delaying the commencement of the limitation period until the plaintiff has attained the age of majority. The *Limitation of Actions Act 1974* (Qld) provides that, subject to certain exceptions, an action by a plaintiff who was under the age of eighteen when the cause of action accrued may be brought within six years of the plaintiff's eighteenth birthday. However, an action to recover damages for personal injury or death may not be brought more than three years after the plaintiff turns eighteen.³⁸⁹

The effect of delaying the commencement of the limitation period until the plaintiff has attained his or her majority is that a potential defendant is at risk of being sued for a very long period. For example, in Queensland an action alleging that the plaintiff's injuries were caused at birth by the negligence of a medical practitioner may be brought up to twenty-one years after the birth. There is likely to be further delay before the matter comes to trial. It is almost inevitable that in such a situation the quality of the available evidence will have deteriorated by the time the claim is

³⁸⁷ In Queensland the age of majority is eighteen years: *Age of Majority Act 1974* (Qld) s 5(1)(a); *Law Reform Act 1995* (Qld) s 17. (The *Age of Majority Act (1974)* Qld was repealed by the *Statute Law Revision Act (No 2) 1995* (Qld). However, its effect was preserved by the latter Act's application to it of s 20A of the *Acts Interpretation Act 1954* (Qld).)

³⁸⁸ The action is usually taken through a "next friend" (probably a parent or guardian): see Rules of the Supreme Court O 3 r 14; District Courts Rules r 26; Magistrates Courts Rules r 29(1). If a minor sues without a next friend, the proceedings are irregular only, not null and void. Unless the defendant objects the proceedings can continue. The matter can proceed to judgment, but a minor who sues without a next friend is not bound by the judgment and may therefore institute further proceedings which would otherwise be met by a plea of res judicata. See BC Cairns, *Australian Civil Procedure* (4th ed 1996) 350-351.

³⁸⁹ *Limitation of Actions Act 1974* (Qld) s 29.

heard. The policy of the Australian Medical Association is that practitioners should retain treatment records for a minimum of ten years after a patient who is a minor attains the age of majority.³⁹⁰ This would mean that a doctor who delivered a baby or treated a very young child would be obliged to keep records for almost thirty years. Apart from the administrative burden thus placed on practitioners, there is the problem for potential plaintiffs of accessing records of those practitioners who have moved or retired. Moreover, at a time when medical indemnity fees are escalating³⁹¹ and there is concern that doctors will be unwilling to enter or remain in certain fields of practice, the length of time for which potential liability can continue is likely to add to the problem.

(a) The “custody of a parent” rule

In some jurisdictions, the commencement of the limitation period is postponed only if the plaintiff is not in the custody of a parent. The onus of proof is on the plaintiff to prove the absence of parental custody.³⁹²

The basis for this rule was explained by the Law Reform Commission of Western Australia:³⁹³

Parents are ordinarily the legal guardians of their minor children. Most minors live with and are in the care of their parents, guardians or other carers. There are of course cases where this is not so, since there are many people under 18 who are living independently. However, the fact remains that in most cases a minor has some adult who can be expected to look after his interests and should be able to ensure that, if circumstances arise under which the minor has a cause of action against another, the necessary steps are taken to bring legal proceedings.

Both the New Zealand Law Commission and the Alberta Institute of Law Research and Reform rejected this approach.³⁹⁴ The Institute commented:³⁹⁵

³⁹⁰ Australian Medical Association, *Handbook of Resolutions* (April 1997) 8 (Resolution 47 of 1993).

³⁹¹ In 1996 the indemnity fee for an obstetrician, neurosurgeon, or orthopaedic surgeon increased from \$10,500 to \$19,000 and for a general practitioner who practises obstetrics the fee increased from \$2,600 to \$6,875: AMAQ, *AMAQ News* (July 1996) 1.

³⁹² See for example *Limitation Act 1974* (Tas) s 26(6), but note that this provision applies only to personal injury actions.

³⁹³ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 399.

³⁹⁴ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 85-86.

³⁹⁵ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 292-293.

We are familiar with too many cases in which a parent ... or a guardian, as the case may be, has permitted a limitation period to expire without bringing a claim, to the serious prejudice of a person under disability.

Despite this view, the Alberta legislation introduced in 1996 retains the rule³⁹⁶ unless “an action is brought by a claimant against a parent or guardian of the claimant and the cause of action arose when the claimant was a minor”, in which case “the operation of the limitation periods provided by [the] Act is suspended during the period of time that the person was a minor”.³⁹⁷

This exception overcomes a major objection to the application of the rule in the situation where a child’s injury has been caused by a parent. It is of particular relevance in a claim for child sexual abuse. However, it does not provide for the situation where the parent is not the potential defendant, but may have reason for not wanting the proceedings to be brought - for example, where an alleged abuser is some other relative or close friend.

(b) A new approach

The Law Reform Commission of Western Australia has expressed the view that extension of the limitation period in all cases of disability cannot be justified. It observed:³⁹⁸

The interests of defendants and of the public in the prompt commencement of litigation justify imposing a responsibility on the parents or guardians of a child in their custody who has a legal claim to commence an action within the ordinary limitation period.

The Commission adopted a new approach, which it believed would deal fairly with minors without creating long limitation periods.³⁹⁹ It recommended in relation to minors that:⁴⁰⁰

- (1) if the plaintiff proves he or she was not in the custody of a parent or guardian, neither the discovery period nor the ultimate period should commence until minority ceases;
- (2) in the absence of such proof, both the discovery and ultimate limitation

³⁹⁶ *Limitations Act 1996 (Alta)* s 1(i)(i).

³⁹⁷ *Id.*, s 5(a).

³⁹⁸ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 399.

³⁹⁹ *Id.*, 398.

⁴⁰⁰ *Id.*, 24, 400.

periods should apply in the ordinary way, except that for the purposes of the discovery period it would be the knowledge of the parent or guardian, and not the minor, which would be relevant;

- (3) exceptional cases where the minor's interests are not adequately protected can be dealt with by the exercise of judicial discretion.

The Commission also recommended that if, subsequent to the injury but before attaining adulthood, the minor ceases to be in the custody of a parent or guardian:⁴⁰¹

- (1) if the discovery period has already commenced, it should be suspended until the minor reaches adulthood;
- (2) if the discovery period has not commenced, it should commence when the minor reaches adulthood;
- (3) the ultimate period should be suspended, and should recommence when the minor reaches adulthood.

(c) The Commission's preliminary view

The Commission is mindful of the length of time for which, if the limitation period is suspended during a person's minority, it may be possible for the person to commence proceedings relating to a claim which arose when the person was a minor.

However, the Commission is not in favour of adopting the "custody of a parent" rule. It agrees with the conclusion reached by the New Zealand Law Commission that people who are under the age of majority:⁴⁰²

... are not necessarily incapable of conducting their own affairs, or in a position where no other person is protecting their interest. On the other hand, they are not necessarily protected by the existence of parents or guardians or other care givers.

In recommending that the limitation period should continue to be suspended during the minority of the plaintiff, the New Zealand Commission expressed the view that:⁴⁰³

This is an area where the law has traditionally been protective, and it is not possible to generalise about the reasonableness or responsibility of parents' or guardians' actions to protect the interests of children and young persons (or to distinguish easily

⁴⁰¹ Ibid.

⁴⁰² New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 85-86.

⁴⁰³ Id, 86.

or effectively between those that may have been reasonable and those that may not).

This Commission is also of the preliminary view that the limitation period should not run against a plaintiff who is a minor.

In this Discussion Paper, the Commission has proposed a general limitation period for common law claims which is the lesser of:⁴⁰⁴

- three years from the date when the plaintiff knew or, in the circumstances, ought to have known the information necessary to bring the claim; and
- fifteen years after the date on which the conduct, act or omission giving rise to the claim occurred.

In the context of a plaintiff who is bringing a claim which arose when the plaintiff was a minor, suspension of the limitation period during the plaintiff's minority would give rise to the following situations.

If the plaintiff at the time of attaining majority knew or, in the circumstances, ought to have known the information necessary to bring the claim, the limitation period would commence when the plaintiff turned eighteen, and would run for three years from that date.

However, if the plaintiff was not and, in the circumstances, could not have been expected to be, aware of the relevant information at the time of attaining majority, the limitation period would be the lesser of:

- three years after the date on which the plaintiff first knew, or in the circumstances ought to have known, the relevant information; and
- fifteen years after the date on which the plaintiff attained majority.

(d) Preliminary recommendation

The Commission's preliminary recommendation is that the operation of the limitation period proposed by the Commission should be suspended during the minority of the plaintiff.

⁴⁰⁴ See pp 60-61 above.

2. OTHER FORMS OF DISABILITY

(a) Existing legislation

The *Limitation of Actions Act 1974* (Qld) provides that, if a potential plaintiff was under a disability on the date on which a right of action accrued, the action may generally be brought within six years from the time when the plaintiff ceased to be under a disability or died, whichever event occurred first.⁴⁰⁵ The six year period is reduced to three years if the action is a claim for damages for personal injury.⁴⁰⁶

The Act further provides that:⁴⁰⁷

... a person shall be taken to be under a disability while the person is ... of unsound mind or a convict who, after conviction, is undergoing a sentence of imprisonment.

The term “of unsound mind” is not defined although, in three specific instances, a person is presumed conclusively to be of unsound mind.⁴⁰⁸

- (a) while the person is a patient within the meaning of the *Mental Health Act 1974*;
- (b) while the person is in strict custody pursuant to an order of the court or in safe custody pursuant to an order given by the Governor in the name of Her Majesty, under section 647 of the *Criminal Code*;
- (c) while the person is detained in a hospital or security patients’ hospital pursuant to an order made under Part 4 of the *Mental Health Act 1974*.

(b) Definition of disability

The emphasis in the present legislation is on incapacity caused by mental illness. However, there are other kinds of disability which may prevent a plaintiff from commencing proceedings.

The definition recommended by the Law Reform Commission of Western Australia is broader than the Queensland definition. It is based on the criteria in the *Guardianship and Administration Act 1990* (WA) for the appointment of an

⁴⁰⁵ *Limitation of Actions Act 1974* (Qld) s 29(1).

⁴⁰⁶ *Id.*, s 29(2)(c).

⁴⁰⁷ *Id.*, s 5(2).

⁴⁰⁸ *Id.*, s 5(3).

administrator who has legal authority to perform any function that the person whose affairs have been placed under administration could do if that person had full legal capacity, including the power to bring legal proceedings on the person's behalf should this prove necessary.⁴⁰⁹ The Commission recommended that special disability provisions should apply to a plaintiff "who is unable by reason of mental disorder, intellectual handicap or other mental disability to make reasonable judgments in respect of his affairs".⁴¹⁰

The Alberta Law Reform Institute recommended the use of the expression "unable to make reasonable judgments in respect of matters relating to the claim". This definition of disability has two advantages. First, it does not discriminate between different kinds of disability. Second:⁴¹¹

In connecting the disability to the particular claim, the new definition recognizes, as does the common law, that a person may be competent for one purpose ... but not for another ... It opens the way to flexible interpretations appropriate to specific facts and circumstances ...

However, even this definition would exclude a physical disability which prevented a potential plaintiff from commencing proceedings. One respondent to this Commission's Information Paper⁴¹² drew the Commission's attention to the situation of a plaintiff whose physical disability means that, for example, he or she is unable to communicate effectively.⁴¹³

(c) The Commission's preliminary view

The Commission agrees with the approach of the Alberta Law Reform Institute. It believes that the definition of disability should not attempt to focus on the cause of the disability, but rather should be linked to the plaintiff's capacity to make decisions about the particular claim. It also accepts that the definition should include lack of capacity to communicate decisions about the claim. This approach is consistent with the views expressed by the Commission in its report on assisted and substituted decisions.⁴¹⁴

⁴⁰⁹ *Guardianship and Administration Act 1990 (WA)* ss 64(1), 71(2).

⁴¹⁰ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 24.

⁴¹¹ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 41.

⁴¹² Queensland Law Reform Commission, Working Paper No 49: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997).

⁴¹³ Submission 3.

⁴¹⁴ Queensland Law Reform Commission, Report No 49: *Assisted and Substituted Decisions* (June 1996).

(d) Preliminary recommendation

The Commission’s preliminary recommendation is that “disability” should be defined as the lack of capacity to understand the nature and foresee the effects of decisions about a claim, or to communicate those decisions.

(e) Time of disability

The existing extension provision applies only if the plaintiff was a person under a disability at the time the cause of action accrued.⁴¹⁵ This restriction is based on the rule that, once a limitation period has commenced running, it cannot be stopped.⁴¹⁶ However, a plaintiff may be unable to commence an action within the applicable limitation period because of a disability which arose after the limitation period had started to run. This issue was raised by one of the respondents to the Information Paper.⁴¹⁷

In a number of Australian jurisdictions, legislation has been enacted to prevent the obvious injustice which may arise in such a situation.⁴¹⁸ The Law Reform Commission of Western Australia has also recommended that subsequent disability should be taken into account in determining the applicable limitation period.⁴¹⁹

The Alberta Law Reform Institute also recommended that the proposed limitation periods should not operate while a person is under a disability, whether the disability existed when the cause of action accrued or arose at some later date.⁴²⁰ This recommendation was implemented in the recently enacted Alberta legislation.⁴²¹

⁴¹⁵ *Limitation of Actions Act 1974* (Qld) s 29(1).

⁴¹⁶ *Rhodes v Smethurst* (1838) 4 M & W 42, 150 ER 1335.

⁴¹⁷ Submission 9.

⁴¹⁸ *Limitation Act 1985* (ACT) s 30(1); *Limitation Act 1969* (NSW) s 52(1); *Limitation Act 1981* (NT) s 36(1); *Limitation of Actions Act 1936* (SA) s 45(1).

⁴¹⁹ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 24-25.

⁴²⁰ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 41.

⁴²¹ *Limitations Act 1996* (Alta) s 5(1).

(f) The Commission's preliminary view

The Commission agrees that if a plaintiff is under a disability, the limitation period should stop running, whether the disability existed at the time the cause of action accrued or whether it arose subsequently.

(g) Preliminary recommendation

The Commission's preliminary recommendation is that the limitation period should be suspended during any period of time that the plaintiff is under a disability.

(h) Effect of the extension provision

The existing legislation will generally suspend the running of the limitation period until the person ceases to be under a disability or dies, whichever happens first.⁴²²

However, in this Discussion Paper, the Commission has made a preliminary recommendation that the present system, based on a limitation period which commences at the date when the cause of action accrues, be replaced by a scheme which provides that the limitation period should be the lesser of two alternative limitation periods - a three year period which commences when the plaintiff becomes or, in the circumstances, ought to have become aware of the information necessary to bring the action, and a fifteen year period which begins on the date of the alleged defendant's act or omission.⁴²³

It is therefore necessary to consider whether the disability extension provision should apply to both of the alternative limitation periods. The Alberta Law Reform Institute concluded that both periods should be suspended by the plaintiff's disability.⁴²⁴

The discovery period is designed to give a claimant sufficient opportunity after discovery to conduct further investigations, to attempt to negotiate a settlement, and to bring a proceeding seeking a remedial order if necessary. As such, it is based on the assumption that a person who obtains the requisite knowledge has the ability to

⁴²² *Limitation of Actions Act 1974* (Qld) s 29(1), 29(2)(c).

⁴²³ See pp 60-61 above.

⁴²⁴ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 78.

make reasonable judgments in decisions relating to a claim. This assumption does not fit an adult under disability who is deemed unable to make reasonable judgments in respect of matters relating to ... a claim.

The operation of the ultimate period is suspended notwithstanding that the ultimate period operates against a claimant even if he could not, after reasonable investigation, discover the requisite knowledge about his claim ... That is because the situation of a person under disability is significantly different from that of a person not under disability: while the person not under disability is able to make investigations and reasonable decisions, a person under disability is deemed not to have this capacity, no matter how much knowledge he may have obtained.

The Law Reform Commission of Western Australia, on the other hand, recommended that the ultimate period should not be suspended by the disability of the plaintiff.⁴²⁵

... it is not desirable to adopt the alternative adopted in most other jurisdictions under which the limitation period does not run while a person is affected by mental incapacity, with the result that the running of the limitation period may be delayed indefinitely. After a given number of years, the defendant should ordinarily be able to regard his liability as at an end. By the time this point is reached, it is unlikely that the issues between the parties can be fairly determined ...

The Western Australian Commission expressed the view that, in any situation where expiration of the ultimate limitation period caused injustice to a plaintiff under a disability, it would be possible to ask the court to exercise its discretion in favour of an extension of the period.⁴²⁶

(i) The Commission's preliminary view

The Commission believes that, although suspension of both alternative limitation periods may cause the defendant to be at risk of indefinite liability, any hardship to the defendant would be outweighed by the injustice to the plaintiff of allowing the limitation period to expire while the plaintiff lacked capacity to commence proceedings.

The Commission is not persuaded that reliance on judicial discretion is the appropriate solution in this situation. It should be sufficient for the plaintiff to establish the existence and duration of the disability.

⁴²⁵ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 401-402.

⁴²⁶ *Id.*, 402.

(j) Preliminary recommendation

It is the preliminary recommendation of the Commission that both the three year limitation period commencing when the plaintiff knew or, in the circumstances should have known, the information necessary to make the claim and the fifteen year alternative limitation period commencing on the date of the defendant's act or omission should be suspended during any period when the plaintiff is under a disability.

(k) Effect of decision-making order

The Alberta Law Reform Institute, while basing its definition of incapacity for the purposes of limitation legislation on the criteria set out in the Alberta legislation providing for the appointment of decision-makers for people with impaired decision-making capacity,⁴²⁷ recommended that the appointment of a decision-maker should not have any effect on the suspension of the limitation period for a person under disability.⁴²⁸ This recommendation was implemented by the *Limitations Act 1996*, which defined "person under disability" to include "a dependent adult pursuant to the *Dependent Adults Act*".⁴²⁹

However, the Western Australian Law Reform Commission, consistently with its recommendation that the limitation period should not be suspended in favour of minors who are in the custody of a parent or a guardian,⁴³⁰ recommended that:⁴³¹

- If an administrator has been appointed under the *Guardianship and Administration Act 1990* (WA), there should be no extension of any applicable limitation period. The discovery period would commence when the damage became discoverable, but it would be the knowledge of the administrator which would be relevant for this purpose.
- Where a person becomes affected by mental incapacity after the commencement of the limitation period, the discovery period should stop

⁴²⁷ *Dependent Adults Act 1980* (Alta) s 25.

⁴²⁸ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 78.

⁴²⁹ *Limitations Act 1996* (Alta) s 1(i)(ii). See also *Limitation Act 1974* (Tas) s 2(2)(b), s 2(3).

⁴³⁰ See pp 90-91 above.

⁴³¹ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 24-25, 402.

running until such time as an administrator is appointed under the *Guardianship and Administration Act 1990* (WA), when it should recommence.

These recommendations were based on the view that:⁴³²

... if there is an administration order in force, the administrator can be expected to take decisions about the commencement of legal proceedings in the same way as a person of full age and capacity could do on his own behalf.

In Queensland, there is no single piece of legislation equivalent to the *Dependent Adults Act* in Alberta or the *Guardianship and Administration Act* in Western Australia. The implementation of such legislation has been recommended by this Commission.⁴³³ However, a number of other provisions allow for administration of a person's estate, and with it the right to undertake legal action on the person's behalf, to be given to the Public Trustee.⁴³⁴

(l) The Commission's preliminary view

Consistently with its view in relation to the "custody of a parent" rule,⁴³⁵ the Commission considers that a plaintiff who is under a disability should not be further disadvantaged by the barring of a potential remedy because a substitute decision-maker has failed to commence proceedings on the plaintiff's behalf.

(m) Preliminary recommendation

It is the preliminary recommendation of the Commission that the suspension of the limitation period in favour of a plaintiff who is under a disability should not be affected by the appointment of a substitute decision-maker.

⁴³² Id, 401.

⁴³³ Queensland Law Reform Commission, Report No 49: *Assisted and Substituted Decisions* (June 1996).

⁴³⁴ See for example *Mental Health Act 1974* (Qld) Schedule 5; *Public Trustee Act 1978* (Qld) ss 65, 67; *Intellectually Disabled Citizens Act 1985* (Qld) s 32.

⁴³⁵ See pp 91-92 above.

3. THE “STOLEN GENERATIONS”

(a) The removal policy and its effect

In all Australian jurisdictions, there existed for many years a policy of removing indigenous children from their families and placing them in institutions or foster homes. This policy was introduced in Queensland in the late nineteenth century and continued until the mid nineteen sixties. Implementation of the policy involved:⁴³⁶

- deprivation of liberty by detaining Aboriginal and Torres Strait Islander children and confining them in institutions;
- abolition of parental rights by taking the children and making the children wards or by assuming custody and control;
- abuses of power in the removal process; and
- breach of guardianship obligations.

The effects of this policy on the “stolen” children, their parents and families, and wider indigenous communities were devastating. The Human Rights and Equal Opportunity Commission, in the report of its national inquiry into the separation of indigenous children from their families, noted:⁴³⁷

Because the objective was to absorb the children into white society, Aboriginality was not positively affirmed. Many children experienced contempt and denigration of their Aboriginality and that of their parents or denial of their Aboriginality. In line with the common objective, many children were told either that their families had rejected them or that their families were dead. Most often family members were unable to keep in touch with the child. This cut the child off from his or her roots and meant the child was at the mercy of institution staff or foster parents. Many were exploited and abused. Few who gave evidence to the Inquiry had been happy and secure. Those few had become closely attached to institution staff or found loving and supportive adoptive families.

... The Inquiry was told that the effects (of removal) damage the children who were forcibly removed, their parents and siblings and their communities. Subsequent generations continue to suffer the effects of parents and grandparents having been forcibly removed, institutionalised, denied contact with their Aboriginality and in some cases traumatised and abused.

It is difficult to capture the complexity of the effects for each individual. Each

⁴³⁶ Human Rights and Equal Opportunity Commission, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: *Bringing them home* (April 1997) 252.

⁴³⁷ *Id.*, 177-178.

individual will react differently, even to similar traumas. For the majority of witnesses to the Inquiry, the effects have been multiple and profoundly disabling. An evaluation ... should take into account the ongoing impacts and their compounding effects causing a cycle of damage from which it is difficult to escape unaided. Psychological and emotional damage renders many people less able to learn social skills and survival skills. Their ability to operate successfully in the world is impaired causing low educational achievement, unemployment and consequent poverty. These in turn cause their own emotional distress leading some to perpetrate violence, self-harm, substance abuse or anti-social behaviour.

(b) Legal action resulting from the policy

It is only recently that the damage caused by the policy of enforced removal has begun to be recognised. The first legal action in Australia for compensation for the loss suffered as a result of separation and institutionalisation was not commenced until 1993.

It was brought by a woman who had been taken away from her Aboriginal mother shortly after her birth in 1942 and placed in an institution caring for Aboriginal children. In 1947, because of overcrowding at that institution and because she had fair skin, she was moved to a home for white children, where she was at first brought up to believe that she was an orphan of European background. She had no visitors and was lonely at the home. She was subjected to some acts of violence. Eventually, after she had run away a number of times, she was told that she had “mud in her veins”; in other words, that she was of Aboriginal descent. The revelation distressed her greatly, since she had been brought up to have a low opinion of Aboriginal people. During the 1960s, she developed various mental disorders, including acute anxiety and reactive depression. As a result of commencing university studies in 1985, she began in her own mind to associate her psychiatric and social problems with her removal to an environment which failed to offer her the love and support for her identity which she needed. In 1991 she was diagnosed as having a severe form of personality disorder attributable to the way she had been treated in the home.

She subsequently commenced actions at common law for negligence and wrongful imprisonment and in equity for breach of fiduciary duty.

Because of the length of time which had elapsed, the plaintiff had to overcome the hurdle of the relevant limitation legislation. Although she was successful in having the limitation period extended,⁴³⁸ the case gives rise to the question of the appropriate relationship between limitation law and claims brought by indigenous Australians for the injurious effects of being taken away from their families.

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Williams v Minister, Aboriginal Land Rights Act 1983 and Another (1994) 35 NSWLR 497.

(c) Options for reform**(i) No limitation period**

The Human Rights and Equal Opportunity Commission noted that, in civil litigation, limitation periods may deny a remedy to many victims of forcible removal and that, in any event, relying only on civil litigation would be likely to lead to great delay, inequity and inconsistency of outcome; that the civil process is daunting and expensive, thus deterring many of those affected; and that it would involve great expense for governments to defend the claims.⁴³⁹

The Commission recommended the establishment of a national statutory compensation fund,⁴⁴⁰ which would make minimum lump sum reparation to indigenous people removed from their families by compulsion, duress or undue influence,⁴⁴¹ and monetary compensation assessed by reference to general civil standards to any person proving on the balance of probabilities that they had suffered particular harm or loss.⁴⁴² It also recommended that, because of the violation of human rights brought about by implementation of the removal policy and because of the long-term effects of that violation, there should be no limitation period for claims made against the fund.⁴⁴³

The Commission further recommended that the proposed compensation scheme should be an alternative to the right to seek damages through the courts.⁴⁴⁴

(ii) Effect of Commission's proposed scheme

Under the scheme proposed by the Commission in this Discussion Paper, the limitation period for a common law claim would be the lesser of three years from when the plaintiff had sufficient information to bring the claim or fifteen years from when the conduct giving rise to the claim occurred.⁴⁴⁵ This would

⁴³⁹ Human Rights and Equal Opportunity Commission, Report of the National Inquiry into the Removal of Aboriginal and Torres Strait Islander Children from Their Families: *Bringing them home* (April 1997) 305.

⁴⁴⁰ Id, 309 (Recommendation 15).

⁴⁴¹ Id, 312 (Recommendation 18).

⁴⁴² Ibid, (Recommendation 19).

⁴⁴³ Id, 310-311 (Recommendation 17(3)).

⁴⁴⁴ Id, 313 (Recommendation 20).

⁴⁴⁵ See pp 60-61 above.

mean that most claims would be out of time, since it is now almost thirty years since implementation of the policy was abandoned. However, the Commission has also recommended that there should be a judicial discretion to extend the limitation period in exceptional cases.⁴⁴⁶ Factors to be taken into account in the exercise of that discretion are set out on pages 69-70 above. They include:

- the length of and reasons for delay on the part of the plaintiff;
- the nature of the plaintiff's injury;
- the conduct of the defendant which resulted in the harm of which the plaintiff complains;
- the duration of any disability of the plaintiff arising on or after the date on which the injury became discoverable; and
- the extent to which the plaintiff acted properly and reasonably in the circumstances once the injury became discoverable.

If the action is an equitable claim for relief from the consequences of breach of fiduciary duty, the effect of the Commission's proposed scheme will depend on whether equitable claims are made generally subject to the scheme. On page 85 of this Discussion Paper, the Commission has asked for submissions on this issue.

If the Commission's final recommendation is that equitable claims should not generally be subject to the scheme, there would be no limitation period for a claim for breach of fiduciary duty brought by a "stolen" child. If equitable claims are made generally subject to the scheme, a "stolen" child may be able to obtain an extension of the limitation period by the exercise of the residual judicial discretion.

(d) The Commission's preliminary view

The Commission acknowledges the need to ensure that plaintiffs are not denied access to justice in claims of this kind. It is the view of the Commission that this objective would be best achieved by the implementation of the recommendations made by the Human Rights and Equal Opportunity Commission.⁴⁴⁷ However, such a recommendation is outside the Commission's terms of reference.

⁴⁴⁶ See Chapter 8 of this Discussion Paper.

⁴⁴⁷ See p 102 above.

In relation to court proceedings, the Commission is not persuaded that it would be desirable to attempt to exclude such claims from the ambit of its preliminary recommendations.

The reasons for the Commission's view are twofold. Firstly, the Commission believes that the wide variety of circumstances in which indigenous children were removed from their families would create considerable difficulty in formulating a definition of plaintiffs whose claim should be excluded. Secondly, the general thrust of the Commission's preliminary recommendations is to avoid, wherever possible, the need for particular provisions for specific claims.

The Commission considers that a claim by an indigenous plaintiff which is based on separation from the plaintiff's family and community would be adequately provided for by the general scheme proposed by the Commission. Clearly, such a claim would be an appropriate example of circumstances in which a court should give consideration to the exercise of its discretion to extend the limitation period in the plaintiff's favour. Further, claims which are founded on a breach of fiduciary duty or some other equitable obligation may be automatically exempted if the Commission's final recommendation is that equitable claims should not be included in the scheme.

(e) Preliminary recommendation

Because the Commission believes that claims brought by "stolen children" as a result of their removal from their families can be adequately dealt with under the general provisions of its proposed scheme, it is the preliminary recommendation of the Commission that there should not be a specific provision in relation to such claims.

4. SURVIVORS OF CHILDHOOD SEXUAL ABUSE

(a) The effects of childhood sexual abuse

Although it is generally accepted that there are many incidents of childhood sexual abuse which remain undisclosed and unreported,⁴⁴⁸ there is now a significant body

⁴⁴⁸ PE Mullen et al, "Childhood Sexual Abuse and Mental Health in Adult Life", (1993) 163 *British Journal of Psychiatry* 721, 729; D Finkelhor, "The International Epidemiology of Child Sexual Abuse", (1994) 18 *Child Abuse and Neglect* 409, 412; LA Potter and RH Potter, "The Impact of Childhood Abuse Experience on Adult Survivors", (1995) 7 *Current Issues in Criminal Justice* 133; W Patton and M Mannison, "Unwanted sexual experiences during childhood: Australian continuum data", (1996) 21 *Children Australia* 5, 10; JM

of literature describing the nature of this kind of abuse and detailing the way in which the mental health of a child who has been sexually abused may be damaged by the abuse.

The majority of adults who sexually abuse children are related to or in a trusted relationship - for example a family friend, teacher or church leader - with the child.⁴⁴⁹ A recent Australian survey indicated that the perpetrator was known to the child in more than half of the incidents reported in the survey - 60 per cent of females' experiences and 50 percent of males' experiences - and that, in more than half of these, the perpetrator was a relative or family friend.⁴⁵⁰ The same survey also found that unwanted sexual experiences most commonly occur between the ages of 9 and 13.⁴⁵¹

The age at which abuse takes place and the relationship between the child and the abuser create an inherent imbalance of power. Because of this imbalance in the relative positions of the abuser and the child, the abuser is generally able to conceal what is happening. There will be no witnesses, as the abuse will take place only when the abuser and the child are alone together.⁴⁵² If the child is too young to understand the sexual character of the abuser's behaviour, the abuser may persuade the child that the conduct is a special secret between them, likely to be misunderstood and therefore not to be shared with anyone else.⁴⁵³ Secrecy is essential for the abuser to escape detection and to be able to continue the abuse. As the child grows older and becomes aware of the illicit nature of the abuser's acts, in order to ensure the child's compliance and silence the abuser may resort to emotional blackmail or threats of violence against the child or, in the case of incestuous abuse, against other members of the family - for example, younger siblings.⁴⁵⁴ In this situation, the child may come to feel responsible not only for allowing the abuse to occur but also for keeping the family safe and intact. A sexually abused child may also fail to report the abuse because of guilt, shame or

Fleming, "Prevalence of childhood sexual abuse in a community sample of Australian women", (1997) 166 *Medical Journal of Australia* 65, 67.

449 RC Summit, "The Child Sexual Abuse Accommodation Syndrome", (1983) 7 *Child Abuse and Neglect* 177, 179.

450 Patton and Mannison, note 448 above, 9-10.

451 Id at 9. See also *Incest Survivors' Association Journal*, (Spring 1996) 29.

452 DG Sturgess, *An Inquiry into Sexual Offences Involving Children and Related Matters* (November 1985), 49.

453 Id, 69.

454 Id, 49; Summit, note 449 above, 181; MG Salten, "Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy", (1984) 7 *Harvard Women's Law Journal* 189, 196; CW Napier, "Civil Incest Suits: Getting Beyond the Statute of Limitations", (1990) 68 *Washington University Law Quarterly* 995, 1002.

fear of blame or disbelief.⁴⁵⁵

The consequences of childhood sexual abuse vary with the individual.⁴⁵⁶ Not all children who are sexually abused are prone to problems in adult life: some seem resilient to possible adverse effects of the abuse.⁴⁵⁷

However, a sexually abused child may demonstrate negative emotional effects from the time of the initial abuse.⁴⁵⁸ The immediate effects of sexual abuse can be very damaging to the child. Common symptoms include anxiety, low self-esteem and depression, which may manifest itself as apathy, withdrawal, anger, loss of interest in normal activities and self-destructive behaviour.⁴⁵⁹

Often the child will internalise the emotional conflict, risking the development of a distorted and negative self-image.⁴⁶⁰ The child may “dissociate” while the abuse is taking place, so that the perception is not of involvement in the abuse but rather of looking on from a distance at the child suffering the abuse.⁴⁶¹ Other survival tactics include repressing the memory of the abuse so that, although the memory is retained, there is no conscious knowledge that it exists; or suppressing the trauma so that, although the abuse could be recalled, the child avoids doing so.⁴⁶²

If, as frequently happens, the abuse remains undetected, the child has to develop his or her own strategies for dealing with what is going on. Many sexually abused children exhibit symptoms which fit or partially satisfy the diagnostic criteria for post-

⁴⁵⁵ Summit, note 449 above, 181; RL Thomas, “Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action”, (1991) 26 *Wake Forest Law Review* 1245, 1249.

⁴⁵⁶ AM Hagen, “Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse”, (1991) 76 *Iowa Law Review* 355, 359; PE Mullen et al, “The Effect of Child Sexual Abuse on Social, Interpersonal and Sexual Function in Adult Life”, (1994) 165 *British Journal of Psychiatry* 35, 43, 45.

⁴⁵⁷ SE Romans and PE Mullen, “Childhood sexual abuse: concerns and consequences”, (1997) 166 *Medical Journal of Australia* 59.

⁴⁵⁸ Napier, note 454 above, 1003; Hagen, note 456 above, 359.

⁴⁵⁹ D Finkelhor, *A Sourcebook on Child Sexual Abuse* (1986) 20-21; Summit, note 449 above, 185; Hagen, note 456 above, 359.

⁴⁶⁰ Salten, note 454 above, 198.

⁴⁶¹ Summit, note 449 above, 185; J Mosher, “Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest”, (1994) 44 *University of Toronto Law Journal* 169, 178.

⁴⁶² Mosher, note 461 above, 178.

traumatic stress disorder (PTSD),⁴⁶³ where memory of a psychologically unacceptable experience is partially or completely repressed due to lack of emotional resources to process the trauma.⁴⁶⁴ The symptoms of PTSD include anxiety, recurring nightmares and flashbacks, insomnia, depression, anger, guilt and mistrust. They also include long-term self-destructive behavioural patterns such as substance abuse, feelings of worthlessness, suicidal thoughts and emotional numbing.⁴⁶⁵

The effects of childhood sexual abuse may continue to develop into adulthood, and the full impact of the abuse may not be fully realised until many years after the abuse occurred. Alternatively, the symptoms of the abuse may lie dormant during a “latency” period which may last for “days or decades”, until the memory is triggered.⁴⁶⁶

The harmful consequences of the abuse may not be found primarily in the immediate aftermath of the actual abuse, but in the disruption to development of the ability to function optimally in intimate sexual relationships and social life.⁴⁶⁷ Studies have shown that adult survivors demonstrate more symptoms and dysfunctions than normal controls, with symptoms clustering in three areas: anxiety and its associated behaviours, depression and lowered self-esteem, and social and sexual dysfunction.⁴⁶⁸

An adult who was sexually abused as a child may react in one of the following ways:⁴⁶⁹

- not experience the symptoms of the abuse for a substantial number of years;
- experience the symptoms but fail to recall the abuse;
- remember the abuse, but fail to make the connection between it and subsequent symptoms, because of either denial of the effects of the abuse, or

⁴⁶³ McLeer et al, “Post-Traumatic Stress Disorder in Sexually Abused Children”, (1988) 27 *Journal of the American Academy of Child and Adolescent Psychiatry* 650, 652; Herman Russell and Trocki, “Long-Term Effects of Incestuous Abuse in Childhood”, (1986) 143 *American Journal of Psychiatry* (1986) 1293.

⁴⁶⁴ Thomas, note 455 above, 1252-1254.

⁴⁶⁵ FH Lindberg and LJ Distad, “Post-Traumatic Stress Disorders in Women Who Experienced Childhood Incest”, (1985) 9 *Child Abuse and Neglect* 329.

⁴⁶⁶ Lindberg and Distad, note 465 above, 332.

⁴⁶⁷ Mullen et al, note 456 above, 45.

⁴⁶⁸ McLeer et al, note 463 above, 650.

⁴⁶⁹ Mosher, note 461 above, 181.

continuing self-blame or failure to identify the abusive conduct as wrongful;

- remember the abuse and make the connection between it and current symptoms but remain unable, because of the pain and suffering involved, to seek compensation from the abuser.

The effects of childhood sexual abuse mean that, in many cases, the person who has been abused is unable to commence legal action for compensation within the limitation period.

(b) Existing legislation

The existing legislation contains a number of provisions for extending the limitation period.

For example, the limitation period for an action based on injury to a child does not commence until the child attains majority.⁴⁷⁰ The commencement of the limitation period may also be delayed if the action is based on fraud or if the right of action has been fraudulently concealed.⁴⁷¹ A similar mechanism has been successfully used in New Zealand to assist a plaintiff who had been sexually abused as a child by an adult who fraudulently concealed the nature of the abuse.⁴⁷² There is also provision for extension of the limitation period in cases of latent personal injury.⁴⁷³

(c) Other jurisdictions

(i) Canada

Legislation which was introduced in Ontario suspended the limitation period in claims relating to assault or sexual assault during any time when the plaintiff was prevented from commencing the proceeding because of his or her physical, mental or psychological condition.⁴⁷⁴ Under the Ontario proposals there would be no limitation period if one of the parties to a proceeding arising from a sexual assault had charge of the person assaulted, or was in a position of trust or authority, or was someone on whom the person

⁴⁷⁰ *Limitation of Actions Act 1974* (Qld) s 29(1).

⁴⁷¹ *Id.*, s 38(1).

⁴⁷² *S v G* [1995] 3 NZLR 681.

⁴⁷³ *Limitation of Actions Act 1974* (Qld) s 31.

⁴⁷⁴ *Limitations Bill 1992* (Ont) cl 9(1), cl 15(7)(a)(i).

assaulted was dependent, financially or otherwise.⁴⁷⁵

Although the proposed legislation in Ontario has not been enacted, three other Canadian provinces have implemented changes to their limitation legislation in relation to claims for childhood sexual abuse. British Columbia and Saskatchewan have abolished limitation periods in cases of misconduct of a sexual nature occurring while the plaintiff was a minor.⁴⁷⁶ The legislation in Prince Edward Island abolishes the limitation period in all cases of sexual misconduct and in all cases where the injury occurred in a relationship of dependency or intimacy.⁴⁷⁷

(ii) Western Australia

The Law Reform Commission of Western Australia gave careful consideration to the question of whether a plaintiff who brought an action for sexual abuse by a person in a position of trust would be unfairly defeated by the application of the ordinary limitation rules which it proposed, or whether there should be special provision for child abuse cases.⁴⁷⁸ The Commission concluded that a special rule was not necessary because the discovery limitation period would not start to run until the plaintiff was in possession of all the relevant information and because, if the ultimate limitation period expired, the plaintiff would be able to apply to the court for an extension under the exercise of the court's discretion. It observed:⁴⁷⁹

It is true that plaintiffs may be under some slight disadvantage in that they will have to persuade the court to exercise its discretion in their favour, rather than being entitled to proceed as of right, but as against this, the discretion solution can deal fairly with the problems involved and avoids the need to create a rule special to a particular class of plaintiffs. A further advantage of the discretionary extension is that the court retains the flexibility to deal with cases which do not fit the paradigm, for example where the plaintiff has unreasonably delayed, or the defendant has been significantly prejudiced by loss of evidence.

(d) Submissions

Four of the submissions received by the Commission in response to the Information

⁴⁷⁵ Id, cl 16(h).

⁴⁷⁶ SBC 1992 c 44; SS 1993 Bill 15.

⁴⁷⁷ SPEI 1992 c 63.

⁴⁷⁸ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 236.

⁴⁷⁹ Id, 237.

Paper gave consideration to this issue.⁴⁸⁰ Three respondents were of the view that limitation periods should not apply to claims by survivors of childhood sexual abuse.⁴⁸¹ The fourth respondent advocated adoption of the Ontario proposals: that is, that the limitation period for claims relating to assault or sexual assault should be suspended during any time when the plaintiff's physical, mental or psychological condition prevents him or her from commencing an action, and that there be no limitation period if, in a claim for sexual abuse, the alleged abuser had charge of the plaintiff or was someone on whom the plaintiff was dependent, financially or otherwise.⁴⁸²

One submission referred to the domination of the abused person by the abuser, and the manipulation which may occur for many years after the abuse has ceased.⁴⁸³ Another observed:⁴⁸⁴

In view of the traumatic long-term effects of child sexual abuse and in recognition of the fact that the abuser's conduct causes not only these life long problems for the victim but also the delay in bringing an action against him, the abuser's ability to defend the claim by relying on statutes of limitation is morally repugnant and should not be condoned by the legal system. ... It follows that statutes of limitation should not apply to child sexual abuse cases.

(e) The Commission's preliminary view

In this Discussion Paper, the Commission's preliminary recommendation is that the operation of the limitation period proposed by the Commission should be suspended during the minority of the plaintiff.⁴⁸⁵

The general limitation period proposed by the Commission is the lesser of:⁴⁸⁶

- three years from the date when the plaintiff knew or, in the circumstances, ought to have known the information necessary to bring the claim; and
- fifteen years after the date on which the conduct, act or omission giving rise to the claim occurred.

480 Submissions 6, 9 15, 23.

481 Submissions 6, 9, 23.

482 Submission 15. See note 474 above.

483 Submission 6.

484 Submission 23.

485 See p 92 above.

486 See pp 60-61 above.

In the context of a plaintiff who is bringing a claim which arose when the plaintiff was a minor, suspension of the limitation period during the plaintiff's minority would give rise to the following situations.

If the plaintiff at the time of attaining majority knew or, in the circumstances, ought to have known the information necessary to bring the claim, the limitation period would commence when the plaintiff turned eighteen, and would run for three years from that date.

However, if the plaintiff was not and, in the circumstances, could not have been expected to be aware of the relevant information at the time of attaining majority, the limitation period would be the lesser of:

- three years after the date on which the plaintiff first knew, or in the circumstances ought to have known, the relevant information; and
- fifteen years after the date on which the plaintiff attained majority.

Depending on the relationship between the plaintiff and the alleged abuser, the plaintiff may be able to bring an equitable claim for breach of fiduciary duty. A number of cases have recognised the parental relationship as creating a fiduciary obligation.⁴⁸⁷ Institutional carers and government welfare agencies may also owe a fiduciary duty to those they undertake to protect or serve.⁴⁸⁸

If the action is a claim for relief from the consequences of breach of fiduciary duty, the effect of the Commission's proposed scheme will depend on whether equitable claims are made generally subject to the scheme. On page 85 of this Discussion Paper, the Commission has asked for submissions on this issue.

If the Commission's final recommendation is that equitable claims should not generally be subject to the scheme, there would be no limitation period for a claim for breach of fiduciary duty. On the other hand, if the Commission recommends that equitable claims should be subject to the same general limitation periods as common law claims, the time limits set out above would apply.

The Commission acknowledges that, while three years from the date of discovery is generally sufficient time to enable a plaintiff to commence proceedings, there may be situations in which it would be unreasonable to expect a plaintiff to initiate a claim of this kind within that period. In this context, failure to commence

⁴⁸⁷ See for example *M (K) v M (H)* (1992) 96 DLR (4th) 289; see also M Bryan, "Parents as fiduciaries: A special place in equity", (1995) 3 *International Journal of Children's Rights* 227.

⁴⁸⁸ See for example *Williams v Minister, Aboriginal Land Rights Act 1983 and Another* (1994) 35 NSWLR 497.

proceedings may be due to a number of other factors: for example, the process of healing may not have progressed sufficiently to allow the plaintiff to relive the experience or to face the stress of litigation, there may be complications caused by family relationships, or embarrassment at having essentially private matters aired in public.⁴⁸⁹

However, the Commission has also recommended that there should be a judicial discretion to extend the limitation period in exceptional cases.⁴⁹⁰ Factors to be taken into account in the exercise of that discretion are set out on pages 69-70 above. They include:

- the length of and reasons for delay on the part of the plaintiff;
- the nature of the plaintiff's injury;
- the conduct of the defendant which resulted in the harm of which the plaintiff complains;
- the conduct of the defendant after the cause of action arose, including:
 - (a) the extent, if any, to which the defendant took steps to make available to the plaintiff means of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant; and
 - (b) any other conduct of the defendant which contributed to the plaintiff's delay in bringing the action;
- the position of the defendant, including the extent to which the defendant could have been expected to be aware that claims might arise long after the acts or omissions in question;
- the duration of any disability of the plaintiff arising on or after the date on which the injury became discoverable;
- the extent to which the plaintiff acted properly and reasonably in the circumstances once the injury became discoverable; and
- the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice received.

The Commission is also aware of arguments that the underlying policy of limitation legislation does not apply to claims for childhood sexual abuse. The policy

⁴⁸⁹ *Incest Survivors' Association Journal* (Spring 1996) 29; Mosher, note 461 above, 203.

⁴⁹⁰ See Chapter 8 above.

rationales for limitation legislation - fairness, certainty and public policy - are explained in Chapter 2 of this Discussion Paper. In the context of claims for childhood sexual abuse, the following comments have been made.

The argument in favour of fairness to the person against whom the claim is brought assumes that the person making the claim is in a position of superior knowledge to the alleged abuser. However, a person who committed abuse will have knowledge of it and should not be allowed to claim to be surprised or disadvantaged by the delay in commencing proceedings.⁴⁹¹

The argument in favour of certainty - the need for people to be able to order their affairs without the indefinite threat of being sued - may make sense where the dispute takes place in a commercial context, and where, after a certain length of time, there is a need for business to be able to carry on as usual. However, its relevance is questionable against an abuser who has succeeded in concealing the abuse as a result of threats, emotional blackmail or misrepresentation of the nature of the abusive conduct, and whose own actions have contributed to the inability of the abused person to commence proceedings within the limitation period.⁴⁹²

The argument in favour of the public interest in the effective working of the court system and in the speedy resolution of disputes, and the concern that the difficulty of deciding disputes where the evidence has become stale will adversely affect the public perception of the judicial system and overtax the resources of the courts, ignores the fact that many jurisdictions do not have any time bar on the prosecution of criminal offences. In those jurisdictions courts have to deal with criminal cases which may be tried a considerable period of time after the commission of the alleged offence. Where a criminal prosecution and a civil compensation claim arise from the same abusive behaviour, there seems no logical explanation why a court should be able to hear the criminal case but not to decide the civil matter. The outcome of both criminal and civil trials will hinge largely on the credibility of the person claiming to have been abused and of the alleged abuser. It would appear that, in civil cases, the potential difficulty of assessing the credibility of the parties has become confused with evidentiary problems created by delay per se.⁴⁹³

Nonetheless, the Commission is not persuaded that claims based on childhood sexual abuse should be excluded from the proposed legislative scheme.

The Commission recognises that there will be many cases where the underlying policy reasons for limitation law do not apply. However, there will also be some

⁴⁹¹ Moshier, note 461 above, 185-186.

⁴⁹² JB Lamm, "Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule", (1991) 100 *Yale Law Journal* 2189, 2198; Moshier, note 461 above, 188.

⁴⁹³ Moshier, note 461 above, 194-196.

cases where the policy reasons do apply. For example, some cases will be brought not against the actual perpetrator of the abuse, but against some other party such as the perpetrator's employer. In such a situation, considerations of prejudice to the defendant as a result of evidentiary difficulties remain relevant.

Further, the need for flexibility to accommodate claims which arise in a wide variety of circumstances could create considerable difficulty in formulating a satisfactory definition of plaintiffs who should be excluded from the scheme.

The general thrust of the Commission's preliminary recommendations has been to avoid, wherever possible, the need for special provisions to deal with particular circumstances. The Commission believes that its general recommendations would adequately provide for claims based on childhood abuse. The exercise of judicial discretion would allow a court to take into account all the relevant factors and to assess the reliability of the evidence many years after the alleged abuse took place. Claims involving a breach of fiduciary duty may be automatically excluded from the scheme if the Commission's final recommendation is that equitable claims should generally be excluded from the scheme.

(f) Preliminary recommendation

Because the Commission believes that its general recommendations provide adequately for claims by survivors of childhood sexual abuse arising out of that abuse, it is the preliminary recommendation of the Commission that there should not be a specific provision in relation to such claims.

5. PRISONERS

(a) Existing legislation

Section 5(2) of the *Limitation of Actions Act 1974* (Qld) provides that a person shall be taken to be under a disability while "a convict who, after conviction, is undergoing a sentence of imprisonment".

(b) Other jurisdictions

The Northern Territory⁴⁹⁴ is the only other jurisdiction in Australia where imprisonment of the plaintiff is specifically included as a disability which will postpone the running of the limitation period. In New South Wales, a person is taken to be under a disability if the person is, for a continuous period of twenty-eight days or more, incapable of, or substantially impeded in, the management of the person's affairs in relation to the claim, by reason of lawful or unlawful restraint.⁴⁹⁵

The New Zealand Law Commission, which also recommended that "incapacity" should include restraint resulting in inability (or substantial impairment of ability) to manage affairs in relation to a claim, commented that:⁴⁹⁶

... our proposals are not intended to provide an automatic extension of a limitation period for persons in penal institutions. The onus is to be on a claimant that the relevant circumstances actually impeded management of his or her affairs. Ordinarily, where communication with those outside the institution is possible, this would be a difficult onus to discharge; but there might be extraordinary circumstances - perhaps some form of solitary confinement - where the onus would be able to be discharged.

(c) Submissions

One of the submissions received by the Commission in response to the Information Paper raised the following issues in relation to prisoners:⁴⁹⁷

The benefit which this provision confers on prisoners is difficult to justify. There is nothing to prevent a prisoner instituting proceedings whilst he or she remains a prisoner. The prisons system allows ready access to legal representatives. A person serving a prison sentence may not have access to substantial funds to conduct a litigation; but the same applies to anyone who is impecunious. It is difficult to understand why the law should confer a particular benefit on prisoners, which is not available to other impecunious members of the community, let alone to a prisoner who is not impecunious. Nor is it immediately apparent why a potential defendant's exposure to the institution of proceedings should be prolonged almost indefinitely, merely because the potential plaintiff is serving a lengthy term of imprisonment.

However, section 91 of the *Public Trustee Act 1978* (Qld) provides that the Public Trustee is the manager of the estate of every prisoner to whom Part 7 of the *Public Trustee Act 1978* applies. Section 90 provides that Part 7 applies to:

- any prisoner who, after conviction of any indictable offence or offences, is

⁴⁹⁴ *Limitations Act 1981* (NT) s 4(1).

⁴⁹⁵ *Limitation Act 1969* (NSW) s 11(3)(b)(ii).

⁴⁹⁶ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 87.

⁴⁹⁷ Submission 3.

undergoing a sentence of imprisonment for life or for a period of 3 years or upwards or for such term as, together with any other sentence or sentences imposed upon the prisoner, has rendered the prisoner liable to imprisonment for a period of 3 years or upwards; or

- a person subject to an indefinite sentence within the meaning of Part 10 of the *Penalties and Sentences Act 1992*; or
- a person directed to be detained pursuant to Part 4 of the *Criminal Law Amendment Act 1945*.

While the Public Trustee is the manager of a prisoner's estate, the prisoner cannot, without the consent in writing of the Public Trustee, bring an action of a property nature or for the recovery of any debt or damage.⁴⁹⁸ It is possible that this mechanism could have some impact on the ease with which a prisoner could bring an action.

The respondent also queried the position of an accused person who is held in custody pending trial:

On the other hand, if there is some justification for granting extensions to prisoners, it is difficult to see why the benefit should be available only to a "convict who, after conviction, is undergoing a sentence of imprisonment". One might think that a person who has been refused bail, and is imprisoned pending trial, is in a position equally meritorious with that of a convicted prisoner, whether or not the trial ultimately results in acquittal or conviction, but especially if the trial results in acquittal.

(d) The Commission's preliminary view

The Commission has not formed a preliminary view on these matters. It specifically seeks submissions on the following issues:

- **Should the operation of limitation legislation continue to be suspended in favour of people who are in prison?**
- **If so, should all convicted prisoners be regarded as under a disability, or only those whose property is subject to management by the Public Trustee?**

⁴⁹⁸

Public Trustee Act 1978 (Qld) s 95(b).

- **Is there any reason to distinguish between a prisoner who has been convicted, and one who is awaiting trial?**

6. SUCCESSIVE DISABILITIES

(a) Existing legislation

Section 29(2)(a) of the *Limitation of Actions Act 1974* (Qld) provides that, where a right of action that has accrued to a person under a disability accrues on the death of that person while still under a disability to another person under a disability, an additional extension of time shall not be allowed by reason of the disability of the second person.

Section 29(3)(a) further provides that postponement of the limitation period is not available if the right of action first accrues to a person who is not under a disability, through whom the person under a disability claims.

(b) Submissions

One of the respondents to the Information Paper observed that these provisions would be capable of operating very harshly.⁴⁹⁹

... the benefit of s. 29 can only enure to the first person to whom the right of action accrues. If that person is not under a disability, but subsequently dies so that the right of action devolves to a person who is under a disability, the second person cannot take the benefit of s. 29; and if the first person to whom the right of action accrues is under a disability but dies before that disability has ceased, the benefit of s. 29 is not available to the person on whom the right of action then devolves. ... Take the case where a husband and wife die as a result of injuries sustained in the same motor vehicle collision, but the husband is killed instantaneously and the wife survives for some time after the husband's death: if the wife is the sole beneficiary of the husband's estate, a right of action in respect of a life assurance policy would immediately enure to the wife, and then on her death to their infant children; but the children would not be entitled to the benefit of s. 29, since the right of action first accrued to a person "not under a disability", namely the wife.

(c) The Commission's preliminary view

In the view of the Commission, this kind of situation is likely to occur infrequently. For example, most causes of action referred to in section 29(2)(a) would accrue to

⁴⁹⁹

Submission 3.

the estate of the first person under a disability on that person's death rather than to another person with a disability. The section is designed to avoid the possibility of a limitation period which is extended almost indefinitely. The Commission believes that the policy underlying the section should be retained and that, in cases where the operation of the section would cause significant injustice, an application could be made for the court to exercise its discretion to extend the limitation period.

(d) Preliminary recommendation

It is the preliminary recommendation of the Commission that the provisions relating to successive disabilities should be retained.

7. WAR

(a) Existing legislation

There is no specific provision in the *Limitation of Actions Act 1974* (Qld) allowing for suspension of the limitation period in the case of war.

(b) Other jurisdictions

Some other Australian jurisdictions provide for the suspension of the limitation period in the case of war.

In some jurisdictions, this is done by reference to the definition of disability. In New South Wales, for example, a person is taken to be under a disability if, for a continuous period of twenty-eight days or more, the person is incapable of, or substantially impeded in, the management of the person's affairs in relation to the claim, by reason of war or warlike operations,⁵⁰⁰ or by circumstances arising out of war or warlike operations.⁵⁰¹ There are similar provisions in the Australian Capital Territory.⁵⁰²

In Victoria, the legislation provides for the limitation period to be suspended for any

⁵⁰⁰ *Limitation Act 1969* (NSW) s 11(3)(b)(iii).

⁵⁰¹ *Id.*, s 11(3)(b)(iv).

⁵⁰² *Limitation Act 1985* (ACT) s 8(3)(b)(ii), (iii).

time “during which it was not reasonably practicable for a person to commence any action by reason of any war or circumstances arising out of any war in which the Commonwealth of Australia is or was engaged”.⁵⁰³ There is a similar provision in the Tasmanian Act.⁵⁰⁴ In both jurisdictions, the limitation period is not to be deemed to expire less than a year from the date when it became reasonably practicable to commence the action.

(c) The Commission’s preliminary view

The Commission acknowledges that situations may arise in which potential plaintiffs are prevented from commencing civil proceedings within the relevant limitation period as a result of armed hostilities.

However, the preliminary view of the Commission is that none of the existing provisions in other Australian legislation is entirely satisfactory. The Commission does not agree that suspension of the limitation period should be achieved by linking war or warlike operations to the definition of “disability”. Nor is the Commission persuaded that the limitation period should be able to be suspended only in circumstances arising out of any war “in which the Commonwealth of Australia is or was engaged”. It is arguable that, for example, a member of the armed forces serving in a peace-keeping role in a foreign conflict would not be entitled to the benefit of such a provision.

The Commission believes that it would be undesirable to attempt to provide specifically for the variety of situations which may occur. In Chapter 8 of this Discussion Paper, the Commission has recommended that the proposed legislative scheme should include a residual judicial discretion. Meritorious cases would be adequately catered for by the exercise of this discretion.

(d) Preliminary recommendation

It is the Commission’s preliminary recommendation that there should not be a specific provision in relation to war or warlike operations, but that cases where commencement of proceedings within the limitation period has been prevented by war or circumstances arising out of war should be dealt with by the exercise of judicial discretion.

⁵⁰³ *Limitation of Actions Act 1958* (Vic) s 23(2).

⁵⁰⁴ *Limitation Act 1974* (Tas) s 28.

8. FRAUD AND FRAUDULENT CONCEALMENT

(a) Existing legislation

The existing legislation enables suspension of the limitation period in cases based on fraud on the part of the defendant, or where the right of action is fraudulently concealed by the defendant.⁵⁰⁵

(b) Submissions

Two of the submissions received by the Commission in response to its Information Paper⁵⁰⁶ commented on the need to reform this provision because of its limited application and lack of flexibility.⁵⁰⁷

(c) The Commission's preliminary view

The Commission envisages that the need for such a provision, and the difficulties of application adverted to by the respondents, would be significantly reduced by its recommendation that there be a limitation period of general application which does not commence until the plaintiff knew or, in the circumstances, ought to have known the information necessary to bring the action.⁵⁰⁸

However, situations may arise where the plaintiff is not able to discover the relevant information before the alternative limitation period has expired.⁵⁰⁹ The Law Reform Commission of Western Australia observed, in relation to such situations:⁵¹⁰

In the ordinary case, the justifiability of protecting the defendant from stale claims decrees that the action becomes barred at this point. However, the matter is different when it is the fraud of the defendant which prevents the plaintiff from

⁵⁰⁵ *Limitation of Actions Act 1974* (Qld) s 38(1).

⁵⁰⁶ Queensland Law Reform Commission, Working Paper No 49: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997).

⁵⁰⁷ Submissions 3, 9.

⁵⁰⁸ See pp 60-61 above.

⁵⁰⁹ The Commission has recommended that the limitation period should be the lesser of three years from the date when the plaintiff knew or, in the circumstances, ought to have known the relevant information, and fifteen years from the date of the act or omission of the defendant on which the claim is based. See pp 60-61 above.

⁵¹⁰ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 328.

discovering the claim before the ultimate period expires.

The Alberta Institute of Law Research and Reform was not initially persuaded that allegations of fraudulent concealment on the part of the defendant justified special consideration. It expressed the view that:⁵¹¹

If a limitations Act contains a provision depriving a defendant of a limitations defence if he has fraudulently concealed facts material to a claim, and if the limitation period applicable to that claim has expired, the claimant will have a powerful incentive to allege that facts material to his claim were fraudulently concealed by the defendant. ... In terms of the reasons for a limitations system, the defendant will be no less vulnerable to an allegation of fraudulent concealment of facts than he will be to an allegation of facts which, if true, would constitute the breach of a duty owed to the claimant. Indeed, because of the persistence of the fallacy of the meritorious claimant, coupled with the emotional response a claim of fraud often produces, the defendant may be more vulnerable. In short, the reasons for a limitations system, if sound, should not be rejected because of a claimant's allegation of fraudulent concealment.

Despite this concern, the Institute recommended that the ultimate limitation period should be suspended for fraudulent concealment by the defendant of the fact that the injury had occurred.⁵¹² The recommendation was implemented in the recent Alberta legislation.⁵¹³ The application of this section is narrower than that of the provision proposed in Ontario, which covered concealment not only of occurrence of the injury, but also of the fact that the injury was caused by the defendant or that a claim with respect to the injury would be appropriate.⁵¹⁴

The Law Reform Commission of Western Australia adopted a different approach. The Commission noted that its recommendations differed from the Alberta legislation and the Ontario proposals because they included a judicial discretion, not present in either of the Canadian schemes, to extend the limitation period in exceptional cases:⁵¹⁵

The Commission's recommended discretion allows the court to recognise cases where the prejudice to the defendant in having to defend an action after the normal limitation period has expired, and the general public interest in finality of litigation, are outweighed by other factors, and the existence of fraudulent concealment would be an important issue in weighing these considerations.

⁵¹¹ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 294-295.

⁵¹² Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 40.

⁵¹³ *Limitations Act 1996* (Alta) s 4(1).

⁵¹⁴ *Limitations (General) Bill 1992* (Ont) cl 15(7)(b).

⁵¹⁵ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 329.

The Commission concluded that, in view of its recommendation relating to judicial discretion, there would be no need for a separate rule dealing with fraudulent concealment.⁵¹⁶

One of the submissions received by this Commission in response to its Information Paper expressed the view that “there should be no ultimate period beyond which a defendant is protected if the plaintiff’s claim is based on the fraudulent conduct of the defendant”.⁵¹⁷

The Commission considered the question of whether cases involving fraud or fraudulent concealment on the part of the defendant should be exempted from limitation legislation. However, it is the preliminary view of the Commission that, regardless of the conduct of the defendant, a plaintiff should be required to act reasonably once he or she is in possession of the relevant information.

Nonetheless, the Commission is also concerned that a defendant whose conduct has prevented a plaintiff from discovering the necessary information should not be able to rely on that conduct to deny the plaintiff the right to bring an action. It is the preliminary view of the Commission that a plaintiff should be entitled to a reasonable time after discovery to commence proceedings, regardless of the time which elapses before discovery.

(d) Preliminary recommendation

It is the preliminary recommendation of the Commission that where:

- **an action is based upon the fraud of the defendant or the defendant’s agent or of a person through whom he or she claims or his or her agent; or**
- **the defendant or any other person named above fraudulently conceals:**
 - (a) the fact that injury has occurred; or**
 - (b) that the injury was caused or contributed to by the conduct of the defendant; or**
- **the defendant or any other person named above knowingly misleads the**

⁵¹⁶ Ibid.

⁵¹⁷ Submission 13.

plaintiff as to the appropriateness of a proceeding as a means of remedying the injury

the alternative limitation period for a claim should be suspended.

CHAPTER 12

OTHER ISSUES REQUIRING SPECIAL CONSIDERATION

1. FRAUDULENT BREACH OF TRUST

(a) Existing legislation

Under the existing Queensland legislation, there is no limitation period for an action by a beneficiary of a trust for fraudulent breach of trust by the trustee, or for recovery of trust property in the possession of the trustee or previously received by the trustee and converted to the trustee's use.⁵¹⁸

(b) Other jurisdictions

A different approach to such claims has been adopted in jurisdictions where the replacement of an accrual based limitation scheme with a discovery based one has been implemented or recommended. The current trend in Canada is not to exempt a claim for fraudulent breach of trust from the operation of a limitation scheme. In Alberta, for example, there is no specific reference in the legislation to fraudulent breach of trust.⁵¹⁹ The Law Reform Commission of Western Australia, consistently with its recommendation about fraudulent concealment, concluded that there was no need for a separate rule dealing with fraudulent breach of trust or the recovery of trust property and that the matter should be left to the exercise of judicial discretion.⁵²⁰

If there is a claim by a beneficiary against a trustee for a fraudulent breach of trust of which the trustee was aware, or to which the trustee was a party, and the discovery period and the ultimate period have both expired, the fact that the breach of trust was fraudulent, and the trustee's involvement, can be taken into account by the court in exercising its discretion whether or not to disregard the running of the limitation period. The fact that the claim was one for the recovery of trust property, or the proceeds of such property, could also be taken into account.

(c) The Commission's preliminary view

The Commission's preliminary view is that claims for fraudulent breach of trust should not be subject to a limitation period. The Commission believes that it is

⁵¹⁸ *Limitation of Actions Act 1974* (Qld) s 27(1).

⁵¹⁹ However, the ultimate limitation period is suspended during any period of time that the defendant fraudulently conceals certain matters. See note 223 above.

⁵²⁰ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 329.

undesirable to place a time limit on the recovery of trust property which has been wrongfully obtained. Exempting claims of this kind from the legislative scheme would not expose a defendant to open-ended liability, since undue delay on the part of a plaintiff would be subject to equitable defences.⁵²¹

(d) Preliminary recommendation

It is the Commission's preliminary recommendation that there should be no limitation period for claims for fraudulent breach of trust.

2. MISTAKE

(a) Existing legislation

The existing legislation enables suspension of the limitation period in cases where the action is for relief from the consequences of mistake.⁵²²

(b) Submissions

One of the submissions received by the Commission in response to its Information Paper⁵²³ criticised the narrowness of the provision. The respondent noted that, in its present form, the legislation would enable a defendant to take advantage of a mistaken belief on the part of the plaintiff as to, for example, the identity of the person against whom proceedings should be commenced.⁵²⁴

Take ... the simple case of a plaintiff who commences proceedings against the wrong defendant - possibly, for example, a related company of the correct defendant.

In such a case, the limitation period would not be suspended, since the action is not one "for relief from the consequences of mistake".

⁵²¹ See pp 85-87 above.

⁵²² *Limitation of Actions Act 1974* (Qld) s 38(1)(c).

⁵²³ Queensland Law Reform Commission, Working Paper No 49: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997).

⁵²⁴ Submission 3.

The respondent proposed that a postponement of the limitation period should be available where the plaintiff has failed to institute proceedings because of some mistake on the part of the plaintiff, provided that the plaintiff proves that the defendant was aware of the mistake and knowingly stood by and failed to correct the mistake.

(c) The Commission's preliminary view

The preliminary view of the Commission is that the change proposed by the respondent is not necessary. The Commission believes that, under its proposed scheme, the kind of mistake referred to in the submission would already be catered for by the Commission's preliminary recommendation that the limitation period should not commence until the plaintiff knew or, in the circumstances, ought to have known certain information, including the identity of the defendant⁵²⁵ and that, in exceptional cases, the court should have a residual discretion to extend the limitation period.⁵²⁶

(d) Preliminary recommendation

It is the Commission's preliminary recommendation that it is not necessary to extend the existing scope of the suspension of the limitation period on the ground of mistake.

3. CLAIMS FOR THE RECOVERY OF LAND

(a) Existing legislation

Under the existing Queensland legislation, an action to recover land may not generally be brought more than twelve years after the date when the cause of action accrued.⁵²⁷ If the plaintiff was under a disability when the cause of action accrued, the claim may be brought up to six years after the person ceases to be under a disability or dies, but may not be brought after thirty years from the accrual date.⁵²⁸

⁵²⁵ See pp 60-61 above.

⁵²⁶ See Chapter 8 above.

⁵²⁷ *Limitation of Actions Act 1974* (Qld) s 13.

⁵²⁸ *Id.*, s 29(1), s 29(2)(b).

The cause of action accrues when a plaintiff who was, by right, in possession of land, is dispossessed or discontinues possession.⁵²⁹ However, the cause of action is deemed not to accrue unless there is a person in adverse possession of the land, in whose favour the period of limitation can run.⁵³⁰

The effect of the expiration of the limitation period is to extinguish title to the land.⁵³¹ This result is different from the effect of the expiration of the limitation period for most other claims, which is merely to bar the remedy provided by successful litigation and to leave the underlying right intact.⁵³²

In this Discussion Paper, the Commission has made the preliminary recommendation that there should be a limitation period of general application which is the lesser of:⁵³³

- three years from the date when the plaintiff knew or, in the circumstances, ought to have known information relevant to making the claim; and
- fifteen years from the date of the act or omission of the defendant which gives rise to the claim.

Because of the consequences of the expiration of the limitation period in an action for recovery of land, it is necessary to consider whether the new approach recommended by the Commission is appropriate in this context, or whether such a claim should be the subject of a special rule.

(b) Other jurisdictions

The Alberta Law Reform Institute recommended that claims for the recovery of land should not be subject to its proposed discovery period, but should be subject to the ultimate limitation period.⁵³⁴ This recommendation was implemented by the recently enacted limitation legislation.⁵³⁵

⁵²⁹ Id, s 14(1).

⁵³⁰ Id, s 19(1).

⁵³¹ Id, s 24(1).

⁵³² See p 12 above.

⁵³³ See pp 60-61 above.

⁵³⁴ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 39.

⁵³⁵ *Limitations Act 1996* (Alta) s 3(4).

The Law Reform Commission of Western Australia agreed that claims for the recovery of land should not be subject to the discovery limitation period.⁵³⁶

... the running of the limitation period for such actions affects substantive property rights, by depriving the former owner of his rights and conferring property rights on the adverse possessor. For this reason, the discoverability principle cannot be easily applied to actions for the recovery of land. For the sake of certainty, it is essential that the limitation period run from some certain point in time, and should expire at some certain point which is known in advance.

However, the Western Australian Commission also concluded that neither of the general periods should apply, and that claims for the recovery of land should continue to be subject to their own special rules.⁵³⁷ It recommended that such claims be excepted from the general limitation principles which under its recommendations would apply to most other actions.⁵³⁸

(c) The Commission's preliminary view

The Commission has not formed a preliminary view on these issues. The Commission specifically seeks submissions on the following questions:

- **Should actions for the recovery of land be subject to the general limitation period proposed by the Commission?**
- **Should there continue to be special rules for such claims?**

4. CLAIMS RELATING TO MORTGAGES

(a) Existing legislation

The present Queensland legislation contains a number of provisions which concern actions relating to mortgages.

⁵³⁶ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 343.

⁵³⁷ *Ibid.*

⁵³⁸ *Id.*, 344.

For example, an action may not be brought to redeem mortgaged land of which the mortgagee has been in possession for a period of twelve years.⁵³⁹ The following limitation periods also apply:

- for an action to recover money secured by a mortgage or other charge on real property - twelve years;⁵⁴⁰
- for an action to recover money secured by a mortgage or other charge on personalty - twelve years;⁵⁴¹
- for a foreclosure action in respect of mortgaged personal property - twelve years from the date on which the right to foreclose accrued;⁵⁴²
- for an action to recover arrears of interest payable in respect of money:
 - secured by a mortgage or other charge; or
 - payable in respect of the proceeds of the sale of land;
 - six years from the date on which the interest became due;⁵⁴³
- for an action to recover damages in respect of such arrears - six years from the date on which the interest became due.⁵⁴⁴

The limitation period for a foreclosure action in respect of mortgaged land is determined by the provisions of the Act relating to actions to recover land.⁵⁴⁵

(b) Issues raised by the existing legislation

These provisions give rise to the question whether all actions relating to mortgages of personalty should be subject to statutory limitation periods. There is currently no

⁵³⁹ *Limitation of Actions Act 1974* (Qld) s 20.

⁵⁴⁰ *Id*, s 26(1).

⁵⁴¹ *Ibid*.

⁵⁴² *Id*, s 26(2). However, if after the date on which the right to foreclose accrued, the mortgagee was in possession of the mortgaged property, the right to foreclose is deemed not to have accrued until the date on which the mortgagee's possession discontinued.

⁵⁴³ *Id*, s 26(5).

⁵⁴⁴ *Ibid*.

⁵⁴⁵ *Id*, s 26(4).

statutory limitation period in Queensland for an action to redeem mortgaged personal property. New South Wales,⁵⁴⁶ the Australian Capital Territory⁵⁴⁷ and the Northern Territory⁵⁴⁸ are the only jurisdictions in Australia where limitation legislation applies to all actions relating to mortgaged personalty. The Law Reform Commission of Western Australia, consistently with its view that limitation periods should apply to all actions of equitable origin which are not presently subject to a statutory period, has endorsed the New South Wales approach.⁵⁴⁹

The other question which arises is whether actions relating to mortgages should be subject to the general legislative scheme proposed by the Commission, or whether special provision should be made for them.

(c) Other jurisdictions

(i) Canada and New Zealand

The Alberta Law Reform Institute recommended that there should be no exception from the general scheme in respect of mortgages, and that approach is reflected in the recently enacted legislation.⁵⁵⁰ However, the Ontario Bill retained special provisions for mortgages. It provided that there be no limitation period in respect of a proceeding by a debtor in possession of collateral to redeem it,⁵⁵¹ or by a creditor in possession of collateral to realize on it.⁵⁵²

The New Zealand Law Commission has also recommended that the general limitation periods should apply.⁵⁵³

(ii) Western Australia

⁵⁴⁶ *Limitation Act 1969* (NSW) ss 41-43.

⁵⁴⁷ *Limitation Act 1985* (ACT) ss 23-25.

⁵⁴⁸ *Limitation Act 1981* (NT) ss 26-28.

⁵⁴⁹ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 367.

⁵⁵⁰ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 39-40; *Limitations Act 1996* (Alta).

⁵⁵¹ *Limitations Bill 1992* (Ont) cl 16(f).

⁵⁵² *Id.*, cl 16(g).

⁵⁵³ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 122-123.

The Law Reform Commission of Western Australia distinguished between mortgages of realty and of personalty. It considered that the three year discovery period would not be appropriate with respect to mortgages of land.⁵⁵⁴

If the mortgagor has only three years from the date when payment first becomes due to exercise his right to redeem, this substantially cuts down the equitable right of redemption ... If the mortgagee must exercise remedies of recovery of possession or foreclosure within three years, as opposed to the 12 years given by the present law, the result will be that taking such steps to enforce the security will become much more common. This would not be in the interests of either mortgagors or of society generally. The Commission does not believe it would be right for it to make any recommendation that would increase repossession and mortgagee sales, at a time when economic circumstances make such events all too common.

However, the Commission saw no reason why the ultimate limitation period should not apply. It therefore recommended that, in relation to mortgages of land, actions by a mortgagor to redeem, and actions by a mortgagee to recover possession, foreclose or recover principal money or interest on that money, should be subject to the ultimate period but not the discovery period.⁵⁵⁵ The effect of this recommendation is to increase the limitation period for claims for interest from six to fifteen years and, in the other situations, from twelve to fifteen years. The Commission preferred this solution, rather than merely preserving the existing rules, because of its reluctance “to preserve another set of special rules unless there is no other satisfactory alternative”.⁵⁵⁶

In relation to mortgaged personalty, the Commission expressed the view that concerns about not encouraging the precipitate enforcement of security to the detriment of mortgagee occupiers did not have the same force as they did in relation to mortgaged realty. It recommended that there should be no special limitation rules for mortgages of personalty, and that actions in relation to such mortgages should be subject to the general discovery and ultimate periods.⁵⁵⁷

(d) The Commission’s preliminary view

The Commission has not formed a preliminary view on these issues. The

⁵⁵⁴ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 366.

⁵⁵⁵ *Id.*, 367.

⁵⁵⁶ *Id.*, 366.

⁵⁵⁷ *Id.*, 368.

Commission specifically seeks submissions on the following questions:

- **Should actions for the redemption of mortgaged personalty be subject to limitation legislation?**
- **Should actions concerning**
 - (a) **mortgaged realty;**
 - (b) **mortgaged personalty****be subject to the general scheme proposed by the Commission?**
- **If not, what limitation period should apply?**
- **For the purposes of limitation legislation, should there be any distinction between legal mortgages and equitable mortgages?**

5. TRANSITIONAL PROVISIONS

(a) The relevance of transitional provisions

Since amendment of limitation legislation has the potential to affect the settled expectations of both plaintiffs and defendants, consideration of possible reforms to such legislation also necessarily involves consideration of the effect which should be given to any proposals for change which may be implemented.

There is a general presumption of statutory interpretation that newly enacted legislation does not have a retrospective effect. It has been said that:⁵⁵⁸

There can be no doubt that the general rule is that an ... enactment ... is prima facie to be construed as having a prospective operation only. That is to say, it is prima facie to be construed as not attaching new legal consequences to facts or events which occurred before its commencement.

⁵⁵⁸

Fisher v Hebburn Ltd (1960) 105 CLR 188 per Fullagar J at 194.

However, this presumption does not apply if the legislation is procedural rather than substantive.⁵⁵⁹

Although the issue is not entirely free of debate, current Australian authority is to the effect that limitation legislation should be classified as procedural.⁵⁶⁰ This would mean that, in the absence of a specific provision to the contrary, changes to such legislation would operate retrospectively.

(b) Existing legislation

The limitation legislation currently in force in Queensland contains a number of transitional provisions.

The *Limitation of Actions Act 1974* (Qld) presently provides that, apart from its extension provisions, it:

- does not generally enable a plaintiff to bring an action that would have been statute-barred under the previous legislation, which it replaced;⁵⁶¹
- does not affect an action commenced before it came into force.⁵⁶²

It also allows a plaintiff whose cause of action arose prior to the commencement of the legislation, but had not become statute-barred, the limitation period under the previous or present legislation, whichever is longer.⁵⁶³

The Act further states that, apart from the specific transitional provisions, it does not affect proceedings founded on a cause of action which arose before it came into operation.⁵⁶⁴

(c) The Commission's preliminary view

The issue of whether newly enacted limitation legislation should be given a

⁵⁵⁹ *Maxwell v Murphy* (1957) 96 CLR 261.

⁵⁶⁰ See Chapter 2 above in relation to classification of limitation legislation. See also the dissenting opinions of Mason CJ and Deane J in *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.

⁵⁶¹ *Limitation of Actions Act 1974* (Qld) s 8(1)(a).

⁵⁶² *Id.*, s 8(1)(b).

⁵⁶³ *Id.*, s 8(2).

⁵⁶⁴ *Id.*, s 8(3).

retrospective effect focusses attention on two competing considerations, described as follows by the New South Wales Law Reform Commission.⁵⁶⁵

Firstly, fairness requires that rights and duties already vested at the time of commencement of a statute should not be adversely affected by that statute. In particular, revival of a statute barred action is said to be unjust because it deprives a defendant of a defence which had already become effective. ... Secondly there is the argument that where the law is changed in response to a particular hardship or injustice, the objective of that change will be partially frustrated if it only applies to causes of action which accrue after its commencement. Thus the benefit of any amendments should be extended to all plaintiffs whether or not their actions were already barred by the amended legislation.

The Law Reform Commission of Western Australia observed that it would be necessary to determine whether new limitation legislation should apply in the following situations:⁵⁶⁶

- **Causes of action which are already running at the date on which the legislation comes into force.** The Commission noted that, if such causes of action were not to be regulated by the proposed new law, the rights of parties would for many years have to be determined by reference to the old legislation rather than the new.⁵⁶⁷ However, the Commission also acknowledged that, in some cases, the limitation period under the proposed new legislation may be reduced. In order to ensure that plaintiffs would not be disadvantaged in such cases, the Commission recommended that.⁵⁶⁸

... in cases where a cause of action has accrued at the time the new Act comes into force, the action should be regarded as brought in time if it complies with the requirements of either the old or the new law.

Under the preliminary recommendations made in this Discussion Paper, the introduction of a limitation period of general application would have the effect of reducing the limitation period for a cause of action which accrued prior to the commencement of the proposed legislation and for which the existing limitation period is longer than three years, provided that the plaintiff knew or, in the circumstances, ought to have known the information relevant to bringing the claim. Some plaintiffs who had acted in reliance on the existing limitation periods may find their actions statute-barred by the implementation of the Commission's preliminary recommendation. However, defendants would be aware of the existing limitation periods, and would not be

⁵⁶⁵ New South Wales Law Reform Commission, Report No 50: *Limitation of Actions for Personal Injury Claims* (October 1986) 61-62.

⁵⁶⁶ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 206.

⁵⁶⁷ Id, 209.

⁵⁶⁸ Id, 210.

disadvantaged if plaintiffs were allowed the benefit of the existing legislation.

This Commission's preliminary view, consistent with the terms of the existing Queensland legislation⁵⁶⁹ and the recommendations of the Western Australian Law Reform Commission, is that a plaintiff whose cause of action arises prior to the commencement of the new limitation period, and is not at that time statute-barred, should be allowed to bring proceedings within either the existing or the new limitation period, whichever is longer. However, the Commission does not intend to make any recommendation on the issue at this stage.

- **Causes of action statute barred under the existing legislation.** Currently, the general effect of the expiration of a limitation period is to bar the remedy which would otherwise be provided by successful court action, but not to extinguish the right upon which that court action would be founded.⁵⁷⁰ Consequently, without legislation to the contrary, changes to limitation law could operate retrospectively to revive a cause of action for which the limitation period under the existing legislation had expired. The question of whether new limitation legislation should be able to revive a cause of action which has become statute-barred under existing law highlights the competing policy considerations outlined by the New South Wales Law Reform Commission.⁵⁷¹

The Law Reform Commission of Western Australia observed:⁵⁷²

The limitation period having expired under the old legislation, defendants will have assumed that their liability is at an end, and may have destroyed records or taken various other steps based on the assumption that they are no longer at risk of being sued. On the other hand, ... the present provisions are inadequate and deny justice to many plaintiffs, not only in cases where they are not and cannot be expected to be aware of their rights before the limitation period expires, but also in other cases where it is not lack of awareness but some other factor that prevents them from bringing proceedings.

Under the preliminary recommendations made in this Discussion Paper, it may be possible for a cause of action which had expired under the existing law to be revived by the proposed new discovery limitation period or by the

⁵⁶⁹ *Limitation of Actions Act 1974* (Qld) s 8(2).

⁵⁷⁰ *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1. See also p 12 above.

⁵⁷¹ See note 565 above.

⁵⁷² Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 210.

exercise of judicial discretion.⁵⁷³ However, because of the proposed fifteen year alternative limitation period, some causes of action which are presently out of time would remain statute-barred, unless the limitation period were judicially extended.

The solution put forward by the Law Reform Commission of Western Australia was that, for the purposes of the transitional provisions only, the new limitation legislation should make a distinction between claims for personal injury and all other types of claim. The Commission recommended that the provisions of the new legislation should apply to causes of action for personal injury, whether or not the action would be statute-barred under the existing law, but that the new scheme should not otherwise operate to revive a statute-barred cause of action.⁵⁷⁴

This Commission has not formed a preliminary view on the issue.

- **Actions that have been commenced before the new legislation comes into force.** The Law Reform Commission of Western Australia noted that legislatures have generally been reluctant to allow new limitation provisions to apply to cases in which proceedings have already been commenced at the time the new provisions come into effect.⁵⁷⁵ This is certainly true of the existing Queensland legislation, which is expressed not to have an effect on an action brought before its commencement, save as is provided in the extension provisions.⁵⁷⁶

The Commission considered this approach to be too restrictive. It expressed the view that it should not make a difference whether or not a plaintiff has commenced proceedings before new limitation legislation comes into force. It recommended that, where a cause of action has accrued before the commencement of new limitation legislation, a plaintiff should have the benefit of either the old or the new limitation rules, whether or not proceedings are pending when the new legislation becomes operative.⁵⁷⁷

This Commission has not formed a preliminary view on the issue.

- **Actions concluded prior to the commencement of the new legislation.**

⁵⁷³ See Chapters 7 and 8 above.

⁵⁷⁴ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 211.

⁵⁷⁵ Id, 212.

⁵⁷⁶ *Limitation of Actions Act 1974* (Qld) s 8(1)(b).

⁵⁷⁷ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 213.

A pending action may be concluded by either the reaching of a settlement or the entry of judgment. The Law Reform Commission of Western Australia was of the view that the public interest in preserving the finality of judgments entered outweighed any injustice incurred by individual plaintiffs who may otherwise have been entitled to the benefit of a longer limitation period under new legislation. It therefore recommended that new legislation should not operate retrospectively to cases which had already been resolved.⁵⁷⁸

The New South Wales Law Reform Commission, on the other hand, considered that, at least in the context of personal injury claims, a blanket rejection of retrospectivity in such a situation could operate unfairly as between statute-barred plaintiffs who commenced proceedings and those who did not, especially in the light of the often technical and complex reasons for a finding of limitation. The Commission recommended that, for a case which proceeded to judgment, the retrospective effect of changes to limitation law should be excluded only where judgment against the plaintiff was based on the substantive merits of the cause of action, apart from any matter of limitation. In relation to causes of action concluded by settlement, the Commission considered that a compromise may be agreed because of an assessment of the likely impact of the existing limitation legislation. It recommended that there should be a judicial discretion to re-open a settlement in cases where it would be just and equitable to do so.⁵⁷⁹

This Commission has not formed a preliminary view on the issue.

The Commission seeks submissions on the extent to which its preliminary recommendations, if implemented, should take effect retrospectively, in particular:

- **whether the new legislation should apply to causes of action which have accrued at the time the new legislation comes into force;**
- **whether the new legislation should apply to proceedings which are pending when the new legislation comes into force;**
- **whether the new legislation should apply to causes of action which,**

⁵⁷⁸ Id, 214.

⁵⁷⁹ New South Wales Law Reform Commission, Report No 50: *Limitation of Actions for Personal Injury Claims* (October 1986) 64-65. See also *Limitation Act 1969* (NSW) Sch 5 cl 5.

when the new legislation comes into force, are statute-barred under the old legislation;

- **whether the new legislation should apply to cases which had been resolved by judgment or compromise under the old legislation.**

APPENDIX

LIST OF RESPONDENTS TO INFORMATION PAPER

Australia Pacific Professional Indemnity Insurance Company Ltd (APPIIL)
Australian Finance Conference
Australian Medical Association (Queensland Branch)
Australian Plaintiff Lawyers' Association (APLA) Inc.
Baxter, Mr Paul
Bunney, Ms Leanne
Davis, Professor J L R
Duncan, Mr K
Freeburn, Mr Paul
Insolvency Practitioners Association of Australia (Queensland Division)
Insurance Council of Australia Limited
Marfording, Ms A
Morris QC, Mr Anthony J H
O'Sullivan, Mr Gavin D
Queensland Asbestos Related Disease Support Society Inc.
Queensland Law Society
Queensland Transport
Roma Community Legal Service Inc. - Rural Women's Outreach Service
Royal Australian College of Medical Administrators (Queensland State Executive)
Speering, Mrs A
Surveyors Board of Queensland, The
Turnbull, Mr Douglas
Women's Legal Service Inc