



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT

LIMITATION OF ACTIONS

(LRC 104 - 2011)

© COPYRIGHT
Law Reform Commission

FIRST PUBLISHED
December 2011

ISSN 1393-3132

LAW REFORM COMMISSION'S ROLE

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 160 documents (Consultation Papers and Reports) containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have led to reforming legislation.

The Commission's law reform role is carried out primarily under a Programme of Law Reform. Its *Third Programme of Law Reform 2008-2014* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in December 2007 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

The Commission's role also involves making legislation more accessible through three other related areas of activity, Statute Law Restatement, the Legislation Directory and the Classified List of Legislation in Ireland. Statute Law Restatement involves the administrative consolidation of all amendments to an Act into a single text, making legislation more accessible. Under the *Statute Law (Restatement) Act 2002*, where this text is certified by the Attorney General it can be relied on as evidence of the law in question. The Legislation Directory - previously called the Chronological Tables of the Statutes - is a searchable annotated guide to legislative changes. The Classified List of Legislation in Ireland is a list of all Acts of the Oireachtas that remain in force, organised under 36 major subject-matter headings.

MEMBERSHIP

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners.

The Commissioners at present are:

President:

Vacant at time of going to print (December 2011)

Full-time Commissioner:

Patricia T. Rickard-Clarke, Solicitor

Part-time Commissioner:

Professor Finbarr McAuley

Part-time Commissioner:

Marian Shanley, Solicitor

Part-time Commissioner:

Mr Justice Donal O'Donnell, Judge of the Supreme Court

LAW REFORM RESEARCH STAFF

Director of Research:

Raymond Byrne BCL, LLM (NUI), Barrister-at-Law

Legal Researchers:

Kate Clancy, LLB (Hons) (TCD)

Conor Cunningham BCL (Clinical) (UCC), LLM (UCL)

Dannie Hanna BCL (NUI), LLM (Cantab)

Donna Lyons LLB (Dub), LLM (NYU), Attorney at Law (NY)

Tara Murphy BCL (Law with French Law) (NUI), LLM (Essex), Barrister-at-Law

Máire Reidy BCL (NUI), LLM (NUI), Barrister-at-Law

STATUTE LAW RESTATEMENT

Project Manager for Restatement:

Alma Clissmann, BA (Mod), LLB, Dip Eur Law (Bruges), Solicitor

Legal Researcher:

Elaine Cahill, BBLS, LLM Eur Law (NUI), Dipl. IP & IT, Solicitor

LEGISLATION DIRECTORY

Project Manager for Legislation Directory:

Heather Mahon LLB (ling. Ger.), M.Litt (TCD), Barrister-at-Law

Legal Researchers:

Aoife Clarke BA (Int.), LLB, LLM (NUI)

Barbara Brown BA (Int.), LLB, Attorney-at-Law (NY)

Rachel Kemp BCL (Law and German) LLM (NUI)

Aileen O'Leary BCL, LLM, AITI, Solicitor

ADMINISTRATION STAFF

Head of Administration and Development:

Ciara Carberry

Executive Officer:

Ann Byrne

Legal Information Manager:

Conor Kennedy BA, H Dip LIS

Cataloguer:

Eithne Boland BA (Hons), HDip Ed, HDip LIS, LLB

Clerical Officers:

Ann Browne

Liam Dargan

PRINCIPAL LEGAL RESEARCHER FOR THIS REPORT

Helen Kehoe BCL (Law with French Law) (NUI), LLM (DUB), Solicitor

CONTACT DETAILS

Further information can be obtained from:

Law Reform Commission
35-39 Shelbourne Road
Ballsbridge
Dublin 4

Telephone:

+353 1 637 7600

Fax:

+353 1 637 7601

Email:

info@lawreform.ie

Website:

www.lawreform.ie

ACKNOWLEDGEMENTS

The Commission would like to thank the following people who provided valuable assistance, including through their submissions and their participation in the seminar on this topic held at the Commission's offices on 7 February 2011:

Paul Breen, Solicitor, Dillon Eustace, Solicitors
Adrian Brennan, Solicitor, Office of the Director of Corporate Enforcement
Patricia Byron, Chief Executive, Injuries Board
Barrett Chapman, Solicitor, McCann FitzGerald, Solicitors
Caroline Costello, Senior Counsel, Bar Council of Ireland
Mary Cummins, Solicitor, Chief State Solicitor's Office
Antoinette Doran, Department of Justice and Equality
Sharon Fahy, School of Law, NUI Galway
Richard Fallon, Department of Justice and Equality
Pamela Hanley, Solicitor, Chief State Solicitor's Office
Elaine Healy, Solicitor, Dillon Eustace, Solicitors
Sinéad Keavey, Solicitor, William Fry, Solicitors
Deirdre Kelly, Solicitor, Dillon Eustace, Solicitors
Paul Kenny, Pensions Ombudsman
Catherine Longstaff, Medical Protection Society
John O'Sullivan, Barrister-at-Law
Rebecca Ryan, Solicitor, Matheson Ormsby Prentice, Solicitors
Martha Wilson, Solicitor, Hayes Solicitors

Full responsibility for this publication lies, however, with the Commission.

TABLE OF CONTENTS

Table of Legislation		xi
Table of Cases		xiii
INTRODUCTION		1
A	Background to this Report	1
B	Overview of Limitations Legislation in Ireland	1
C	The Statute of Limitations and other legislation containing limitation periods	2
D	Limitations Law Internationally and Terminology	3
E	Key Principles in Review of the Law on Limitations and the Move to a Core Limitations Regime	4
F	Outline of the Report	6
CHAPTER 1	CURRENT LIMITATIONS LAW, SCOPE OF THE PROPOSED REFORMS, AND GUIDING PRINCIPLES	9
A	Introduction	9
B	Overview of Difficulties with Current Limitations Law	9
C	Scope of the <i>Statute of Limitations 1957</i> and the Report	13
D	Guiding Principles	18
(1)	Competing Constitutional Interests	18
(2)	European Convention on Human Rights	23
(3)	Breach of Article 6 by Ireland arising from excessive delay	26
(4)	Conclusion and Recommendation	28
E	General Developments in Limitations Law in Other Jurisdictions and Models of Reform	28
(1)	England and Wales	28
(2)	Northern Ireland	30
(3)	Scotland	30
(4)	Canada	31
(5)	New Zealand	35
(6)	Model for Reform: A Core Limitations Regime	37
F	Procedural Issues	37
(1)	Pleading the Statute of Limitations 1957	37
(2)	Effect of Expiry of the Limitation Period	38
(3)	Calculating the Limitation Period	38
(4)	Concurrent wrongdoers and third party notices	39
CHAPTER 2	UNIFORM BASIC LIMITATION PERIOD	41
A	Introduction	41
B	A Uniform Basic Limitation Period	41
C	Length of the Uniform Basic Limitation Period	42
D	Running the Basic Limitation Period	44
CHAPTER 3	UNIFORM ULTIMATE LIMITATION PERIOD	57
A	Introduction	57
B	History and Function of the Ultimate Limitation Period	57
C	Length of an ultimate limitation period	60
(1)	10, 12, 15 or 30 years?	62
(2)	Previous Recommendations (10 or 15 years)	63

	(3) Conclusion	64
D	Starting date of an ultimate limitation period	64
	(1) Selected Models for Reform	67
	(2) Recommendation	73
E	Application of the Ultimate Limitation Period to Personal Injuries Actions	73
CHAPTER 4	DISCRETION TO DISMISS CLAIMS, DISCRETION TO DISAPPLY LIMITATION PERIODS AND EXCEPTIONAL CIRCUMSTANCES	79
A	Introduction	79
B	Judicial Discretion to Dismiss Claims	79
	(1) Very old claims not allowed to proceed even if within Statute of Limitations	79
	(2) Dismissal for abuse of process	81
	(3) The Primor Test and Dismissal for Want of Prosecution or Delay	82
	(4) Equitable discretion and limitation periods	85
	(5) Conclusion	86
C	Statutory Discretion to Extend Limitation Periods	86
	(1) Ireland	87
	(2) England and Wales	87
	(3) Scotland	88
	(4) New Zealand	89
	(5) Manitoba	90
	(6) Advantages and disadvantages of Judicial Discretion	91
	(7) Limited nature of Statutory Discretion	92
	(8) Specific Guidance for the Statutory Discretion	94
D	Retention of the Postponement Provisions in the 1957 Statute	98
	(1) The plaintiff's 'disability'	98
	(2) Acknowledgement and Part-Payment	102
	(3) Fraud	103
	(4) Mistake	104
CHAPTER 5	SUMMARY OF RECOMMENDATIONS	105
APPENDIX	DRAFT LIMITATIONS BILL 2011	109

TABLE OF LEGISLATION

Civil Liability Act 1961	No. 41 of 1961	Irl
Civil Liability and Courts Act 2004	No. 31 of 2004	Irl
Common Law Procedure Amendment Act (Ireland) 1853	16 & 17 Vic, c.113	Irl
Consumer Protection Act 1987	1987 c. 43	UK
Criminal Law Act 1997	No. 14 of 1997	Irl
Defamation Act 2009	No. 31 of 2009	Irl
Defective Premises Act 1972	c. 35	UK
European Convention on Human Rights Act 2003	No. 20 of 2003	Irl
Forfeiture Act 1870	33 & 34 Vic, c.23	Irl
Interpretation Act 2005	No. 23 of 2005	Irl
Land and Conveyancing Law Reform Act 2009	No. 27 of 2009	Irl
Liability for Defective Products Act 1991	No. 28 of 1991	Irl
Limitation Act	R.S.B.C. 1996, c. 266	BC
Limitation Act 1950	No. 65 of 1950	NZ
Limitation Act 1969	No. 31. Version for 6 July 2009.	NSW
Limitation Act 1975	c. 54	Eng
Limitation Act 1980	c. 58	Eng
Limitation Act 1985	A1985-66; Repub. No. 20 of 24 December 2010	ACT
Limitation Act 2005	No. 19 of 2005	WA
Limitation Act 2010	Public Act 2010, No. 110	NZ
Limitation of Actions Act 1958	No. 6295 of 1958	Vic
Limitations Act	SS 2004, c.L- 16.1	Sask'n
Limitations Act	RSA 2000, c. L - 12	Al'ta
Limitations of Actions Act	C.C.S.M. c. L150	Man
Limitations of Actions Act 1931	S.M. 1931, c. 30	Man
Limitations Act 2002	SO 2002, c.24, Schedule B	Ont
Limitations of Actions Act	SNB 2009, c. L- 8.5	New Bruns

Malicious Injuries Act 1981	No. 9 of 1981	Irl
Mercantile Marine Act 1955	No. 29 of 1955	Irl
Prescription and Limitation (Scotland) Act 1973	c. 52	Scot
Proceeds of Crime Act 1996	No. 30 of 1996	Irl
Real Property Limitation Act 1833	3 & 4 Will IV, c.27	Irl
Real Property Limitation Act 1874	37 & 38 Vic., c.57	Irl
Sale of Goods and Supply of Services Act 1980	No. 16 of 1980	Irl
Statute of Limitations 1623	21 Jac. I, c. 16	Irl
Statute of Limitations 1957	No. of 1957	Irl
Statute of Limitations (Amendment) Act 1991	No. 18 of 1991	Irl
Statute of Limitations (Amendment) Act 2000	No. 13 of 2000	Irl
Succession Act 1965	No. 27 of 1965	Irl

TABLE OF CASES

Adams v Bracknell Forest Borough Council	[2004] UKHL 29, [2005] 1 AC 76	UK
Airey v Ireland	(1979-1980) 2 EHRR 305	ECHR
Allen v Sir Alfred McAlpine Sons and anor	[1968] 2 QB 229	Eng
Ashingdane v United Kingdom	(1985) 7 EHRR 528	ECHR
B v Murray (No. 2)	[2005] SLT 982	Scot
AB v Minister for Justice, Equality and Law Reform	[2002] 1 IR 296	Irl
AB v Nugent Care Society (formerly Catholic Social Services (Liverpool))	[2006] EWHC 3031, [2006] All ER (D) 431	Eng
Barry v Ireland	[2005] ECHR 865	ECHR
Bolger v O'Brien	[1999] 2 IR 431	Irl
Brady v Donegal County Council	[1989] ILRM 282	Irl
Buckley and Others (Sinn Féin) v Attorney General & anor	[1950] IR 67	Irl
Bula Ltd (in receivership) v Crowley & Ors	[2009] IESC 35	Irl
Byrne v Ireland	[1972] IR 289	Irl
Byrne v Minister for Defence	[2005] 1 IR 577	Irl
Cahill v Sutton	[1980] IR 269	Irl
Comcast International Holdings Inc v Minister for Public Enterprise	[2007] IEHC 296	Irl
Desmond v MGN Ltd	[2009] 1 IR 737	Irl
Devlin v Roche and Others	[2002] 2 IR 360	Irl
Donnellan v Westport Textiles Ltd & Ors	[2011] IEHC 11	Irl
Doran v Ireland	[2003] ECHR 417	ECHR
Doran v Thompson Ltd	[1978] IR 223	Irl
Forbes v Wandsworth Health Authority	[1997] QB 402	Eng
G D Searle & Co v Gunn	[1996] 2 NZLR 129	NZ
Gilroy v Flynn	[2005] 1 ILRM 290	Irl
Golder v United Kingdom	(1979) 1 EHRR 524	ECHR
In re Illegal Immigrants	[2000] 2 IR 360	Irl

(Trafficking) Bill, 1999

Invercargill City Council v Hamlin	[1994] 3 NZLR 513	NZ
Kelly v O'Leary	[2001] 2 IR 526	Irl
Kenny v An Bord Pleanála	[2010] IEHC 321	Irl
KR and Ors v Bryn Alyn Community (Holdings) Ltd	[2004] 2 All ER 716	Eng
London Strategic Health Authority v Whiston	[2010] 3 All ER 452	UK
M.M. v Roman Catholic Church of Canada	[2001] MBCA 148	Man
McDonnell v Ireland	[1998] 1 IR 141	Irl
McBrearty v North Western Health Board	[2010] IESC 27	Irl
McFarlane v Ireland	[2010] ECHR 1272	ECHR
McGuinness v Armstrong Patents Ltd	[1980] IR 289	Irl
McMullen v Ireland	[2004] ECHR 422	ECHR
Macauley v Minister for Posts and Telegraphs	[1966] IR 345	Irl
Manning v Benson & Hedges Ltd	[2004] 3 IR 556	Irl
Murphy v Grealish	[2009] 3 IR 366	Irl
Murphy v Greene	[1990] 2 IR 566	Irl
Murphy v Minister for Justice	[2001] 1 IR 95	Irl
Nash and Ors v Eli Lilly & Co and Ors	[1993] 1 WLR 782	UK
Newton v Cammell Laird & Co (Shipbuilders and Engineers) Ltd	[1969] 1 WLR 415	UK
J O'C v Director of Public Prosecutions	[2000] 3 IR 478	Irl
J O'M v O'Neill & Regan	[2010] IEHC 273	Irl
Ó Domhnaill v Merrick	[1984] IR 151	Irl
O'Brien v Keogh	[1972] IR 144	Irl
O'Brien v Manufacturing Engineering Co. Ltd	[1973] IR 334	Irl
O'Reilly and Anor v Ireland	[2006] 40 EHRR 40	ECHR
O'Reilly v Granville	[1971] IR 90	Irl
O'Brien v Manufacturing Engineering Co. Ltd	[1973] IR 334	Irl

O'Dowd v North Western Health Board	[1983] ILRM 186	Irl
M.P. v Attorney General	[2010] IEHC 473	Irl
Price and Lowe v United Kingdom	[2003] ECHR 409	ECHR
Primor plc v Stokes Kennedy Crowley	[1996] 2 IR 459	Irl
In re R. Ltd	[1989] IR 126	Irl
Rainsford v Limerick Corporation	[1995] 2 ILRM 561	Irl
Read v Brown	(1888) 22 QBD 128	Eng
Ryan v Attorney General	[1965] IR 294	Irl
Ryan v Connolly	[2001] 1 IR 627	Irl
S v G	[1995] 3 NZLR 681	NZ
Seymour v Williams	[1995] PIQR 470	UK
Sheehan v Amond	[1982] 1 IR 235	Irl
Smith v Central Asbestos Co Ltd	[1973] AC 518	UK
Stephens v Paul Flynn Ltd	[2008] 4 IR 31	Irl
Stubbings v United Kingdom	[1997] 23 EHRR 213	ECHR
Stubbings v Webb	[1993] 1 All ER 322	Eng
The State (O'Connell) v Fawsitt	[1986] IR 362	Irl
Tate v Minister for Social Welfare	[1995] 1 IR 418	Irl
Trustees Executors Ltd v Murray	[2007] NZSC 27	NZ
Tuohy v Courtney	[1994] 3 IR 1	Irl
W v W	[2011] IEHC 201	Irl
White v Dublin City Council	[2004] 1 IR 545	Irl
Whitely v Minister for Defence	[1998] 4 I.R. 442	Irl
X v Sweden	(App. No. 9707/82, judgment of 6 October 1982)	ECHR

INTRODUCTION

A Background to this Report

1. This Report forms part of the Commission's *Third Programme of Law Reform 2008-2014*,¹ and follows the publication in 2009 of a *Consultation Paper on Limitation of Actions*.² The Commission held a seminar on this topic on 7 February 2011, and it very much appreciates the participation and insightful comments of those who attended, which greatly assisted the Commission in its deliberations leading to the preparation of this Report.

2. This project follows the Commission's long-standing work on the reform of the law of limitations. The Commission has previously addressed specific aspects of limitation periods in civil actions, including in its 1987 *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries*,³ which led to the enactment by the Oireachtas of the *Statute of Limitations (Amendment) Act 1991*. The general issue of limitation periods was also addressed in the Commission's 2005 *Report on Reform and Modernisation of Land Law and Conveyancing Law*,⁴ which led to the enactment of the *Land and Conveyancing Law Reform Act 2009*.

B Overview of Limitations Legislation in Ireland

3. In Ireland, the law concerning limitation of actions, which is regulated primarily by the *Statute of Limitations 1957* (as amended), refers to the statutory rules that limit the various periods of time available to a person to initiate different civil claims (also known as civil actions) against another person.⁵

4. This system of rules allows the person bringing the claim (often called the plaintiff⁶) a specific amount of time, running from a specified date, within which to bring an action against the defendant. A plaintiff usually begins civil proceedings by issuing an originating document in the appropriate court office. Once the plaintiff commences proceedings, the limitation clock stops running.⁷

¹ *Report on Third Programme of Law Reform 2008-2014* (LRC 86-2007), Project 4.

² *Consultation Paper on Limitation of Actions* (LRC CP 54-2009).

³ *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (LRC 21-1987). The Commission also examined the area in: *Report on the Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001); *Consultation Paper on the Law of Limitation of Actions arising from Non-Sexual Abuse of Children* (LRC CP 16-2000); *Consultation Paper on the Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injuries)* (LRC CP 13-1998); *Report on Defective Premises* (LRC 3-1982); and *Working Paper on the Law relating to the Liability of Builders, Vendors, and Lessors for the Quality and Fitness of Premises* (LRC WP 1-1977).

⁴ *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005), at 322-339. The Commission also addressed land-related limitation periods in its *Report on Title to Adverse Possession of Land* (LRC 67-2002), and is currently preparing a further Report on this area (to be published in 2012) as part of the *Third Programme of Law Reform 2008-2014* (Project 20).

⁵ In preparing this Report, the Commission has had the advantage of the analysis of this area in Brady and Kerr, *The Limitation of Actions*, 2nd ed (Law Society of Ireland, 1994) and in Canny, *Limitation of Actions* (Round Hall, 2010).

⁶ In the *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010), paragraphs 2.02-2.05, the Commission noted that a number of terms are currently used to describe the parties in different civil claims, as well as the documents used in those claims. The Commission recommended that these different terms could be rationalised. In this Report, the Commission discusses the most commonly-used descriptions currently in use.

⁷ The plaintiff need not serve the originating document on the defendant immediately; once the document is issued, the clock stops running. Under O.8, r.1 of the *Rules of the Superior Courts 1986*, which applies to High Court proceedings, the plaintiff is allowed 12 months from when the originating document was issued before

5. If the plaintiff does not begin proceedings within the time allowed, the defendant has a defence to the plaintiff's claim and may argue that the plaintiff is out of time, in other words, that it is "statute-barred." The defendant must then establish to the court that the plaintiff began proceedings outside the time period allowed. If the defendant satisfies the court that the plaintiff is statute-barred, the defendant has a complete defence to, or immunity from, the civil liability, regardless of whether the plaintiff has a valid claim. The law of limitations operates, therefore, as a procedural defence to a claim that has been brought outside the specified time limit; such a claim is also often referred to as a "stale" claim.

6. By way of example, for a civil claim based on a contract debt such as a loan, the limitation period in the *Statute of Limitations 1957* is 6 years from the date of the debt default (for example, the date when a payment on the loan was due). If the plaintiff begins the claim 6 years and one day after the debt default, the defendant may raise this and have the claim dismissed because it is statute-barred under the *Statute of Limitations 1957*. Similarly, for a straightforward personal injuries claim arising after a traffic incident, the limitation period in the *Statute of Limitations 1957* is 2 years from the date of the incident. If the plaintiff begins this type of claim 2 years and one day after the incident, the defendant may raise this and have the claim dismissed because it is statute-barred under the *Statute of Limitations 1957*.

C The Statute of Limitations and other legislation containing limitation periods

7. As already noted, the law on limitation of actions in Ireland is principally governed by the *Statute of Limitations 1957*, as amended in particular by the *Statute of Limitations (Amendment) Act 1991*, and the *Statute of Limitations (Amendment) Act 2000*.⁸

8. The 1957 Statute contains the relevant time limits for initiating many, though not all, civil actions. With the enactment of an increasing amount of legislation that either involves the statutory codification of the relevant rules of civil liability or the creation of completely new areas of liability, it has become necessary to set out new limitation periods for these new types of proceedings. In some instances, this has involved making amendments to the *Statute of Limitations 1957*, but in others the relevant limitation period is simply included in the new legislation without reference to the *Statute of Limitations*.⁹ The result is that limitation periods are now to be found in a large number of Acts¹⁰ as well as in the *Statute of Limitations*.

he or she need serve it on the defendant. If the 12 month period is about to expire and it has not yet been served, the plaintiff may apply to the court for permission to renew the originating document for a further 6 months. Even after this 12 months has expired, the plaintiff may apply to renew the summons.

⁸ The *Statute of Limitations 1957* has also been amended on a number of occasions by other legislation, such as the *Civil Liability Act 1961*, the *Civil Liability and Courts Act 2004* and the *Defamation Act 2009*. The Commission has, under its *First Programme of Statute Law Restatement*, published on its website, www.lawreform.ie, pre-certified Restatements (administrative consolidations) of the *Statute of Limitations 1957*, the *Statute of Limitations (Amendment) Act 1991* and the *Statute of Limitations (Amendment) Act 2000*.

⁹ See Canny, *Limitation of Actions* (Round Hall, 2010), Chapter 1.

¹⁰ See, for example, *Civil Liability Act 1961*; ss.49 and 122, *Registration of Title Act 1964*; Schedule, *Civil Liability (Amendment) Act 1964*; Part 11, *Succession Act 1965*; s.22(7), *Family Law (Maintenance of Spouses and Children) Act 1976*; s.13(8), *Sale of Goods and Supply of Services Act 1980*; s. 23, *Malicious Injuries Act 1981*; s.3(6), *Animals Act 1985*; *Age of Majority Act 1985*; s.3(2), *Health (Amendment) Act 1986*; s.21(4), *Control of Dogs Act 1986*; s.133, *Bankruptcy Act 1988*; s.3, *International Carriage of Goods by Road Act 1990*; s.7, *Liability for Defective Products Act 1991*; Schedule 3, *Criminal Law Act 1997*; Schedule, *Stamp Duties Consolidation Act 1999*; s.134(2), *Copyright and Related Rights Act 2000*; s.50, *Personal Injuries Assessment Board Act 2003*; s.84(7), *Residential Tenancies Act 2004*; s.7, *Civil Liability and Courts Act 2004*; s.38, *Defamation Act 2009*. In addition, where new areas of liability arise under EC Directives, the implementing legislation may often take the form of Regulations made under the *European Communities Act 1972*, so that some relevant limitation periods are now to be found in such Regulations rather than in Acts of the Oireachtas.

9. In approaching the preparation of this Report, therefore, the Commission was aware that, in reviewing the *Statute of Limitations* and making proposals for its reform, it must take account of the reality that some limitation periods are already to be found in other Acts. The Commission considers that the inclusion of limitation periods in specific Acts other than the *Statute of Limitations* has a clear practical advantage from the point of view of accessibility, namely that a person with an interest in that area will be able to see immediately the relevant limitation period for the subject in question rather than having to search separately in the *Statute of Limitations*. The Commission notes, therefore, that it would not be useful (or feasible) to remove these limitation periods from these Acts and to attempt to compile a *Statute of Limitations* containing *all* limitation periods for *all* civil actions. Indeed, no *Statute of Limitations* has attempted to do this.¹¹

10. While the *Statute of Limitations 1957* does not, therefore, contain a complete statement of the rules concerning limitation periods, this Report concentrates on the 1957 Statute. As discussed in Chapter 1 below, this is primarily because the 1957 Statute continues to set out the limitation periods for the most commonly-litigated civil claims, namely contract-related claims (often involving debt-related claims) and other non-contractual claims (tort actions), including personal injuries claims.

D Limitations Law Internationally and Terminology

11. Like Ireland, virtually all countries have in place legislation that imposes limitation periods within which civil claims must be initiated, and these have been enacted for the same essential reason, namely, to avoid litigating “stale” claims.¹² Ireland shares with most other common law legal systems (such as Australia, New Zealand and the United Kingdom) the underlying approach that the legislation on limitations largely operates as a procedural defence to a claim. In many of the civil law states (such as Canada, France and Germany) the comparable legislation often uses the term “law of prescription.” This different terminology also reflects two key differences. First, in civil law states, a failure to comply with a prescribed limitation period often affects the substantive rights involved in the civil claim or dispute. Secondly, in the common law systems, the concept of prescription is, in general, limited to claims involving land ownership. Thus, the 12 year period after which a person may be able to claim adverse possession over land (in effect, a title that is “adverse” to the original owner) is sometimes also described as prescription.¹³

12. A related issue of terminology is that many common law states have, in the process of reforming their law on limitations, also changed the name of the main Act involved. Thus, many states have replaced a “Statute of Limitations” with a “Limitations Act.” Similarly, in some international instruments that have included provisions concerning time limits, and to which common law states and civil law states have assented, the neutral term “limitation period” has been used.¹⁴ In approaching its general statutory

¹¹ The three Appendices to Canny, *Limitation of Actions* (Round Hall, 2010) (which run to 14 pages) provide an extremely useful summary of the many different limitation periods that apply in connection with different claims, including those set out in legislation other than the *Statute of Limitations 1957*. The number of Acts referred to in these Appendices underline the reality that limitation periods for specific types of claims are to be found in very many Acts other than the 1957 Statute, and that it would not be feasible (or useful) to attempt to set out all limitations periods in a single Act.

¹² For an overview, see Brady and Kerr, *The Limitation of Actions*, 2nd ed (Law Society of Ireland, 1994), Canny, *Limitation of Actions* (Round Hall, 2010), and Bonell, “Limitation Periods,” in Hartkamp and Ors (eds), *Towards a European Civil Code* 4th revised and expanded edition (Wolters Kluwer Law and Business, 2011), Chapter 31.

¹³ The Commission addressed land-related limitation periods in its *Report on Title to Adverse Possession of Land* (LRC 67-2002), and is currently preparing a further Report on this area (to be published in 2012) as part of the *Third Programme of Law Reform 2008-2014* (Project 20).

¹⁴ The term “limitation period” is used, for example, in the title of the 1974 UN *Convention on the Limitation Period in the International Sale of Goods*, as amended by the 1980 Protocol. The 1974 Convention, as amended, is the complementary Convention for the 1980 UN *Convention on Contracts for the International Sale of Goods* (CISG). The Commission, in its 1992 *Report on the United Nations (Vienna) Convention on*

mandate to keep the law under review, the Commission is always conscious that, where possible, terminology used should facilitate comparison with comparable legislation in other states and in relevant international agreements.¹⁵ Reflecting this approach, the Appendix contains a draft *Limitations Bill* to implement the Commission's recommendations in this Report.

E Key Principles in Review of the Law on Limitations and the Move to a Core Limitations Regime

13. The *Statute of Limitations 1957*, and this Report, is concerned with the effect of the lapse of time on legal rights or legal claims. In other words, it deals with whether a person may be prevented from initiating or continuing a civil claim because there is a considerable lapse of time between when the issue it concerns arose and when the case has been initiated. It is a basic matter of justice that a person should not delay unreasonably in bringing a claim. Initiating and pursuing litigation is a serious matter, and undue delays can become a cloud that hangs over the person, so it is better for that person not to prolong its presence in their lives, personal or corporate. Equally, any person facing potential litigation should be able to know that certain claims must be brought within clearly defined time limits; and that they will not face unreasonably "stale" claims. Similarly, from the point of view of society, it is important that the valuable and limited resources of the courts are not taken up with very old claims that it would be futile to litigate. The law of limitation periods is, therefore, concerned with ensuring that cases are initiated within a reasonable time, that is, ensuring that there has been reasonable expedition leading up to the initiation of a claim.¹⁶ This emphasis on making clear that civil claims should be initiated within a reasonable period complements the obligation to ensure that, once proceedings are initiated, they are dealt with by the courts within a reasonable period.¹⁷

14. The law of limitations developed over many centuries and, because of this, the current law contains many different limitation periods that may have been explicable when they were developed but do not necessarily retain a sense of coherence. Thus, the key limitation period for initiating a personal injuries claim is 2 years after, for example, a traffic incident, whereas the key limitation period for initiating a contract claim is 6 years after the breach of contract. There may have been a good reason why, in the early 1800s (when the first recognisable Limitation Acts were enacted), a contract claim need not be initiated for 6 years because, for example, it involved a claim over the contents of cargo on a ship that had gone on a round-the-world trip. In an era of internationally-required GPS requirements for merchant shipping (arising from international conventions on safety at sea) and virtually instantaneous communication, however, a 6 year time limits is very difficult to explain. Because of this, many countries have examined their existing limitation laws by reference to the key principles mentioned in the preceding paragraph and in order to bring some clarity and, where possible, simplicity to the existing law.

15. The current law in Ireland fits the general picture that applied up to recently in many comparable developed countries in that it reflects the somewhat haphazard development of the law over many centuries. The *Statute of Limitations 1957* had the great benefit of bringing together into a single consolidated Act the pre-1957 legislation in this area, but as the discussion in this Report indicates the 1957 Statute is also similar to many other Limitation Acts of the mid 20th century in that it retains many complex elements that had been developed over the centuries. It did not, therefore, examine the essential structure of the limitation laws which it consolidated and which were largely based on the technology of the 19th century. In many developed countries, this model of a Limitations Act has been replaced by

Contracts for the International Sale of Goods 1980 (LRC 42-1992), recommended that the State should ratify the CISG. The 2011 *Report of the Sales Law Review Group*, available at www.djei.ie, reiterated this recommendation, noting that most of the State's major international trading partners had also ratified it.

¹⁵ See, for example, the *Report on Legal Aspects of Family Relationships* (LRC 101-2010).

¹⁶ See generally Brady and Kerr, *The Limitation of Actions*, 2nd ed (Law Society of Ireland, 1994), Chapter 1, and Canny, *Limitation of Actions* (Round Hall, 2010), Chapter 1.

¹⁷ The Commission dealt with the judicial control and case management of civil litigation *after* it has been initiated in its *Report on the Consolidation and Reform of the Courts Acts* (LRC 97-2010), paragraphs 2.35-2.40.

versions that have been based on a re-examination of the key principles that underlie the law of limitations, taking into account the reality of current technologies and the majority of cases that actually are litigated in courts.

16. As discussed in Chapter 1 of the Report, below, the most litigated civil claims in Ireland are contract-related (often debt-based) claims and personal injuries actions. The great majority of these are initiated within 2 years. This also reflects experience internationally, and this has, in turn, led many countries to introduce a generally-applicable limitation period of 2 or 3 years, usually referred to as a basic limitation period. Indeed, since 2005, the general limitation period in Ireland for personal injuries claims is 2 years.¹⁸ In addition, many countries have also legislated for a “long stop” period, or ultimate limitation period, of between 10 and 15 years. This is intended to take account of unusual cases where a strict 2 years limitation period would operate unfairly. A strict 2 year rule would prevent a claim being litigated, for example, in connection with a defect in a building did not arise for 8 or 9 years or in connection with an illness that did not become symptomatic until many years after the event involving exposure, for example to asbestos fibres. The inclusion of an ultimate limitation period to deal with unusual cases is often linked to the introduction of a rule that stops the limitation clock until a person becomes aware, or ought on an objective standard of the reasonable person to have become aware, of the damage or injury in question: this is usually referred to as a discoverability test.

17. Traditional laws on limitations, such as the *Statute of Limitations 1957*, often deal with the problem of unusual cases by providing that specific matters such as that the person was under age (under 18) when the event occurs stops the limitation clock; a similar approach is taken to situations where fraud is alleged or where the case involves a hidden (latent) defect or illness. In the more recent “core” limitation laws, these difficult and unusual situations are often accommodated by allowing a court an exceptional discretion to override or extend the basic or ultimate limitation period and allow a claim to proceed if this appears to be in the interest of justice.

18. Regardless of the type of limitations law involved, the following questions must be answered satisfactorily:¹⁹

1. What event triggers the start of the limitation period (the limitation period is sometimes referred to as “the clock” or “time”, and so this is often described as “when does the clock start to run” or “when does time start to run”)?
2. How long is the limitation period?
3. What happens when the limitation period is passed?
4. Can the limitation period be suspended, shortened, extended or otherwise overridden?

19. Some countries, including Ireland and the United Kingdom, have retained the essential elements of traditional limitation laws, although they have also introduced various modifications to take account of unusual and difficult cases, such as personal injuries actions involving hidden, latent, injuries. In Ireland, for example, the Oireachtas enacted a discoverability test in the *Statute of Limitations (Amendment) Act 1991*, which implemented the Commission’s 1987 *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries*.²⁰ The 1991 Act followed the approach taken in many other countries to deal with latent injuries claims, exemplified internationally by the asbestos exposure cases that emerged towards the end of the 20th century. In Ireland, the most-litigated example of latent personal injuries were claims by members of the Defence Forces arising from exposure to high noise levels, the Army deafness claims, which emerged in the 1990s.

¹⁸ Section 11(2)(b) of the *Statute of Limitations 1957* had originally included a 3 year limitation period for personal injuries actions. Section 11(2)(b) of the 1957 Statute was repealed and replaced by section 3 of the *Statute of Limitations (Amendment) Act 1991*, which introduced a 3 year rule connected to a discoverability test. Section 3 of the 1991 Act was amended by section 7 of the *Civil Liability and Courts Act 2004*, which reduced the 3 year limitation period to a 2 year period. See further paragraph 1.08, footnote 3, below.

¹⁹ See also the Foreword by Mr Justice McMahon to Canny, *Limitation of Actions* (Round Hall, 2010).

²⁰ *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (LRC 21-1987).

20. A number of countries that have responded to these unusual and difficult cases have gone further by legislating for core limitation laws. As discussed in the Report in detail, these include Australia, Canada and New Zealand. There are two principal reasons why countries have enacted core limitation laws. First, they involve a clearer, more succinct, statement of limitation periods, and usually comprise: a generally applicable basic limitation period, an ultimate limitation period and a limited judicial discretion to extend these periods in exceptional cases. The relative simplicity of such a law has the benefit of reducing the potential for expensive “satellite” litigation that revolves solely around whether the claim is within, or outside, the limitation period. This Report includes discussion of such cases in Ireland, where for example it has been debated in the High Court and Supreme Court whether a claim is covered by a 2 years limitation period or a 6 year limitation period. Many countries have taken the view that a more streamlined limitation law has the real potential to prevent such satellite litigation, thus facilitating a more efficient and effective civil justice process.

21. A second major reason given for moving towards a core limitation regime is based on the recognition that much civil litigation occurs in connection with issues that, to one extent or another, are backed by some form of insurance. The introduction of compulsory road traffic insurance (which had resulted from the reality that, before then, many persons injured in traffic accidents had been left uncompensated and therefore required care and social security support from the State) led to an increase in civil claims arising from road traffic incidents. Similarly, while employer’s liability insurance, professional indemnity insurance or defamation insurance is not compulsory in Ireland, many organisations and professionals (notably large employers, medical practitioners, accountants, lawyers and media organisations) carry significant levels of insurance. Because of the direct connection between the level of civil claims and insurance costs, reform of limitations law has also been considered against the background as to whether any reforms have the potential to increase, or decrease, insurance costs.

22. In this respect, it has been noted previously by the Commission that the insurance industry in Ireland has suggested that, by contrast with the more traditional limitations law exemplified by the 1957 Statute (which allows for open-ended extension of the limitation periods related to the age of the plaintiff and the other factors already mentioned), a core limitations regime, with an ultimate limitation period of 12 or 15 years, would have the benefit of providing some improvement in the actuarial calculation of potential losses.²¹ This is not to suggest that a core limitation law would lead directly to a reduction in insurance premiums. It is clear that the main factor in determining insurance costs is the actual level of claims. Thus, in connection with the cost of road traffic insurance, measures such as those related to road safety strategies (road engineering improvements as well as legislative reforms related to drink-driving, such as mandatory breath testing, and penalty points related to speeding offences) are much more influential in leading to insurance premium reductions. The Commission considers, nonetheless, that a core limitation regime would, at a minimum, have a neutral effect and is likely to have a potential for some minor positive effects in terms of clarifying actuarial risks. The Commission is not in a position to engage in a full economic cost-benefit analysis concerning the introduction of a core limitation regime, but its consultation process leading to this Report, including the seminar it held in 2011, indicates that the views expressed to the Commission in its previous work in this area remain valid. The Commission also notes in this respect that, in 2010, a similar conclusion was arrived at in the context of the introduction of New Zealand’s core limitation law, the *Limitation Act 2010*.²²

F Outline of the Report

23. In Chapter 1, the Commission reviews existing limitations legislation in Ireland. This includes a brief discussion of the historical origins of limitations legislation in the State and the scope of the *Statute of Limitations 1957*. The Commission also outlines the current problems associated with the legislation.

²¹ See *Report on the Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001).

²² See *Regulatory Impact Statement – Limitation Bill* (2009), published by the New Zealand Treasury Ministry in 2010, available at www.treasury.govt.nz. The *Limitation Bill* discussed in this Regulatory Impact Statement was enacted by the New Zealand Parliament as the *Limitation Act 2010*.

24. The Commission then outlines the guiding principles that must be considered in analysing this topic, and in proposing reforms to limitations legislation. In particular, the Commission is mindful that a limitations system must take account of the competing rights and interests of the plaintiff and the defendant, as well as the public interest, as set out in the Constitution of Ireland and under the European Convention on Human Rights. The balancing of these interests will ensure, to the greatest extent possible, fairness to both the plaintiff and the defendant.

25. A general comparative analysis is also included of what limitation systems are in place in the other jurisdictions that are discussed throughout the Report. This leads to the Commission's general recommendation that a core limitations law be enacted to regulate the most commonly-litigated claims, contract claims and personal injuries actions.

26. The Commission also discusses some procedural matters that apply when a defendant argues that a claim is statute-barred, the effect of the expiry of a limitation period and how to calculate a limitation period.

27. In Chapter 2, the Commission discusses the first strand of the proposed core limitation regime, the uniform basic limitation period. The Commission then provides a summary of the key features of the basic limitation period, the advantages it lends to a limitations system, its length and the commencement date. These features are examined in detail, including a comparative analysis of how such a uniform basic limitation period has been viewed and implemented in other jurisdictions. The Commission recommends that a uniform basic limitation period of 2 years commencing from the date of discoverability should be introduced. This would have the effect that the plaintiff would have 2 years from the date he or she discovered the cause of action to initiate proceedings. The Commission then discusses in detail the key elements of the proposed discoverability test, namely, what constitutes discovery and knowledge.

28. In Chapter 3, the Commission discusses the second element of a core limitations law, the ultimate limitation period or "long-stop". Currently, the "long-stop" is rarely used in Irish limitations law, an unusual instance being a 10 year ultimate limitation period applying only to product liability claims under the *Liability for Defective Products Act 1991*.²³ An ultimate limitation period consists of a period of limitation beyond which no action could be brought, even if the cause of action has not yet accrued, or is not discoverable. The Commission examines the history and function of the ultimate limitation period, in particular taking account of its more extensive use in other States. The Commission also considers previous recommendations it has made in relation to ultimate limitation periods.

29. The Commission then examines the key features of a "long-stop," its duration and start date, and concludes by recommending a long-stop of 15 years duration, and a start date of the date of the act or omission giving rise to the cause of action. The Commission considers the application of an ultimate limitation period to personal injuries actions, and recommends that these actions should also fall within the scope of an ultimate limitation period.

30. In Chapter 4, the Commission considers how highly exceptional instances are to be dealt with in the proposed core limitations regime. This deals with those instances where, for a specific reason, the plaintiff is not in a position to discover their cause of action until after 15 years have passed, for example, because the consequences of exposure to asbestos fibres can be symptomless for up to 40 years. The Commission therefore discusses to what extent the ultimate limitation period may be extended or otherwise overcome.

31. Virtually all limitations laws (including the traditional type of which the *Statute of Limitations 1957* is an example) include the need to provide for these unusual and exceptional circumstances. In the *Statute of Limitations 1957* this is done through a series of provisions dealing with "postponement" of the limitation periods for a variety of specified reasons: the plaintiff's "disability" (being under 18 or by virtue of intellectual disability), fraud, mistake, part-payment and acknowledgement. In addition to these specific examples in the 1957 Statute, the Commission notes the long-standing jurisdiction of the courts to

²³ Section 7(2)(a), *Liability for Defective Products Act 1991*. This long stop limitation period was required by Directive 85/374/EEC, the 1985 EU Directive on Product Liability. Claims under the 1991 Act in relation to defective products supplement, but do not replace, the existing common law remedies in contract and tort for product liability claims.

dismiss or strike out claims on the grounds of prejudicial delay or for abuse of the court process. The discussion in Chapter 4 makes clear that this jurisdiction is clearly based on the same general principles that underlie limitations legislation, in particular that litigating “stale” claims is inimical to the proper administration of justice.

32. The Commission concludes in Chapter 4 that, to deal with unusual and exceptional cases, it is necessary to include in the proposed core limitations regime a narrow statutory discretion to extend or disapply the ultimate limitation period, subject to clearly-defined statutory criteria. The Commission also assesses the scope of the current postponement provisions and ultimately concludes that there would be no continuing need to retain them. This is because the proposed statutory criteria to guide the narrow discretion are sufficient to deal with the current specified instances; and they have the added advantage that they do not create a statutory straitjacket. The Commission also concludes that, in order to avoid any doubt on the matter, it should be expressly stated that this narrow discretion is in addition to the established discretion of the courts to dismiss or strike out claims on the grounds of prejudicial delay, or for abuse of process.

33. The Commission considers it is worth noting briefly the effect of the core limitation regime recommended in the Report. The application of the 15 year long-stop proposed in Chapter 3 means that the basic limitation period of 2 years proposed in Chapter 2 can begin to run at any point within the 15 year period. For example, a plaintiff could become aware of (“discover”) the claim at any stage during this 15 year period and, therefore, start the 2 year period running. Time would then “run out” for the plaintiff and result in their claim being “statute-barred” in one of two ways: firstly, the plaintiff could discover their cause of action but fail to commence proceedings within 2 years of this discovery, or secondly, the plaintiff might only discover their cause of action after 15 years have passed. In this respect, the potential defendant is offered greater certainty in that, after 15 years and the end of the ultimate limitation period, the defendant receives the clear benefit that the claim is statute-barred. The advantage for the plaintiff is that the basic limitation period runs from the plaintiff’s discovery of the action, which places greater emphasis on the state of knowledge of the plaintiff. For exceptional cases, of course, such as the latent personal injuries claims due to asbestos exposure, the 15 year long-stop can be extended under the limited judicial discretion proposed in Chapter 4 (subject to the other general discretion of the courts to stop a claim if it would be unduly prejudicial to the defendant to allow it to proceed).

34. Chapter 5 contains a summary of the Commission’s recommendations.

35. The Appendix to the Report contains a draft *Limitations Bill* intended to implement the Commission’s recommendations.

CHAPTER 1 CURRENT LIMITATIONS LAW, SCOPE OF THE PROPOSED REFORMS, AND GUIDING PRINCIPLES

A Introduction

1.01 This Chapter provides an overview of the general scope of this Report. In Part B, the Commission briefly outlines the origins and key elements of the *Statute of Limitations 1957*. The Commission also outlines some difficulties with the current state of the law concerning limitation periods. In particular, the Commission discusses how the complexity of the different limitation periods in the 1957 Statute have given rise to “satellite” litigation in Ireland, as it has under the equivalent legislation in England and Wales. In Part C, the Commission outlines the scope and parameters of its proposed new *Limitations Act*, as indicated by the draft *Limitations Bill* in the Appendix; in particular what types of civil claims would be included in it. Part D sets out the guiding principles which influence and shape the Commission’s proposed *Limitations Act*. In Part E, the Commission briefly summarises the comparable law currently in place in a number of other countries, which are discussed in detail in the Report. The Commission also outlines briefly the selected model for reform, a “core limitations regime”. Part F discusses an important procedural issue, namely, that the relevant time limit in a law on limitations, such as the *Statute of Limitations 1957*, must be specifically raised (pleaded) by a party in civil proceedings in order prevent the claim from proceeding.

B Overview of Difficulties with Current Limitations Law

1.02 In this Part B, the Commission briefly outlines the origins and key elements of the *Statute of Limitations 1957*. The Commission also outlines some difficulties with the current state of the law concerning limitation periods. In particular, the Commission discusses how the complexity of the different limitation periods in the 1957 Statute have given rise to “satellite” litigation in Ireland, as it has under the equivalent legislation in England and Wales.

1.03 The Consultation Paper examined in detail the development of the law of limitation in Ireland, from its origins in 17th and 18th century legislation to the current legislation, the *Statute of Limitations 1957*, as amended.¹ The evolution of legislation in this area has been relatively limited. The *Common Law Procedure Amendment Act (Ireland) 1853* had its origins in 17th and 18th century legislation, and the 1853 Act remained in operation until the *Statute of Limitations 1957* was enacted.

1.04 The Commission came to the conclusion in the Consultation Paper that fundamental reform of the law of limitations was necessary. A short synopsis of the analysis leading to this conclusion is provided below. This outlines in broad terms some of the main problems encountered in limitations law and also the reasoning which underpinned the Commission’s conclusion.

1.05 Until now, the law of limitations has not been subject to any general review. The *Statute of Limitations 1957* has been amended by the *Statute of Limitations (Amendment) Act 1991* (which introduced a discoverability test for certain personal injuries claims) and the *Statute of Limitations (Amendment) Act 2000* (which introduced a special rule to deal with child sexual abuse claims), but these amendments have involved limited change. Other changes, such as those in the *Civil Liability Act 1961*, the *Sale of Goods and Supply of Services Act 1980* and the *Defamation Act 2009*, have also been limited in scope.

1.06 The *Statute of Limitations 1957*, as amended, contains 7 different limitation periods (1, 2, 3, 6, 12, 30, and 60 years), each applying to different types of civil actions. For example, the limitation period

¹ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraphs 1.05-1.10.

for personal injuries actions is (since 2005) 2 years, for contract claims it is 6 years and for the tort of defamation it is (since 2010) 1 year (subject to a maximum of 2 years at the discretion of the court; this novel discretionary approach was introduced by the *Defamation Act 2009*). An example of a very long limitation period is the 30 year period that applies to actions to recover land where the plaintiff is a government Department.²

1.07 The Consultation Paper discussed in detail the key basic limitation periods in the *Statute of Limitations 1957*, with particular emphasis on what are described as the common law actions – contract-related claims, debt-related claims and tort (non-contractual) claims, notably personal injuries and defamation claims. In the Consultation Paper and this Report, the Commission has concentrated on the common law actions because they are the high-volume claims that comprise the majority of civil proceedings initiated each year in the courts. By concentrating on reform of the limitations periods for these claims, the Commission intends to maximise the benefits of any reform proposals for those involved in civil litigation.

1.08 The *Statute of Limitations 1957* is almost entirely based on the principle of fixed periods of limitation running from the date of accrual of a cause of action, with the exception of personal injuries actions where discoverability principles apply to the 2 year limitation period that has been in place since 2005.³ In addition, under the *Liability for Defective Products Act 1991*, discoverability principles are applied, along with a “long-stop” limitation period of 10 years, reflecting its origins in the 1985 EU Directive on Product Liability, 85/374/EEC.⁴

1.09 The concept of “date of accrual” is not defined in the *Statute of Limitations 1957*, but it means the date on which the cause of action is complete, that is, when it becomes possible to begin civil proceedings. In a contract case, this means the date on which the term of a contract was broken, in a personal injuries claim it means the date when an event causing injury occurs, and in a defamation claim it means when an untrue and damaging publication occurs. Using the “date of accrual” concept, no action or claim accrues until each element of the cause of action is present and can be proven by the plaintiff.

1.10 Thus, different limitation periods of varying lengths, and starting from various starting points, apply to a wide range of actions. Deciding upon which limitation period applies, and when it commences, is by no means a straightforward exercise of consulting the relevant legislation. Different rules have

² All of the land-related limitations are outside the scope of this project. The Commission addressed land-related limitation periods in its *Report on Title to Adverse Possession of Land* (LRC 67-2002), and is currently preparing a further Report on this area (to be published in 2012) as part of the *Third Programme of Law Reform 2008-2014* (Project 20).

³ Section 11(2)(b) of the *Statute of Limitations 1957* had originally provided for a 3 year limitation period for personal injuries actions. Section 11(2)(b) of the 1957 Statute was repealed and replaced by section 3 of the *Statute of Limitations (Amendment) Act 1991*, which introduced a 3 year rule connected to a discoverability test (where relevant), intended to deal with “latent damage” claims such as asbestos-related claims (and which was also used in the context of the “Army deafness claims” of the 1990s, which concerned noise-induced hearing loss). The 1991 Act implemented the recommendations in the Commission’s *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (LRC 21-1987). Section 3 of the 1991 Act was amended by section 7 of the *Civil Liability and Courts Act 2004*, which reduced the 3 year period to a 2 year period with effect from March 2005. The 2004 Act, and the *Personal Injuries Assessment Board Act 2003*, implemented the thrust of the recommendations in the 2002 *Final Report of the Motor Insurance Advisory Board*, available at www.djei.gov.ie, as to which see generally *Byrne and McCutcheon on the Irish Legal System*, 5th ed (Bloomsbury Professional, 2009), paras 5.08-5.16.

⁴ Claims brought under the *Liability for Defective Products Act 1991* in relation to defective products operate in parallel with (rather than replace) the common law contract and tort rules concerning defective products. This includes that the long-stop limitation period in the 1991 Act applies where the claim is made under the 1991 Act, but that where a product liability claim is made under common law the different limitation periods under the *Statute of Limitations Act 1957*, as amended, apply (discoverability related to cause of action, with no long-stop).

evolved for different causes of actions. Some of these supplemental rules are contained in the *Statute of Limitations 1957*, as amended, and as interpreted by the courts.

1.11 The rationale for applying different limitation periods depending on the type of action is no longer clear. Nor is it apparent that it is advantageous to continue to follow this approach. This multitude of varying limitation periods can lead to categorisation difficulties, which in turn gives rise to complex “satellite” litigation on issues of whether a claim is statute-barred or not. The decision of the Supreme Court in *Devlin v Roche and Others*⁵ illustrates this problem. The case also exemplifies some of the extremely technical analysis which can be necessary in a case involving the interpretation and application of limitation periods in the 1957 Statute.

1.12 *Devlin v Roche* involved a personal injuries action by the plaintiff against a number of State defendants and two members of the Garda Síochána. The plaintiff’s claim was for damages (including aggravated damages) for assault and battery, negligence, breach of duty and breach of statutory duty on the part of the defendants. The fifth-named defendant, a member of the Garda Síochána, argued in his defence that the plaintiff’s claim was statute barred under the *Statute of Limitations 1957*, as amended by the *Statute of Limitations (Amendment) Act 1991*. The High Court found that the plaintiff’s claim for damages for assault was not statute barred, and the fifth-named defendant appealed to the Supreme Court.

1.13 Two different limitation periods and two different sections of the 1957 Statute were relevant to this case:

- (a) The first limitation period was in section 3(1) of the *Statute of Limitations (Amendment) Act 1991* (replacing section 11(2)(b) of the *Statute of Limitations 1957*), which provided that a 3 year limitation period applied to actions “claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty”. This 3 year limitation period ran from the later date of either the date of accrual or the date of knowledge.
- (b) The second limitation period was in section 11(2)(a) of the *Statute of Limitations 1957*, as amended by section 3(2)(a) of the *Statute of Limitations (Amendment) Act 1991*, which provided that, subject to section 3(1) of the 1991 Act, above, a 6 year limitation period applied to an action based on tort. This 6 year limitation period ran from the date of accrual.

1.14 The Supreme Court held that the phrase “breach of duty” in section 3(1) of the 1991 Act does not encompass intentional trespass to the person. For the purpose of interpreting the *Statute of Limitations 1957*, as amended, and applying a particular limitation period, a distinction was made between actions seeking damages for personal injuries sustained as a result of intentional trespass to the person, and personal injuries suffered as a result of negligence, nuisance or breach of duty. A limitation period of 6 years runs from the date of accrual in actions for intentional trespass to the person but, at the time of the *Devlin* case, a 3 year limitation period applied to an action for damages arising from negligence, nuisance or breach of duty. Given that the ingredients of the respective torts are virtually identical, this disparity in limitation periods is difficult to justify and clearly gave rise to confusion at least for the litigants in the *Devlin* case. Nonetheless, this differentiated approach to the limitation periods led to the result that the Supreme Court dismissed the fifth-named defendant’s appeal, and thus the plaintiff could proceed with his claim for damages.

1.15 Similar difficulties arise in England and Wales in relation to how to categorise certain civil claims, notably those involving child abuse. Such actions are typically based on claims of trespass and negligence, and there are issues concerning which limitation period is applicable. Under section 2 of the English *Limitation Act 1980* there is a 6 year limitation period for claims based on the tort of trespass to the person, and a 3 year limitation period for personal injuries actions,⁶ which includes negligence leading to personal injury. In the past, this has led to the situation that different limitation periods apply to an

⁵ [2002] IESC34, [2002] 2 IR 360.

⁶ Sections 11, 14 and 33 of the 1980 Act.

action arising out of the same facts. Take, for example a case where a claimant⁷ sued both parents for abuse, in which one parent is sued for assaulting the claimant and the other parent is sued for negligently failing to prevent such an assault. The action against a perpetrator of child abuse involves a strict 6 year limitation period as this is the limitation period applicable to the tort of assault (running from the time when the claimant reaches the age of majority), whereas an action for negligence against a non-perpetrator of abuse involves a 3 year limitation period running from the date of knowledge of the claimant.

1.16 This issue has arisen in a number of cases in England and Wales.⁸ The English Law Commission, in its 2001 Report *Limitation of Actions*, recommended that a core limitation regime be introduced to eliminate this problem, stating that it “is not always clear which category a cause of action falls into, and thus how it should be treated for limitation purposes.”⁹

1.17 In 2003, the English Court of Appeal, in *KR and Ors v Bryn Alyn Community (Holdings) Ltd*,¹⁰ strongly endorsed the Law Commission’s recommendations. Indeed, Auld LJ noted that, in a previous Court of Appeal decision *Seymour v Williams*,¹¹ two members of the Court had referred to the anomaly of there being different periods of limitation as between a perpetrator of abuse and someone negligent in not preventing it, and had “invited the Law Commission to consider the anomaly.” Auld LJ added that the Law Commission had:¹²

“done so, recommending that claims for personal injuries, including those of child abuse, whether in trespass to the person or in negligence, should be subject to the same core regime of an extendable three years limitation period with discretion to disapply; see Law Com 270, paras. 1.5, 3.156, 3.162, 3.169 and Appendix A, Draft Limitation Bill, cls. 1, 2, 12 and 38. For what it is worth, we warmly commend such a proposal. Early statutory implementation of it would obviate much arid and highly wasteful litigation turning on a distinction of no apparent principle or other merit.”

1.18 Notwithstanding this strong judicial endorsement that the Law Commission’s recommendations would prevent wasteful litigation, it appears at the time of writing (November 2011) that they are unlikely to be implemented in the near future, if at all. As discussed in Part E below, in November 2009 the then Parliamentary Under-Secretary of State for Justice announced that the UK Government’s proposed draft *Civil Law Reform Bill* would not include provisions to reform the law of limitation of actions. Indeed, since then, in January 2011 the UK Government decided not to proceed even with the remaining elements of its predecessor’s draft *Civil Law Reform Bill*. In Part E, below, the Commission discusses in more detail the current approach to limitations in England and Wales (in the context of a general comparative overview).

1.19 The Commission’s analysis in the Consultation Paper¹³ illustrated in detail: the array of the different limitation periods applicable, the many rules governing their application and commencement, and the problems that these layers of complexity inevitably create. The difficulties with the current system of limitation were summarised in the Consultation Paper:

“There is no ‘golden thread’ running through the limitations system, determining the length, running, postponement and expiry of the limitation periods. Moreover, some of the rules, such

⁷ Since the introduction in England and Wales of the *Civil Procedure Rules 1998*, made under the *Civil Procedure Act 1997*, the term claimant has replaced plaintiff to describe the person initiating a civil claim in England and Wales.

⁸ *Stubbings v Webb* [1993] 1 All ER 322, *Seymour v Williams* [1995] PIQR 470, *KR and Ors v Bryn Alyn Community (Holdings) Ltd (in liquidation) and Another* [2004] 2 All ER 716, and *AB v Nugent Care Society (formerly Catholic Social Services (Liverpool))* [2006] EWHC 3031, [2006] All ER (D) 431.

⁹ Law Commission of England and Wales, *Limitation of Actions* (Law Com. No. 270) paragraph 1.5.

¹⁰ [2003] EWHC Civ 85.

¹¹ [1995] PIQR 470.

¹² [2003] EWHC Civ 85 at para 100 of the judgment.

¹³ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at Chapter 2.

as those determining the date of accrual, remain governed by common law and are difficult to ascertain and understand, even for experienced practitioners.”¹⁴

1.20 The current limitation provisions in the *Statute of Limitations 1957*, as amended, lack coherence and clarity. They are unnecessarily complex and therefore have proven to be inaccessible even to experienced legal practitioners, let alone others affected by the relevant law. Fundamental reform and simplification of the law on limitation of actions is, therefore, necessary. The Commission accordingly reiterates the view in the Consultation Paper, and so recommends, that since the principal legislation governing limitation of actions, the *Statute of Limitations 1957* (as amended), is unnecessarily complex, it is in need of fundamental reform and simplification.

1.21 *The Commission recommends that since the principal legislation governing limitation of actions, the Statute of Limitations 1957 (as amended), is unnecessarily complex, it is in need of fundamental reform and simplification.*

C Scope of the *Statute of Limitations 1957* and the Report

1.22 The *Statute of Limitations 1957* applies to a wide range of civil actions which can be divided into four general headings.

1. The most commonly-litigated claims, often referred to as the “common law” actions, in particular claims concerning: (a) contracts (including debt-related claims), (b) quasi-contract (sometimes referred to as claims for restitution); (c) torts (that is, non-contractual obligations, including actions claiming damages for negligence, nuisance or breach of duty, such as personal injury actions); and (d) wrongful detention or conversion of an item.¹⁵

2. Actions for the recovery of land, which take up 30 of the 80 sections in the *Statute*.¹⁶

3. Actions in respect of trust property.¹⁷

4. Actions to recover the personal estate of a deceased person, such as the legal right share under the *Succession Act 1965*.¹⁸

1.23 The *Statute of Limitations 1957* does not set out limitation periods for all types of civil actions. Indeed, it specifies that it does not apply to the following types of civil actions:

- Proceedings in respect of the forfeiture to the State of a ship or an interest in a ship under the *Mercantile Marine Act 1955*.¹⁹
- Actions for which a period of limitation is fixed by any other limitation enactment;²⁰ ;
- Actions to which a State authority is a party and for which, if that State authority were a private individual, a period of limitation would be fixed by any other limitation enactment;²¹

¹⁴ *Ibid* at paragraph 2.251.

¹⁵ These claims are dealt with in sections 11 and 12 of the *Statute of Limitations 1957*. The Commission notes that sections 11 and 12 of the 1957 Statute also deals with other specific forms of actions, such as actions to enforce a recognizance, actions to enforce an award, actions to recover any sum recoverable by virtue of an enactment and certain actions based on an instrument under seal. As discussed below, the Commission’s recommendations for reform deal specifically with the common law actions listed in the text, as these are the most commonly-litigated civil claims.

¹⁶ Sections 13 to 42 of the *Statute of Limitations 1957*.

¹⁷ Sections 43 and 44 of the *Statute of Limitations 1957*.

¹⁸ Sections 45 and 46 *Statute of Limitations 1957*.

¹⁹ Section 4 of the *Statute of Limitations 1957*.

²⁰ Section 7(a) of the *Statute of Limitations 1957*.

- Actions within the Admiralty jurisdiction of the High Court that are enforceable *in rem*.²²

1.24 In addition, with the enactment of an increasing amount of legislation that either involves the statutory consolidation and reform of the relevant rules of civil liability or the creation of completely new areas of liability, it has become necessary to set out revised or completely new limitation periods for these proceedings. This has taken four different forms:

- specific amendments to the *Statute of Limitations 1957*;²³
- repealing and replacing the relevant limitation period in the 1957 Statute with a provision in the new legislation without reference to the *Statute of Limitations*;²⁴
- providing that the 1957 Statute applies to certain types of proceedings;²⁵ or
- providing that the 1957 Statute does not apply to certain types of proceedings.²⁶

1.25 The result is that limitation periods are now to be found in a large number of Acts,²⁷ as well as in the *Statute of Limitations*.

1.26 Consistently with the approach taken in the Consultation Paper, the Commission remains of the view that priority should be given, in terms of proposals for reform, to the most common types of actions that lead to civil proceedings in the courts. As a result, the focus of this Report is on claims concerning contracts (including debt-related claims) and torts (including personal injury actions), often referred to as “common law” actions. This group of civil claims make up a large portion of the civil business of the courts in Ireland each year. This is clear from the following breakdown of many of the civil law actions initiated in 2009 and 2010 in the High Court, derived from the Courts Service *Annual Report 2010*:²⁸

²¹ Section 7(b) of the *Statute of Limitations 1957*. Where a State authority is party to an action in relation to which a limitation period is fixed for private citizens under an enactment other than the *Statute*, the State authority is subject to that limitation period (and not to the *Statute*).

²² Section 11(8) of the *Statute of Limitations 1957*.

²³ For example, those made by Part 11 of the *Succession Act 1965*.

²⁴ For example, the repeal of section 2(3) of the *Statute of Limitations 1957* by the *Civil Liability Act 1961* and its replacement by section 31 of the 1961 Act.

²⁵ For example, section 3(6) of the *Animals Act 1985*.

²⁶ For example, section 10 of the *Proceeds of Crime (Amendment) Act 2005*.

²⁷ See, for example, *Civil Liability Act 1961*; ss.49 and 122, *Registration of Title Act 1964*; Schedule, *Civil Liability (Amendment) Act 1964*; Part 11, *Succession Act 1965*; s.22(7), *Family Law (Maintenance of Spouses and Children) Act 1976*; s.13(8), *Sale of Goods and Supply of Services Act 1980*; s. 23, *Malicious Injuries Act 1981*; s.3(6), *Animals Act 1985*; *Age of Majority Act 1985*; s.3(2), *Health (Amendment) Act 1986*; s.21(4), *Control of Dogs Act 1986*; s.133, *Bankruptcy Act 1988*; s.3, *International Carriage of Goods by Road Act 1990*; s.7, *Liability for Defective Products Act 1991*; Schedule 3, *Criminal Law Act 1997*; Schedule, *Stamp Duties Consolidation Act 1999*; s.134(2), *Copyright and Related Rights Act 2000*; s.50, *Personal Injuries Assessment Board Act 2003*; s.84(7), *Residential Tenancies Act 2004*; s.7, *Civil Liability and Courts Act 2004*; s.38, *Defamation Act 2009*. In addition, where new areas of liability arise under EU Directives, the implementing legislation may often take the form of Regulations made under the *European Communities Act 1972*, so that some relevant limitation periods are now to be found in such Regulations rather than in Acts of the Oireachtas.

²⁸ Courts Service *Annual Report 2010*, available at www.courts.ie, pp.47-52 for an overview, and pp.54-79 for a more detailed breakdown.

Actions commenced in the High Court	2010	2009	+/-
Personal Injuries Summonses	7,068	7,099	(-0.43% approx)
<i>Medical negligence</i> claims	671	529	(+ 21% approx)
Companies Acts ²⁹	349	409	Exact figures below ³⁰
New cases in the Commercial List ³¹	293	373	-21%
Breach of Contract (includes negligence)	1,811	1,594	(+ 12% approx)
Claims for the recovery of debt	6,103	5,653	+8%
Registration of judgments	5,473	5,661	- 3%
Judgment mortgage certificates ³²	2,533	1,108	+128%
Judgment on foot of Master's Order	588	347	+ 69%
Judicial review proceedings	1,581	1,317	+ 20%
Regulation of Professions: Medical Council matters	21	16	
Nurses Acts	18	21	
Solicitors Acts	99	105	
Family Law Actions (including judicial separation, divorce and nullity)	53	68	(- 22% approx)

²⁹ This refers to the combined number of separate groups of applications to the High Court for an order to wind up a company, applications to the High Court for the restriction of persons from acting as company directors, and applications to the High Court for the disqualification of directors. Each of these categories of actions is listed separately in the Courts Service *Annual Report 2010* and has been combined here for illustration purposes only.

³⁰ Courts Service *Annual Report 2010* p.50. Overall, there was an 18% decrease in applications to wind up a company, a 6% increase in applications for the restriction of persons from acting as company directors, and a 13% decrease in applications to the High Court for the disqualification of directors.

³¹ The Courts Service *Annual Report 2010* noted that an increasing number of cases entering the list commence as a claim for a liquidated sum on a summary summons. In the first quarter of 2009, 40% of all cases admitted to the list commenced in this way, and by the fourth quarter, 52% of all new cases admitted to the list were on foot of a summary summons.

³² Judgment mortgage affidavits are no longer required since 1 December 2009, they have been replaced by judgment mortgage certificates which were introduced by the *Land and Conveyancing Law Reform Act 2009*. The figure for 2009 of 1,108 refers to both judgment mortgage certificates and judgment mortgage affidavits dealt with in 2009.

1.27 The civil business of the Circuit Court in 2010 can be briefly summarised as follows:³³

Actions commenced in the Circuit Court	2010	2009	+/-
Personal Injuries Summonses	7,567	6,999	+ 8%
Breach of Contract (includes recovery of debt)	27,629	28,394	- 3%
Family Law Actions (including judicial separation, divorce and nullity)	4,789	5,330	(- 10% approx)

1.28 A more general overview of the civil law business of the Courts is outlined in the table below.

Type of Civil Law Proceedings [2010]	High Court	Circuit Court	District Court
A. Cases of Enforcement of Contract Debt	6,103	17,009 ³⁴	29,771
Total Contract Debt Cases in the Civil Courts: 52,883			
B. Personal Injuries Claims	7,068	7,567	n/a
Total PI Claims in the Civil Courts: 14,635			
C. Small Claims Procedure	n/a	n/a	3,947
Total SCP: 3,947			
Sub-total Common Law Actions Per Court (as per categories A, B, C)	(HC) 13,171	(CC) 24,576	(DC) 33,718
Total Common Law Actions in the Civil Courts: 71,465			

1.29 From this analysis it can be seen that almost half of all civil claims initiated in the District, Circuit and High Courts in 2010 were related to what the 1957 Statute describes as common law actions; actions consisting of claims of enforcement of contract debt, personal injuries claims and small claims procedure. These categories made up just over 71,000 of the total figure of over almost 157,000 of all civil claims initiated,³⁵ or about 45.5% of the total of all civil claims passing through the courts system.

³³ Courts Service *Annual Report 2010* pp.47-52 for an overview, and pp.54-79 for a more detailed breakdown.

³⁴ See further Courts Service *Annual Report 2010* at pp.50 and 69. In 2010, the Circuit Court received 27,629 new claims for breach of contract including recovery of debt. As regards, recovery of debt, judgment was marked in Circuit Court offices in 17,009 cases, a 25% increase on the 13,613 in 2009.

³⁵ Courts Service *Annual Report 2010* at p 50. There were 156,790 civil cases initiated in 2010; 27,125 in the High Court, 43,587 in the Circuit Court, and 85,988 in the District Court.

1.30 The Commission has concluded that these high-volume civil law actions should be the focus of the recommendations for reform in this Report, because this will ensure that the greatest benefit in practical terms is likely to arise from reform. The Commission thus concludes, and so recommends, that the scope of the proposed reforms to limitations legislation in this Report should deal with the most commonly-litigated civil claims, often referred to as the “common law” actions, namely, claims concerning: (a) contracts (including debt-related claims), (b) quasi-contract (sometimes referred to as claims for restitution); (c) torts³⁶ (that is, non-contractual obligations, but not defamation claims, for which the Oireachtas has enacted a specific limitation rule in the *Defamation Act 2009*); (d) personal injuries actions claiming damages for negligence, nuisance or breach of duty; and (e) wrongful detention or conversion of an item or chattel.³⁷

1.31 *The Commission recommends that the scope of the proposed reforms to limitations legislation in this Report should deal with the most commonly litigated civil claims, often referred to as the “common law” actions, namely, claims concerning: (a) contracts (including debt-related claims), (b) quasi-contract (sometimes referred to as claims for restitution); (c) torts (that is, non-contractual obligations, but not defamation claims, for which the Oireachtas has enacted a specific limitation rule in the Defamation Act 2009); (d) personal injuries actions claiming damages for negligence, nuisance or breach of duty; and (e) wrongful detention or conversion of an item or chattel.*

1.32 The Commission accepts that this means that its proposals, if enacted, would not lead to a complete repeal of the *Statute of Limitations 1957*, and will therefore leave certain actions to continue to be dealt with under the 1957 Statute. Thus, limitation periods concerning land and trusts will continue to be dealt with under the 1957 Statute, although the Commission notes that these have also been the subject of separate consideration by the Commission.³⁸ In any event, it would not be feasible to attempt to compile a single, consolidated, *Limitations Act* containing *all* limitation periods for *all* civil actions. Indeed, no *Statute of Limitations* has attempted to do this. Thus, the *Statute of Limitations 1957* itself excluded from its scope a number of civil claims, such as admiralty actions. In addition, as already noted, since the 1957 Statute was enacted, limitation periods for other specific forms of civil claims are contained in the Acts related to those subjects, sometimes without reference to the 1957 Statute. Similarly, limitation periods for public law proceedings such as judicial review, planning, asylum or immigration proceedings are not dealt with in the *Statute of Limitations 1957* but in the legislation related to those specific areas.

1.33 In this respect, the Commission notes that for the convenience of users of legislation it may in fact be preferable, as the Oireachtas has done, to locate some specific limitation periods in the legislation to which such claims relate (such as planning-related claims or defamation claims). Nonetheless, there

³⁶ The Commission notes that certain claims involving a breach of the Constitution or of EU law have been treated as torts for the purposes of limitation law: see further Canny, *Limitation of Actions* (Round Hall, 2010), paras 7-04 and 16-65-16-66, discussing *McDonnell v Ireland* [1998] 1 IR 141 and *Tate v Minister for Social Welfare* [1995] 1 IR 418.

³⁷ These claims are dealt with in sections 11 and 12 of the *Statute of Limitations 1957*. As noted in the text, the Oireachtas has enacted a specific limitation rule in the *Defamation Act 2009* and the Commission considers that this recent legislative determination should not be altered. The Commission also notes that sections 11 and 12 of the 1957 Statute also deals with other specific forms of actions, such as actions to enforce a recognizance, actions to enforce an award, actions to recover any sum recoverable by virtue of an enactment and certain actions based on an instrument under seal. The Commission’s recommendations for reform deal specifically with the common law actions listed in the text (and not the other actions referred to in sections 11 and 12 of the 1957 Statute), as these are the most commonly-litigated civil claims.

³⁸ The Commission’s 2005 *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005) led to the enactment of the *Land and Conveyancing Law Reform Act 2009*. In 2008, the Commission published a *Report on Trust Law: General Proposals* (LRC 92-2008), in respect of which the Government’s *Legislation Programme, Autumn Session 2011* (September 2011) proposes to publish a *Trustee Bill*. The Commission intends to publish in 2012 a *Report on Adverse Possession* under its *Third Programme of Law Reform 2008-2014* (Project 20): this would deal with the current 12 year “prescription” period to which adverse possession relates.

remains a case for enacting a *Limitations Act* having a very wide scope, as in the case of the scope of the civil claims to which the reform proposals in the draft *Limitations Bill* in the Appendix applies.

D Guiding Principles

1.34 In the Consultation Paper, the Commission analysed in considerable detail the general principles, derived from both the Constitution and the European Convention on Human Rights, which assist its approach to reform of limitations law.³⁹ A summary of this analysis is set out in this Part.

1.35 Where a party to proceedings raises the procedural defence that the relevant limitation period has passed, this has the effect that even the clearest, strongest, claim is statute-barred; put simply, if the limitation period is raised and has expired, a court is banned from hearing the case.

1.36 The Commission notes that there are three clear interests involved in assessing the law on limitations from the point of view of underlying principles:

- (a) The plaintiff's interests and rights;
- (b) The defendant's interests and rights; and,
- (c) The public interest.

1.37 Essentially, a limitation period should support a plaintiff's right of access to the courts, while encouraging the plaintiff to make claims without undue delay. This also protects defendants from the unjust pursuit of old, stale, claims. It must be the aim of limitations legislation to strike a fair balance between these interests.

1.38 Article 15.4 of the Constitution prohibits the Oireachtas from enacting laws that are repugnant to the provisions of the Constitution. In *O'Brien v Manufacturing Engineering Co. Ltd*,⁴⁰ Walsh J noted:

"Rights conferred by the Constitution, or rights guaranteed by the Constitution, are of little value unless there is adequate opportunity for availing of them; any legislation which would create such a situation must necessarily be invalid, as would any legislation which would authorise the creation of such a situation."

1.39 It follows that limitation periods must provide litigants with adequate opportunity to avail of their respective rights as protected under the Constitution. This balancing of competing constitutional rights under limitations legislation, and the role of both the Oireachtas and the judiciary in achieving this balance, was summarised by Finlay CJ in *Tuohy v Courtney*.⁴¹

"[T]he Oireachtas in legislating for time limits on the bringing of actions is essentially engaged in a balancing of constitutional rights and duties. What has to be balanced is the constitutional right of the plaintiff to litigate against two other contesting rights or duties, firstly, the constitutional right of the defendant in his property to be protected against unjust or burdensome claims and, secondly, the interest of the public constituting an interest or requirement of the common good which is involved in the avoidance of stale or delayed claims.

The Court is satisfied that in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation, but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights."

(1) Competing Constitutional Interests

(i) The Plaintiff's Interests

³⁹ See *Consultation Paper on Limitation of Actions* (LRC CP 54-2009), Chapter 1, Parts C and D.

⁴⁰ *O'Brien v Manufacturing Engineering Co. Ltd* [1973] IR 334, 366.

⁴¹ *Tuohy v Courtney* [1994] 3 IR 1, 47.

1.40 The right of access to the courts is an unenumerated personal right guaranteed by Article 40.3.1° of the Constitution.⁴² As such, it is one of the fundamental rights of Irish citizens,⁴³ which the State is obliged to respect, vindicate and defend.⁴⁴ The Courts have recognised that the right to litigate is “a necessary inference” from Article 34.3.1° of the Constitution, which establishes the full original jurisdiction of the High Court, and that its existence is confirmed by the procedure outlined in Article 40.4 for challenging unlawful detention.⁴⁵ Furthermore, the right to litigate is the means through which the personal rights protected by the Constitution may be asserted and enforced.⁴⁶

1.41 This right of access to the courts has also been described as a right to bring proceedings,⁴⁷ “the right to litigate claims”,⁴⁸ or “to have recourse to the courts for the purpose of having determined any justiciable controversies between a citizen and the State”.⁴⁹ The right to litigate applies to “every individual, be he a citizen or not”.⁵⁰ In 1996, the *Report of the Constitution Review Group* stated that the objective of the right of access is “to ensure that these minimum standards of legality and fair procedures are not otherwise jeopardised.”⁵¹

(ii) The Defendant’s Interests

1.42 It is beyond doubt that defendants have a right to a speedy trial; indeed, the right has been traced remotely from the *Assize of Clarendon* (1166), but more directly from *Magna Carta* (1215).⁵²

1.43 This right is linked to the unenumerated right to fair procedures is derived from Article 40.3.1°. It can also be said to be a facet of the “judicial duty to ensure the timely administration of justice which is derived from Article 34.1”.⁵³

1.44 It is well established that a long delay between the events alleged and the trial of an action may strip defendants of their constitutional right to a fair trial. Stale claims create a risk of injustice to defendants. As has been noted by the English Court of Appeal, the delay of justice is a denial of justice⁵⁴ or, in other words, the chances of being able to find out what really happened are progressively reduced as time goes on, and this “puts justice to the hazard.”⁵⁵

1.45 The delay may also give rise to “fading memories, unavailability of witnesses, through death or for other reasons, the destruction of evidence or changes in circumstances”.⁵⁶ The loss or deterioration of

⁴² *Macauley v Minister for Posts and Telegraphs* [1966] IR 345, 358; *Murphy v Minister for Justice* [2001] 1 IR 95, 98.

⁴³ *Buckley and Others (Sinn Féin) v Attorney General & anor* [1950] IR 67, 81. Article 40.3.1° provides: “The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”

⁴⁴ In *Murphy v Minister for Justice* [2001] 1 IR 95, 98-99.

⁴⁵ *Macauley v Minister for Posts and Telegraphs* [1966] IR 345, 358.

⁴⁶ *Byrne v Ireland* [1972] IR 289, 292-3.

⁴⁷ *Buckley and Others (Sinn Féin) v Attorney General* [1950] IR 67, 84.

⁴⁸ *O’Brien v Keogh* [1972] IR 144, 155.

⁴⁹ *Byrne v Ireland* [1972] IR 289, 293.

⁵⁰ *Murphy v Greene* [1990] 2 IR 566, 578.

⁵¹ *Report of the Constitution Review Group* (1996) at 134.

⁵² *The State (O’Connell) v Fawsitt* [1986] IR 362, 365.

⁵³ *Donnellan v Westport Textiles Limited & Ors* [2011] IEHC 11 at paragraph 37.

⁵⁴ *Allen v Sir Alfred McAlpine Sons and anor* [1968] 2 QB 229, 245.

⁵⁵ *Allen v Sir Alfred McAlpine Sons and anor* [1968] 2 QB 229, 255.

⁵⁶ *White v Dublin City Council* [2004] 1 IR 545, 56. See also *Kelly v O’Leary* [2001] 2 IR 526; *Sheehan v Amond* [1982] 1 IR 235; *Allen v Sir Alfred McAlpine Sons and anor* [1968] 2 QB 229, 255.

evidence is a particular problem for defendants who are providers of goods or services as they will often find it difficult to identify which transactions will give rise to a cause of action.⁵⁷ Further, the scene of the accident may have changed, medical and other evidence may have lost sharpness or reality, and money values may have changed out of all recognition.⁵⁸ These factors may prejudice the ability of a defendant to contest the plaintiff's claim.⁵⁹ It may then be unfair to expect the potential defendant to meet the claim.⁶⁰

1.46 In *Ó Domhnaill v Merrick*, the Supreme Court considered that it would be “contrary to natural justice and an abuse of the process of the court” to require a defendant to meet a claim in respect of an accident that had occurred 24 years earlier.⁶¹ Here, the plaintiff's delay was found to be inordinate and inexcusable, and the Court found that no countervailing circumstances existed that would swing the balance of justice in his favour. The Court ruled that, in such cases, “it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial”.⁶²

1.47 In *J O’C v Director of Public Prosecutions*⁶³ the effect of delay on the fairness of civil trials was described as follows by Hardiman J in the Supreme Court:

- (a) A lengthy lapse of time between an event giving rise to litigation and a trial creates a risk of injustice;
- (b) The lapse of time may be so great as to deprive the defendant of his capacity to be effectively heard;
- (c) Such lapse of time may be so great as it would be contrary to natural justice and an abuse of the process of the court if the defendant had to face a trial in which he or she would have to try to defeat an allegation of negligence on her part in an accident that would have taken place 24 years before the trial;
- (d) A long lapse of time will necessarily create inequity or injustice, and amount to an absolute and obvious injustice or even a parody of justice;
- (e) The foregoing principles apply with particular force where disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, as opposed to cases where there are legal issues only, or at least a high level of documentation or physical evidence, qualifying the need to rely on oral testimony.⁶⁴

(iii) The Public Interest

1.48 The Supreme Court has recognised that there is a public interest in the avoidance of delayed claims (sometimes referred to as stale claims).⁶⁵ Limitation periods promote the expeditious trial of civil

⁵⁷ British Columbia Law Institute *The Ultimate Limitation Period: Updating the Limitation Act* (BCLI Report No. 19, July 2002) at 6.

⁵⁸ *Sheehan v Amond* [1982] IR 235, 238.

⁵⁹ Law Reform Commission *Consultation Paper on The Law of Limitation of Actions arising from Non-Sexual Abuse of Children* (LRC CP16-2000) at paragraph 1.19.

⁶⁰ *White v Dublin City Council* [2004] 1 IR 545, 568.

⁶¹ *Ó Domhnaill v Merrick* [1984] IR 151, 157.

⁶² *Ibid* at 158.

⁶³ [2000] 3 IR 478, 499-500. Hardiman J was in a minority in terms of the outcome of the case, but this summary of the effect of delay is not affected by this.

⁶⁴ This summary of principles was adopted and applied by the High Court in *Manning v Benson & Hedges Ltd* [2004] 3 IR 556, 568.

⁶⁵ *Tuohy v Courtney* [1994] 3 IR 1, 47, in which limitation periods were referred to as involving a balancing of rights including “the interest of the public constituting an interest or requirement of the common good which is involved in the avoidance of stale or delayed claims.”

actions, and as a result, they also promote the achievement of justice in judicial decision-making. Indeed, the Supreme Court also observed that limitation periods are “designed to promote as far as possible expeditious trials of action so that a court may have before it as the material upon which it must make its decision, oral evidence which has the accuracy of recent recollection and documentary proof which is complete, features which must make a major contribution to the correctness and justice of the decision arrived at.”⁶⁶

1.49 Economics are a further relevant consideration when assessing the various aspects of limitations law, and its impact upon the public interest, particularly from the point of view of insurance. The Commission has previously noted that it is arguable that, if the finality of potential claims was not ensured by limitation periods, the burden of insuring against and defending unlimited claims would result in higher costs of insurance premiums, which would affect all members of society.⁶⁷ In addition, as noted in the Introduction to this Report,⁶⁸ a core limitations regime is likely to have at least a neutral, and potentially a positive, effect in terms of relevant insurance costs.

1.50 The Commission notes that any reform of the limitations legislation would not alter or affect the requirement on organisations who provide goods and services (both public sector and private sector), and who may be subject to both regulatory requirements and the risk of civil claims, to ensure ongoing good record-keeping concerning their activities. These records are often maintained for quite lengthy periods, some related to time limits concerning tax-related matters, some related to potential employment and human resources issues, some to deal with potential consumer or regulatory matters (for example, occupational safety, environmental or data protection requirements) and some related to defending possible civil claims. It is clear that, regardless of changes to limitations legislation, such records should continue to be maintained for considerable periods of time.⁶⁹

1.51 As to the relationship between insurance and extremely long time lapses between an incident and litigation, in *Ó Domhnaill v Merrick*, Henchy J noted in the Supreme Court that “[a]part from the personal unfairness that such a trial would thrust on the defendant”, to allow a trial to proceed 24 years after the road traffic incident in that case would be “unfair for being incompatible with the contingencies which insurers of motor vehicles could reasonably be expected to provide against.”⁷⁰

1.52 In a 2002 Report, the British Columbia Law Institute was of the view that the duration of a limitation period could also adversely impact upon insurance costs for potential defendants, and thus affect the public interest society generally. It stated:⁷¹

“The 30 year ULP [Ultimate Limitation Period] imposes significant expenses on defendants with regard to maintaining records, evidence and insurance until the period has been exhausted. Higher costs in the provision of goods and services form part of the overhead that are typically passed on to clients through increased prices... In some cases access to protective insurance

⁶⁶ *Ibid* at 48.

⁶⁷ *Consultation Paper on the Law of Limitation of Actions arising from Non-Sexual Abuse of Children* (LRC CP 16-2000), at paragraph 1.19.

⁶⁸ Introduction, paragraph 22, above.

⁶⁹ Guidance on record-keeping is available from regulatory bodies such as the Data Protection Commissioner, at www.dataprotection.ie, and reputable bodies such as the Chartered Institute of Personnel and Development in Ireland (CIPD Ireland), at www.cipd.co.uk/branch/ireland/. The Data Protection Commissioner guidance points out that personal data should be retained for no longer than is necessary, unless required by specific legislation. The CIPD guidance indicates that some records should be retained for relatively short periods (such as 5 years for most parental leave records), while others may need to be retained permanently (such as actuarial valuation reports, works council minutes or risk assessments required under occupational safety and health legislation).

⁷⁰ *Ó Domhnaill v Merrick* [1984] IR 151, 158.

⁷¹ British Columbia Law Institute *The Ultimate Limitation Period: Updating the Limitation Act* (Report No. 19, July 2002) at 6.

is elusive as a professional person may be susceptible to liability long after retirement, but may not be able to obtain insurance coverage or may only be able to do so at great expense.”

1.53 In 2000, the New Zealand Law Commission observed that the public interest will be adequately provided for once a fair balance is struck between the interest of the plaintiff and the defendant. It stated that:

“the task of devising a fair limitations law is best approached as one of holding the balance between what is fair to intending plaintiffs, and what is fair to intended defendants. If that balance can be properly struck, then the public interest will usually be found to have been taken care of.”⁷²

(iv) Balancing the Various Rights and Interests

1.54 Under Article 40.3.2° of the Constitution, the State is obliged to protect, by its laws, the rights of every citizen from unjust attack, and to vindicate such rights “in the case of injustice done”. This is qualified, however, by the words “as best it may.” The Supreme Court held in *Ryan v Attorney General* that this “implies circumstances in which the State may have to balance its protection of the right as against other obligations arising from regard for the common good.”⁷³ Thus, the exercise of personal rights is not unlimited⁷⁴ and their curtailment is not automatically unconstitutional;⁷⁵ as the exercise of constitutional rights may be restricted by the constitutional rights of others, and by the requirement of the common good.⁷⁶

1.55 The Constitution also specifically provides for limits on the right to private property. Article 43.2.1° recognises that, in a civil society, the exercise of the right ought to be regulated by “the principles of social justice”. Article 43.2.2° allows the State to delimit the exercise of the right by law, with a view to reconciling the exercise of the right with “the exigencies of the common good”. Clearly, therefore, it is not unconstitutional to impose limitation periods on civil actions concerning property rights. Such limitation periods must, however, be assessed in light of the protection given by the Constitution.

1.56 The weighing of the relevant considerations has been held by the Supreme Court to be “quintessentially a matter for the judgement of the legislator”⁷⁷ and as such, is “a matter of policy and discretion”.⁷⁸ Nevertheless, the curtailment of constitutional personal rights is subject to constitutional scrutiny, and the courts may intervene where the balance of rights and interests achieved by the Oireachtas is oppressive to all or some citizens, or where there is “no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen.”⁷⁹

1.57 A useful summary was provided by Finlay P in the High Court in *Cahill v Sutton*⁸⁰, where he suggested that he should firstly examine the *Statute of Limitations 1957* against the background of the circumstances of the ordinary life in the country at the time the 1957 Statute was enacted, to discover whether it provided a reasonable or unreasonable time limit, and then examine it in the light of the

⁷² New Zealand Law Commission *Tidying the Limitation Act* (NZLC R61, July 2000) at paragraph 1.

⁷³ *O'Brien v Manufacturing Engineering Co. Ltd* [1973] IR 334, 372.

⁷⁴ *Ryan v Attorney General* [1965] IR 294, 312-313.

⁷⁵ *Murphy v Greene* [1990] 2 IR 566, 572.

⁷⁶ *Ryan v Attorney General* [1965] IR 294, 312-313: “When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good”.

⁷⁷ *White v Dublin City Council* [2004] 1 IR 545, 568.

⁷⁸ *In re the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, 393.

⁷⁹ *Ryan v Attorney General* [1965] IR 294, 312-313.

⁸⁰ *Cahill v Sutton* [1980] IR 269.

balance which the Oireachtas was required to hold between the rights of prospective plaintiffs and prospective defendants with a view to seeing whether the limitation period was a reasonable one.⁸¹

1.58 A key consideration in the assessment will be reasonableness.⁸² The courts will consider whether the balance of interests achieved is “unduly restrictive or unreasonable”⁸³ or “unreasonably or unjustly impose hardship”.⁸⁴

1.59 In *Tuohy v Courtney*⁸⁵ the Supreme Court stated that such a limitation must be “supported by just and reasonable policy decisions.” The Court held that while it is accepted that all limitation periods will potentially impose some hardship on some individual, the extent and nature of such hardship must not be “so undue and so unreasonable” as to make it constitutionally flawed, having regard to the proper objectives of the relevant legislation.⁸⁶ The Court concluded that the absolute character of the 6 year limitation period laid down by s. 11(2)(a) of the *Statute of Limitations 1957* did not render it unconstitutional. It observed that the “period of six years is, objectively viewed, a substantial period” and that existing provisions for extension in cases of disability, part-payment, fraud and mistake “constitute a significant inroad on the certainty and finality provided by the Act.”

1.60 In addition, the reasonableness of limitation periods will be assessed “in the general circumstances of the ordinary life of this country prevailing at the time when the enactment comes into force” but the hypothetical situation of a prospective litigant having no knowledge of a statutory period of limitation is not relevant to the assessment of the reasonableness of that limitation period.⁸⁷

1.61 It is a well established principle of statutory interpretation that any legislative exception to a constitutional provision must be strictly construed, and must not be availed of except where it was essential to do so.⁸⁸ Limitation periods, which necessarily constrict the constitutional personal right to litigate, will therefore be strictly construed.

(2) European Convention on Human Rights

1.62 The *European Convention on Human Rights Act 2003* incorporated into Irish law the rights contained in the Council of Europe 1950 Convention on Human Rights and Fundamental Freedoms. Section 2(1) of the 2003 Act provides that the courts must interpret and apply any statutory provision or rule of law in a manner compatible with the State’s obligations under the Convention provisions, “so far as is possible, subject to the rules of law relating to such interpretation and application”. This duty applies, pursuant to section 2(2) of the 2003 Act, to any statutory provision or rule of law in force immediately before the passing of the 2003 Act or any such provision coming into force since then.

1.63 Since the 2003 Act came into force, Article 6 of the Convention, which provides for a fair and public hearing within a reasonable time, is now – in addition to the provisions of the Constitution already discussed – also relevant to assessing the appropriateness of limitation provisions.⁸⁹

⁸¹ *Ibid* at 273-274. Finlay P followed the approach adopted in *O'Brien v Manufacturing Engineering Co. Ltd* [1973] IR 334 rather than the approach adopted in *O'Brien v Keogh* [1972] IR 144. The approach taken by Finlay P in *Cahill* was followed by Costello J in *Brady v Donegal County Council* [1989] ILRM 282.

⁸² *Murphy v Greene* [1990] 2 IR 566, 572.

⁸³ *O'Dowd v North Western Health Board* [1983] ILRM 186, 190.

⁸⁴ *Tuohy v Courtney* [1994] 3 IR 1, 48.

⁸⁵ *Tuohy v Courtney* [1994] 3 IR 1, 48, 50.

⁸⁶ *Ibid* at 48.

⁸⁷ *O'Brien v Manufacturing Engineering Co. Ltd* [1973] IR 334, 366.

⁸⁸ *In re R. Ltd* [1989] IR 126. The Court was considering the interpretation of section 205(7) of the *Companies Act 1963* which permitted, under certain circumstances, the hearing of an application pursuant to that section *in camera*. The Court had regard to Article 34 of the Constitution, which specifies that the administration of justice be in public, subject to exceptions prescribed by law.

⁸⁹ See *Comcast International Holdings Inc v Minister for Public Enterprise* [2007] IEHC 296 (Gilligan J).

1.64 Article 6(1) of the Convention states:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

1.65 Article 6(1) embodies the “right to a court”. One aspect of this right is a right of access to the courts, which comprises the right to institute proceedings before a court in civil matters.⁹⁰ This right seeks “to protect the individual concerned from living too long under the stress of uncertainty” and “to ensure that justice is administered without delays which might jeopardise its effectiveness and credibility.”⁹¹

1.66 It is well-established that Article 6 of the Convention is “intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”.⁹² Article 6(1) therefore implies an effective right of access to the court and access to the courts must mean access in fact as well as in principle.⁹³

1.67 Nonetheless, as with the right of access to the courts under Article 40.3 of the Constitution, the right of access under Article 6 is not absolute, and it does not prohibit the imposition of limitation periods.⁹⁴ The European Court of Human Rights has acknowledged that limitation periods are a common feature of the national legal systems of Council of Europe member states. Indeed, the Court has acknowledged the merits of limitation periods:

“They serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.”⁹⁵

1.68 The Court has also acknowledged that the interest of good administration of justice is served by the imposition of time limits within which prospective proceedings must be instituted, that time limits may be final, and that there can be no possibility of instituting proceedings even when new facts arise after the expiry of the time limit imposed.⁹⁶

1.69 The European Court of Human Rights has noted a lack of uniformity among the member states of the Council of Europe as to the length of civil limitation periods and the date from which those periods run.⁹⁷ It has observed that in many States the limitation period begins to run from the date of accrual, whereas in others it runs from the date of knowledge. The date of knowledge test is not, therefore, commonly accepted in Council of Europe member states.⁹⁸

1.70 The Court has applied a margin of appreciation to the manner in which member States organise their limitation periods. In *Stubbings v United Kingdom*,⁹⁹ the Court dismissed a claim that a limitation of 3 years in the English *Limitation Act 1980* was in breach of Article 6 of the Convention. In

⁹⁰ *Stubbings v United Kingdom* [1997] 23 EHRR 213, § 50.

⁹¹ Jacobs and White *The European Convention on Human Rights* (4th ed OUP 2006) at 187.

⁹² *Airey v Ireland* (1979-1980) 2 EHRR 305, at paragraph 24 of the judgment.

⁹³ *Golder v United Kingdom* [1979] 1 EHRR 524.

⁹⁴ *Ibid* at paragraph 38 of the judgment.

⁹⁵ *Stubbings v United Kingdom* [1997] 23 EHRR 213, at paragraph 51.

⁹⁶ *X v Sweden* (App. No 9707/82, judgment of 6 October 1982).

⁹⁷ *Stubbings v United Kingdom* [1997] 23 EHRR 213, § 54.

⁹⁸ *Ibid* at § 54.

⁹⁹ *Stubbings v United Kingdom* [1997] 23 EHRR 213, § 54.

doing so, the Court noted that the UK Parliament had devoted a substantial amount of time and study to the consideration of the limitation periods in the 1980 Act.¹⁰⁰

1.71 The Court added that, by its very nature, litigation calls for regulation by the state.¹⁰¹ Limitations on the right of access must be for a legitimate aim and must not transgress the principle of proportionality.¹⁰² There must, therefore, be “a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”¹⁰³ Moreover, the Court has held that while restrictions may be placed on the right of access to the courts by way of limitation period, such restrictions cannot function but to such a degree as to impair the essence of the right of access.¹⁰⁴ In other words, “the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.”¹⁰⁵

1.72 Article 6(1) of the Convention guarantees that in the determination of his civil rights and obligations, everyone is entitled to a hearing “within a reasonable time”.¹⁰⁶ The European Court of Human Rights has stressed that “it is for the State to organise its legal system as to ensure the reasonably timely determination of legal proceedings”.¹⁰⁷ Thus, Contracting States must provide mechanisms to ensure that hearings are held within a reasonable time. It is for the State to decide what mechanisms to adopt - whether by way of increasing the numbers of judges, or by automatic time-limits and directions, or by some other method.¹⁰⁸ The Court has held that if a State lets proceedings continue beyond the “reasonable time” prescribed by Article 6(1) without doing anything to advance them, it will be responsible for the resultant delay.¹⁰⁹

1.73 It is not sufficient, for the purposes of Article 6(1), for a State to place an onus on litigants to proceed with due expedition. The Court has consistently held that “a principle of domestic law or practice that the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings, does not dispense the State from complying with the requirement to deal with cases in a reasonable time”.¹¹⁰ With regard to the conduct of the responsible national authorities, the Court has noted the following:

“[W]hether or not a system allows a party to apply to expedite proceedings, the courts are not exempted from ensuring that the reasonable time requirement of Article 6 is complied with, as the duty to administer justice expeditiously is incumbent in the first place on the relevant authorities”.¹¹¹

¹⁰⁰ *Ibid* at § 55.

¹⁰¹ *Ibid* at § 50.

¹⁰² *Ashingdane v United Kingdom* [1985] 7 EHRR 528 at §§ 57-59.

¹⁰³ *Stubbings v United Kingdom* [1997] 23 EHRR 213 at § 50.

¹⁰⁴ *Ashingdane v United Kingdom* [1985] 7 EHRR 528 at § 57.

¹⁰⁵ *Ashingdane v United Kingdom* [1985] 7 EHRR 528 at § 57.

¹⁰⁶ See generally Delany “The Obligation on the Courts to Deal with Cases within a ‘Reasonable Time’” (2004) 22 *ILT* 249.

¹⁰⁷ *Doran v Ireland*, (App. No. 50389/99, judgment of 31 July 2003), [2003] ECHR 417 at § 44.

¹⁰⁸ *Price and Lowe v United Kingdom*, (App. No’s. 43185/98 and 43186/98, judgment of 29 July 2003), [2003] ECHR 409 at § 23.

¹⁰⁹ *Ibid* at § 23.

¹¹⁰ *Price and Lowe v United Kingdom*, (App. No’s. 43185/98 and 43186/98, judgment of 29 July 2003), [2003] ECHR 409 at § 23.

¹¹¹ *Doran v Ireland*, (App. No. 50389/99, judgment of 31 July 2003), [2003] ECHR 417 at § 47.

(3) Breach of Article 6 by Ireland arising from excessive delay

1.74 The European Court of Human Rights has consistently held that the reasonableness of the length of proceedings will be assessed in the light of the circumstances of the case and having regard to the criteria laid down in its case-law.¹¹² The Court has stated that each case must be looked at from a procedural, factual and legal point of view.¹¹³ Of particular relevance is the complexity of the case, the importance of what is at stake for the applicant in the litigation, and the conduct of the applicant and of the relevant authorities.¹¹⁴ In a number of cases, Ireland has been found to be in violation of Article 6(1) of the Convention owing to the failure of the State to prevent excessively lengthy legal proceedings.¹¹⁵

1.75 In *Doran v Ireland*¹¹⁶, the Court held that Ireland had breached Article 6 for its failure to comply with the 'reasonable time' requirement. The applicants had initiated a claim in negligence in the Irish courts in July 1991. The final assessment of costs in the case, the taxation certificate, was signed by the Taxing Master of the High Court in December 1999, thereby ending the proceedings. The proceedings had, therefore, lasted nearly 8½ years. When the Supreme Court gave judgment on the applicants' appeal in March 1998, the proceedings had already been in being for over 6½ years. The European Court of Human Rights ruled that, in these circumstances, "particular diligence" was required of the judicial authorities that were subsequently concerned with the proceedings to ensure the speedy determination of the outstanding issues namely, the assessment and apportionment of damages by the High Court and the applicants' costs.¹¹⁷

1.76 The Court did not consider the case to be significantly complex from an administrative or factual point of view and, although there was a "legal novelty", this could not explain the length of the proceedings.¹¹⁸

1.77 In *McMullen v Ireland*¹¹⁹, the applicant's case concerning negligence proceedings against his solicitor had begun some 16 years previously and was still continuing as a determination on the taxation of costs remained outstanding. The European Court of Human Rights found that the conduct of the applicant contributed "in no small part" to the delay in the proceedings.¹²⁰ Nevertheless, the Court ruled that the applicant's conduct did not, alone, explain their overall length of the proceedings.¹²¹ The Court considered the State to be responsible for several periods of delay, comprising a year between the last date of High Court hearings and the delivery of the judgment of the High Court; almost two years between the applicant's confirmation that all appeal documents had been filed and the first hearing date for the appeal; and six months for the Supreme Court to re-constitute and fix a hearing date for the appeal.¹²²

¹¹² *Doran v Ireland*, (App. No. 50389/99, judgment of 31 July 2003), [2003] ECHR 417 at § 47.

¹¹³ *McMullen v Ireland*, (App. No. 42297/98, judgment of 29 July 2004), [2004] ECHR 422 at § 33.

¹¹⁴ *McFarlane v Ireland*, (App. No. 31333/06, judgment of 10 September 2010), [2010] ECHR 1272, at § 140. The European Court of Human Rights referred to its "constant case law" of having consistently set out these principles.

¹¹⁵ See *McMullen v Ireland*, (App. No. 42297/98, judgment of 29 July 2004), [2004] ECHR 422, *O'Reilly and Anor v Ireland*, (App. No. 54725/00, judgment of 29 October 2004), [2006] 40 EHRR 40, and *Barry v Ireland*, (App. No. 18273/04, judgment of 15 December 2005), [2005] ECHR 865.

¹¹⁶ *Doran v Ireland*, (App. No. 50389/99, judgment of 31 July 2003), [2003] ECHR 417 at § 48. The State was ordered to pay damages of €26,000 to the applicants.

¹¹⁷ *Ibid* at § 48.

¹¹⁸ *Ibid* at § 45.

¹¹⁹ *McMullen v Ireland*, (App. No. 42297/98, judgment of 29 July 2004), [2004] ECHR 422. The State was ordered to pay €8,353.26 to the applicant.

¹²⁰ *McMullen v Ireland*, (App. No. 42297/98, judgment of 29 July 2004), [2004] ECHR 422 at § 37.

¹²¹ *Ibid* at § 37.

¹²² *Ibid* at § 39.

1.78 In *O'Reilly and Anor v Ireland*, the State was again found to be in violation of Article 6(1) of the Convention.¹²³ The applicants had brought proceedings in 1994 seeking an order of mandamus compelling a local authority to repair the road on which they lived. The proceedings took nearly 4 years and 11 months, ending in June 1999 with the final orders of the Supreme Court.¹²⁴ The European Court of Human Rights found that none of the delay was attributable to the applicants, but that two specific and lengthy delays were attributable to the national authorities, namely 16 months spent waiting for the High Court to deliver its judgment, and a material delay of 3 months in the appeal hearing.¹²⁵

1.79 In *Barry v Ireland*¹²⁶, the applicant, then a doctor, was arrested in 1997 and charged with sexual assault of a former patient. He was later charged with 237 offences of a sexual nature concerning 43 complainants. He issued judicial review proceedings seeking to have his prosecution abandoned, and sought discovery. The prosecution did not proceed until 8 years later, in 2005. At the time of the decision of the European Court of Human Rights in 2005, the proceedings in question were not yet completed, and had been in train for 10 years and 4 months.

1.80 In *McFarlane v Ireland*¹²⁷, the Court found against the State under Article 6(1) (right to a fair trial within a reasonable time) and Article 13 (right to an effective remedy). The case involved delays in criminal proceedings brought against the applicant for offences allegedly committed in 1983, of which he was acquitted in 2008.

1.81 In January 1998, the applicant was charged by the Special Criminal Court with false imprisonment and the unlawful possession of firearms, offences he was alleged to have committed in 1983. After delivery of the Book Evidence by the prosecution, the applicant engaged in correspondence with the prosecution between July 1998 and March 1999 during which it emerged that a crucial piece of evidence, an original fingerprint, had been lost. A forensic report, including photographs of this fingerprint evidence, had been retained. The applicant initiated judicial review proceedings in November 1999, which continued in parallel with the criminal proceedings, and these ultimately concluded in 2008 when the Special Criminal Court found the defendant not guilty.

1.82 The European Court of Human Rights found Ireland in breach of Article 6(1), as it was of the view that the “overall length of the criminal proceedings against the applicant was excessive and failed to meet the ‘reasonable time’ requirement.”¹²⁸ The Court considered that although both parties in any litigation were required to take responsibility for the progression of proceedings, this shared responsibility could not dispense the State from the “requirement to organise its system to deal with cases within a reasonable period of time. If a State allows proceedings to continue beyond a ‘reasonable time’ without doing anything to advance them, it will be responsible for the resultant delay.”¹²⁹

1.83 The Court went on to emphasise the vital importance of this responsibility on the part of the State to ensure that proceedings progress reasonably quickly particularly given the constitutional duties and rights involved.

“Accordingly, the Court considers that the existence of any possibility or right on the part of the applicant to take steps to expedite did not dispense the State from ensuring that the proceedings progressed reasonably quickly. Indeed, the Government themselves recalled that

¹²³ *O'Reilly and Anor v Ireland*, (App. No. 54725/00, judgment of 29 October 2004), [2006] 40 EHRR 40. The State was ordered to pay €1,400 to the applicants.

¹²⁴ *Ibid* at § 31.

¹²⁵ *Ibid* at § 32-33.

¹²⁶ *Barry v Ireland*, (App. No. 18273/04, judgment of 15 December 2005), [2005] ECHR 865. The State was ordered to pay to the applicant €15,000 in damages.

¹²⁷ *McFarlane v Ireland*, (App. No. 31333/06, judgment of 10 September 2010) [2010] ECHR 1272. The State was ordered to pay to the applicant €15,500 in damages.

¹²⁸ *McFarlane v Ireland*, (App. No. 31333/06, judgment of 10 September 2010), [2010] ECHR 1272, at § 156.

¹²⁹ *Ibid* at § 152.

domestic courts have an inherent jurisdiction to ensure that justice is done and have a constitutional duty to protect constitutional rights, including the right to reasonable expedition.”

(4) Conclusion and Recommendation

1.84 In light of this analysis of the relevant constitutional provisions and the related requirements of the European Convention on Human Rights, the Commission reaffirms the view it took in the Consultation Paper that the law governing limitation of actions must ensure that a balance is struck between the competing rights of the plaintiff and the defendant, and have regard to the public interest. In particular, the law should have regard to the right of the plaintiff of access to the courts and the right to litigate, the right of the defendant to a speedy trial and to fair procedures, and the public interest in the avoidance of delayed claims and the timely administration of justice.

1.85 *The Commission recommends that the law governing limitation of actions must ensure that a balance is struck between the competing rights of the plaintiff and the defendant, as well having regard to the public interest; in particular the right of the plaintiff of access to the courts and the right to litigate, the right of the defendant to a speedy trial and to fair procedures, as well as the public interest in the avoidance of delayed claims and the timely administration of justice.*

E General Developments in Limitations Law in Other Jurisdictions and Models of Reform

1.86 In this Part, the Commission provides a general overview of the development of limitations laws in a number of jurisdictions. This is intended to assist in determining the most appropriate approach to reform and modernise limitations legislation in Ireland. The Commission notes in this respect that a number of common law jurisdictions have moved from a traditional model of limitations law towards a “core limitations” regime. Such a regime, found for example in the New Zealand *Limitations Act 2010*, involves three key elements: a uniform basic limitation period; a uniform commencement date; and a uniform ultimate limitation period. As discussed in this Part, these core limitations regimes owe much to the pioneering work in the 1980s in Canada of the Alberta Institute of Law Research and Reform (the predecessor to the Alberta Law Reform Institute).¹³⁰

(1) England and Wales

1.87 The history of limitations legislation in England dates back as far as 1540, when limitation periods were first set by reference to fixed periods of time rather than fixed dates.¹³¹ Up to the 19th Century, the relevant English limitations legislation also applies in Ireland. In the 20th Century, the English *Limitations Act 1939* consolidated with some limited reforms the 19th Century legislation; and the 1939 Act was the model for the Irish *Statute of Limitations 1957*.

1.88 In England, further amendments to the 1939 Act were made in 1975 and 1980, and these were in turn consolidated in the *Limitation Act 1980*. The 1980 Act remains the principal Limitations Act in England, though it has itself been amended a number of times to deal with: latent damage in negligence, defamation and malicious falsehood claims and claims under the *Consumer Protection Act 1987* (the 1987 Act is, broadly, equivalent to the *Liability for Defective Products Act 1991*, both involving the implementation of the 1985 EU Directive on Defective Products, 85/374/EEC).

1.89 The English *Limitation Act 1980*, and its predecessors, broadly mirrors the *Statute of Limitations 1957*, as amended, in that several different types of limitation periods apply depending on the type of action involved. This is hardly surprising, since the 1957 Statute largely involved a consolidation of the pre-1922 legislation on limitation periods enacted in the UK Parliament, and the 1980 Act has, in general, followed the essential pattern of the older legislation on limitation periods. As in Ireland, the

¹³⁰ See Alberta Institute for Law Research and Reform, *Limitations*, (Report for Discussion No. 4, September 1986) and Alberta Institute for Law Research and Reform, *Limitations* (Report No. 55, December 1989), both discussed below.

¹³¹ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at paragraph 1.6. For example, before 1237, a person could not claim land on the basis of seisin before the day in 1135 when Henry I died.

reform and development of the English legislation on limitations has been equally piecemeal, with sporadic amendments being made from time to time.

1.90 In 2001, the Law Commission for England and Wales published a Report *Limitation of Actions*.¹³² The Law Commission concluded that the English 1980 Act, as amended, required simplification and rationalisation because it was “uneven, uncertain and unnecessarily complex.”¹³³ The Law Commission was of the view that the 1980 Act lacks coherence owing to its ad hoc development; it also considered that the legislation is unfair and outdated.¹³⁴ The Law Commission therefore concluded that the case for a wide-ranging reform to be compelling, and recommended the introduction of “a law of limitations that is coherent, certain, clear, just and cost-effective.”¹³⁵

1.91 The Law Commission recommended that a core regime of limitations be introduced. In summary, some of the main features of this regime would be as follows:

- A primary limitation period of three years starting from the date that the claimant had knowledge, or ought reasonably to have had knowledge¹³⁶;
- A long-stop limitation period of ten years starting from the date of the accrual of the cause of action;
- A judicial discretion to dis-apply the primary limitation period in respect of personal injuries;
- No long-stop limitation period to apply to personal injuries actions.
- In relation to adult claimants with a disability - where the claimant is under a disability and is in the care of a responsible adult ten years for ten years after the later date of (a) the act or omission giving rise to the claim, or (b) the onset of disability; then the primary limitation period runs from the date the responsible adult knew or ought to have known the relevant facts (unless the responsible adult is a defendant to the claim).¹³⁷
- All personal injury claims will be subject to the regime whether the claim concerned is framed in terms of negligence or trespass to the person.¹³⁸

1.92 The Law Commission recommended that this core regime should apply to tort and contract claims (with the exception of personal injuries), restitutionary claims, claims for breach of trust and related claims (including claims in respect of the personal estate of a deceased person), claims on a judgment or arbitration award and claims on a statute.¹³⁹

1.93 After 2001, the UK Government engaged in a further consultation exercise with interested parties. In 2009, it indicated that proposal for it did not intend to proceed with the enactment of a core limitations law. In November 2009, the then Parliamentary Under-Secretary of State for Justice (Bridget

¹³² Law Commission of England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998); *Limitation of Actions* (Report No. 270, 2001).

¹³³ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at paragraph 1.1.

¹³⁴ *Ibid* at 1.2.

¹³⁵ *Ibid* at 1.5.

¹³⁶ This is broken down as knowledge of the facts which give rise to the cause of action, the identity of the defendant, and if an injury or loss was suffered, that the injury or loss was significant. See further Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at paragraph 1.12.

¹³⁷ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at paragraph 1.14.

¹³⁸ *Ibid* at 1.14. This would combat the classification difficulties encountered in England and Wales in claims of child sexual abuse. In such cases, the claims are often made in negligence and trespass to the person, to which two different limitation periods apply.

¹³⁹ *Ibid* at 1.13.

Prentice) announced by way of ministerial statement that the proposed draft *Civil Law Reform Bill* would not include provisions to reform the law of limitation of actions. The reasons given were as follows:

These provisions were based on a Law Commission Report of 2001. But a recent consultation with key stakeholders has demonstrated that there are insufficient benefits and potentially large-scale costs associated with the reform. In addition, the courts have remedied some of the most significant difficulties with the law that the Law Commission identified, for example, in relation to the limitation aspects of child abuse cases. The limitation reforms will therefore not now be taken forward.¹⁴⁰

1.94 As this announcement indicated, the draft *Civil Law Reform Bill* which was published in December 2009 does not contain any provisions relating to the reform of the limitation of actions.¹⁴¹ It therefore appears that, at the time of writing, the UK Government has decided against making any changes to the current limitations regime in England and Wales. It is notable that the Government gave two reasons for this: first that the potential costs of reform would outweigh and benefits; and, second, that decisions of the UK courts since 2001 had largely remedied some of the deficiencies identified by the Law Commission in 2001.

(2) Northern Ireland

1.95 In Northern Ireland, the *Statute of Limitations (Northern Ireland) 1958* largely mirrored the English *Limitations Act 1939* (and, therefore, the *Statute of Limitations 1957*). The 1958 Statute was amended a number of times, again reflecting comparable amendments to the English legislation. Similarly, following the consolidation that occurred in England with the *Limitation Act 1980*, the *Limitation (Northern Ireland) Order 1989* consolidated the limitation law for Northern Ireland. This included, for example, incorporating the implementation of the 1985 EU Product Liability Directive, 85/374/EEC, which had already been implemented in the *Consumer Protection (Northern Ireland) Order 1987*. The 1989 Order remains the principal limitations legislation in Northern Ireland.

(3) Scotland

1.96 In Scotland, the concepts of prescription and limitation are used within the principal legislation in this area, the *Prescription and Limitation (Scotland) Act 1973*. Though similar in terms of practical effect, prescription and limitation are viewed as being conceptually different. Prescription is perceived as a rule of substantive law, while limitation is viewed as a procedural rule. Therefore, when a limitation period expires, the obligation to pay damages technically continues to exist, whereas once the period of prescription ends, this obligation is considered to be extinguished.

1.97 Different limitation periods apply to different types of proceedings, for example, 3 years for personal injuries actions¹⁴² and defamation actions. There is also a general long negative prescription period of 20 years applicable to most actions, although it does not, however, apply to personal injuries actions, actions involving “any real right of ownership in land”, actions concerning obligations of trustees, or product liability actions.¹⁴³

¹⁴⁰ HC Deb 19 November 2009 c13WS. Accessed at <http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snha-04209.pdf> and, <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm091119/wmstext/91119m0003.htm#09111944000028>

¹⁴¹ *Civil Law Reform A Draft Bill*, published December 2009, accessed at <http://www.justice.gov.uk/publications/docs/draft-civil-law-reform-bill.pdf>. The Commission notes that, in any event, in January 2011 the UK Government decided not to proceed with the remaining elements of its predecessor’s draft *Civil Law Reform Bill*. See <http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/consultations/civil-law-reform-bill.htm>.

¹⁴² The Scottish Commission recommended that the limitation period for personal injury actions should be extended to five years. Scottish Law Commission *Report on Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com No. 207) at paragraph 2.59.

¹⁴³ Section 7(2) *Prescription and Limitation (Scotland) Act 1973*.

1.98 There is also a short 5 year prescription period which applies in relation to certain types of actions, such as obligations to pay a sum of money due in respect of a particular period.¹⁴⁴ This short prescription period is of limited application, and does not extend to a range of other civil proceedings such as defamation actions, obligations relating to land, or, personal injuries actions.

1.99 Since 1980, the Scottish courts have had a discretionary power under section 19A of the *Prescription and Limitation Act 1973*, to disregard limitation periods in personal injury cases.¹⁴⁵ The court's discretion is not limited, and there are guidelines developed from case law to which the court can have regard if it is equitable for the limitation period to be extended.¹⁴⁶ In its 2007 *Report on Personal Injury Actions: Limitation and Prescribed Claims*, the Scottish Law Commission noted that despite each case turning on its own facts, "judges have tended to develop similar approaches" to how they approach the application of this discretion.¹⁴⁷ Thus concerns expressed when the discretion was introduced that it would lead to increasing uncertainty and inconsistency in how the courts apply this discretion, have not materialised.¹⁴⁸

1.100 The Scottish Law Commission noted that the main disadvantage of retaining this discretionary power was that it created uncertainty, but nevertheless, it noted that its main advantage is that of flexibility. It felt that it tempered the arbitrariness inherent in a time limit, "enabling actions to proceed where the limitation period is overshot by only a short period without any material impairment to the defender's ability to resist the claim."¹⁴⁹

1.101 The Scottish Law Commission recommended that this judicial discretion to allow a time-barred action to proceed should be retained.¹⁵⁰ However, it also recommended that section 19A of the *Prescription and Limitation Act 1973* be amended to include a list of non-exhaustive factors which the court could have regard to in exercising its discretion in determining whether to allow a time-barred action to proceed.¹⁵¹

(4) Canada

1.102 In 2010, the Manitoba Law Reform Commission published a Report on Limitations¹⁵² which set out a summary of the different limitation regimes applicable throughout the Canadian Provinces. It noted that there are three different types of limitation systems in place in Canada;

- (1) The core limitation or "modern limitation regime";
- (2) The traditional limitation system which is somewhat similar to the *Statute of Limitations 1957* as it is also based on historical English legislation; and,
- (3) Semi-reformed legislation which is a mixture of the old and new approach to limitations.

1.103 The Manitoba Commission provided this following summary of these different regimes:

"The limitations statutes of Alberta, Saskatchewan, Ontario and New Brunswick are the more recently reformed Canadian regimes, and represent similar concepts and philosophies. The new statutes eliminate the traditional approach, under which different limitations applied to

¹⁴⁴ Section 6 *Prescription and Limitation (Scotland) Act 1973*.

¹⁴⁵ Section 19A *Prescription and Limitation Act 1973*, inserted by the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980*.

¹⁴⁶ Scottish Law Commission *Report on Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com No. 207) at paragraph 3.9 - 3.10.

¹⁴⁷ *Ibid* at paragraph 3.11.

¹⁴⁸ *Ibid* at paragraph 3.23.

¹⁴⁹ *Ibid* at paragraph 3.18 - 3.19.

¹⁵⁰ *Ibid* at paragraph 3.24.

¹⁵¹ *Ibid* at paragraph 3.37.

¹⁵² Manitoba Law Reform Commission *Limitations* (Report #123, July 2010).

specified cause of action, and replace it with a streamlined structure based on a two year 'basic' limitation and a longer 'ultimate' limitation. In this report, we refer to the limitations statutes of these provinces collectively as the modern limitations regimes. British Columbia and Newfoundland and Labrador have semi-reformed legislation, with various limitations applicable to claims according to a system of categories. The remaining provinces and territories have limitation statutes founded on early English legislation, though differing in significant particulars from one another."¹⁵³

(i) Alberta

1.104 The Alberta Institute of Law Research and Reform (the predecessor to the Alberta Law Reform Institute) published a report in 1986 on the topic of limitations, and it is widely viewed as a seminal work on this subject matter.¹⁵⁴ In 1989, the Institute published its final Report.¹⁵⁵ It recommended that the existing legislation be completely overhauled, and a core limitations regime be introduced based on a two year basic limitation period and a longer 15 year¹⁵⁶ ultimate limitation period. This 1986 report formed the basis for the new limitations legislation introduced in Alberta in 1996.¹⁵⁷

1.105 The work of the Alberta Institute was greatly influential with respect to later projects regarding reforming limitations legislation in Ontario, Saskatchewan and New Brunswick, as well as the Uniform Law Conference of Canada.

1.106 In its Report of 1989, the Alberta Institute published a *Model Limitation Act*, introducing this core limitation regime.¹⁵⁸ This model had the key advantage of simplicity. Thus, instead of a number of limitation periods running for various lengths from different dates of accrual, one basic limitation period running from the date of discovery along with a long-stop period, running from the date on which the cause of action arose. Provisions for the judicial extension of the limitation period were considered unnecessary.

1.107 The Alberta model also has the advantage of clarity. It is easily understood by practitioners and litigants alike, and therefore reduces the possibility of a claimant finding themselves statute-barred due to their lack of knowledge or comprehension of limitation law. The uniformity of the Alberta rules also essentially eliminates problems of classification in that arise where different limitation periods are ascribed to different categories of claim. In addition, it reduces the potential for litigation on definitional issues.

1.108 The Alberta Institute's Model Limitation Act was the foundation upon which a core limitation regime was introduced in Alberta in 1996,¹⁵⁹ Ontario in 2002¹⁶⁰ and Saskatchewan in 2004¹⁶¹, in New Brunswick in 2010,¹⁶² as well as the inspiration for the Uniform Law Conference of Canada's Uniform Limitations Act, adopted in 2005, and the proposed model Act proposed by the Manitoba Law Commission in 2010.¹⁶³

¹⁵³ Manitoba Law Reform Commission *Limitations* (Report #123, July 2010), at p.9.

¹⁵⁴ Alberta Institute for Law Research and Reform, *Limitations*, (Report for Discussion No. 4, September 1986).

¹⁵⁵ Alberta Institute for Law Research and Reform, *Limitations*, (Report No. 55, December 1989).

¹⁵⁶ The Alberta legislature opted for a 10 year ultimate limitation period. See section 3(1)(b) *Limitations Act* R.S.A. 2000, c. L-12.

¹⁵⁷ *Limitations Act*, S.A. 1996, c. L-15.1, commenced on March 1st 1999; now R.S.A 2000, c. L-12.

¹⁵⁸ Alberta Institute for Law Research and Reform, *Limitations*, (Report No. 55, December 1989) at pgs 5 - 12.

¹⁵⁹ *Limitations Act, Revised Statutes of Alberta 2000*, Chapter L-12.

¹⁶⁰ *Limitations Act, 2002, SO 2002*, Chapter 24, Schedule B.

¹⁶¹ *The Limitations Act, Chapter L-16.1 of The Statutes of Saskatchewan, 2004* (effective May 1, 2005), as amended by the Statutes of Saskatchewan, 2007, c.28.

¹⁶² *Limitations of Actions Act*, S.N.B. 2009, c. L-8.5.

¹⁶³ Manitoba Law Reform Commission *Limitations* (Report #123, July 2010), at pgs 6 - 10.

1.109 The Alberta Institute set out two basic principles in the 1989 Report, upon which they founded their recommendations in favour of a core limitation regime, and these principles have since been influential in the majority of limitation reform projects. The basic principles are as follows:

“The first basic principle is knowledge. It is derived from the limitations strategy in equity and serves the interests of claimants. 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. After discovery, the claimant has 2 years within which to seek redress in a civil judicial proceeding. This 2-year period constitutes the "discovery limitation period".

The second basic principle is repose. It incorporates the certainty of the fixed periods used in the limitations strategy at law, and serves the interests of defendants by providing an absolute cut off date of 15 years within which the claimant must seek a remedial order. The 15-year period applies irrespective of whether the claimant has knowledge of the claim. The principle of repose facilitates long term planning by persons subject to potential claims. As well, at a certain stage evidence and adjudication becomes defective because of the passage of time. This 15-year 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. The defence must be pleaded, as the traditional approach in the limitations strategy at law currently requires. A successful defence gives the defendant immunity from liability under the claim. Immunity from liability is not conferred automatically and a successful limitations defence does not expunge legal rights.”¹⁶⁴

(ii) British Columbia

1.110 British Columbia was the first province in Canada to begin the process of modernising its limitation regime. It introduced, in the *Limitation Act*¹⁶⁵ (first introduced in 1975), a type of core or modern limitation regime in that it contained two different types of limitation periods, basic and ultimate limitation periods. However, it is quite a complicated form of a core limitation regime, as the Act contains three different basic limitation periods of two, six and ten years, and two ultimate limitation periods of six and 30 years in duration. There have been problems with determining which basic limitation period is applicable, and also then the relevant start date. “Provisions have even been criticized by the courts as being ‘obscure’ and ‘a longstanding source of frustration in British Columbia.’”¹⁶⁶

1.111 There are also difficulties with the two ultimate limitation periods as these run from the date of the accrual of the action. The date of accrual means the date on which the cause of action is complete, that is, when it becomes possible for a plaintiff to commence proceedings. A cause of action is complete when each necessary element of the cause of action is present, for example, in the case of the tort of negligence, there are four elements which must be present, thus allowing a plaintiff to initiate proceedings. In summary, these four elements consist of a duty of care, a failure to conform to the required standard, actual loss or damage to the interests of the plaintiff, and a sufficiently close causal connection between the conduct of the defendant and the injury suffered by the plaintiff.¹⁶⁷

¹⁶⁴ Alberta Institute for Law Research and Reform, *Limitations*, (Report No. 55, December 1989) at pgs 1-2.

¹⁶⁵ *Limitation Act* R.S.B.C. 1996, c. 266.

¹⁶⁶ Ministry of Attorney General Justice Services, Civil Policy and Legislation Office, *White Paper on Limitation Act Reform: Finding the Balance*, at p.2.

¹⁶⁷ For more detailed discussion, see McMahon and Binchy, *Law of Torts*, 3rd ed, (Butterworths 2000), Chapter 5.

1.112 The British Columbia Law Reform Commission in 1990 recommended the reduction of the 30 years limitation period to 10 years.¹⁶⁸ Its successor, the British Columbia Law Institute (“BCLI”), reiterated this recommendation in 2001.¹⁶⁹ The BCLI felt that such a prolonged ultimate limitation period, and the resulting prolonged liability, had adverse effects on business. This was due to the significant expenses imposed on defendants with regard to maintaining records, evidence and insurance until the period ended.

1.113 In 2010, the Attorney General of British Columbia published a *White Paper on Limitation Act Reform: Finding the Balance*.¹⁷⁰ It recommended a complete overhaul of the limitation system with the introduction of a core limitation regime similar to that of Alberta, Ontario, Saskatchewan and New Brunswick, and the model limitations law of the Uniform Law Conference of Canada; this would consist of a single two-year basic limitation period for all civil claims, and either a 10 or 15-year ultimate limitation period running from the date of the act or omission.

(iii) Uniform Law Conference of Canada

1.114 The Uniform Law Conference of Canada (the “ULCC”) is a nation-wide organisation that promotes reform and greater uniformity of laws across Canadian jurisdictions. It makes recommendations for changes to federal legislation based on deficiencies in the existing law. Its work is done by delegates appointed by member governments. The Conference adopts a “model statute” which it offers as a recommended method of harmonisation for the use of member governments if they wish to do so.¹⁷¹

1.115 The ULCC first considered the topic of limitations in 1931, and again in 1982. In 2005, the ULCC introduced a new model act in relation to limitations, the *Uniform Limitations Act 2005*¹⁷², which is based upon the ‘core limitation regime’ legislation enacted recently in Alberta (in 1996), Ontario (in 2002) and Saskatchewan (in 2004).¹⁷³

(iv) Manitoba

1.116 In Manitoba, the existing legislation is somewhat similar to the legislation in Ireland, in that its origins can be traced back to historical English legislation. When Manitoba became a province in 1870, the limitations legislation brought into force was the *Statute of Limitations 1623* and this continued in operation until the Manitoba Legislature enacted *The Limitations of Actions Act 1931* with significant amendments being made in 1967, 1980 and 2002.¹⁷⁴ The Manitoba Commission was of the view that as the principal limitations legislation, (*The Limitations of Actions Act*), was “highly dated” and in need of reform” as it was “fundamentally based on an amalgam of limitations provisions that originated in England centuries ago”.¹⁷⁵

1.117 The Manitoba Commission recommended that a core limitations regime be put in place, with a two year basic limitation period running from the date of discoverability and a longer 15 year ultimate

¹⁶⁸ Law Reform Commission of British Columbia *Report on the Ultimate Limitation Period: Limitation Act*, section 8 (LRC 112, 1990) at p.31.

¹⁶⁹ British Columbia Law Institute *The Ultimate Limitation Period: Updating the Limitation Act* (Report No. 19, July 2002) at p.8.

¹⁷⁰ Ministry of Attorney General Justice Services, Civil Policy and Legislation Office, *White Paper on Limitation Act Reform: Finding the Balance*, Introduction, at p.3.

¹⁷¹ See <http://www.ulcc.ca/en/about/>.

¹⁷² Uniform Law Conference of Canada, *Uniform Limitations Act 2005*, accessible at http://www.ulcc.ca/en/us/Uniform_Limitations_Act_En.pdf

¹⁷³ Manitoba Law Reform Commission *Limitations* (Report #123, July 2010), at p.9.

¹⁷⁴ *Ibid* at 5.

¹⁷⁵ *Ibid* at 120.

limitation period running from the date of the act or omission.¹⁷⁶ It also recommended that the proposed Act should not retain any judicial discretion to extend a limitation period.¹⁷⁷

1.118 The proposed reforming legislation appended to the 2010 report of the Manitoba Commission was based primarily on the *Uniform Limitations Act 2005* of the Uniform Law Conference of Canada. In turn, this uniform Act was based on the legislation enacted in Alberta, Ontario and Saskatchewan. These Provinces adopted a modernised and uniform limitations system based on a core limitations regime.¹⁷⁸

(5) New Zealand

1.119 Until 2010, New Zealand limitations law was set out in the *Limitation Act 1950*, as amended. The 1950 Act set out limitation periods for the common law actions, namely contract and tort claims, as well as claims for the recovery of land and claims for breach of trust. The 1950 Act did not apply, for example, to probate and judicial review actions.¹⁷⁹

1.120 Under the *Limitation Act 1950*, most actions had a 6 year limitation period starting from the date of the accrual,¹⁸⁰ this being the date when the loss occurred in tort negligence cases, and the date on which a contract was breached in contract cases. This meant that a limitation period often had expired before a plaintiff realised they had a case, most commonly in latent personal injury cases or defective premises cases. The New Zealand Court of Appeal sought to remedy this in *Invercargill City Council v Hamlin* in which it held that, that where a defect in the construction of the building on which a negligence claim is based is latent, the cause of action does not accrue until the damage is either discovered or reasonably discoverable.¹⁸¹ The Court extended this discoverability test to cases involving a claim for damages for personal injuries due to sexual abuse¹⁸², and also for personal injuries arising from medical negligence¹⁸³.

1.121 In a 2000 Report *Tidying the Limitation Act*, the New Zealand Law Commission noted that this left the law in a state of uncertainty as to whether the discoverability test could be applied to all actions or merely to actions for economic loss caused by defective buildings and bodily injury.¹⁸⁴

1.122 In 2007, in *Trustees Executors Ltd v Murray*,¹⁸⁵ the New Zealand Supreme Court stated clearly that the answer to this question was that the courts were not prepared to apply the discoverability test more generally. The Court considered that the concept of accrual could not be pushed any further in its interpretation to accommodate a judicially imposed concept of discoverability, a trend which emerged in the absence of any reform of the limitation legislation on the part of the New Zealand parliament.¹⁸⁶ The Court stated that “some considerable straining of a core concept in the Limitation Act [1950] has occurred to cope with what the courts have regarded as particularly necessitous individual circumstances.

¹⁷⁶ *Ibid* at 120.

¹⁷⁷ *Ibid* at 41.

¹⁷⁸ Manitoba Law Reform Commission *Limitations* (Report #123, July 2010), at pp.9-10.

¹⁷⁹ New Zealand Law Commission *Limitation Defences in Civil Cases: Update Report for the Law Commission, Miscellaneous Paper prepared by Chris Corry, Barrister* (NZLC MP16, 2007) at paragraph 18.

¹⁸⁰ Section 4(1) *Limitation Act 1950*. The 1950 Act was repealed on 1 January 2011, when the New Zealand *Limitation Act 2010* came into force.

¹⁸¹ *Invercargill City Council v Hamlin* [1994] 3 NZLR 513.

¹⁸² *S v G* [1995] 3 NZLR 681.

¹⁸³ *G D Searle & Co v Gunn* [1996] 2 NZLR 129.

¹⁸⁴ New Zealand Law Commission *Tidying the Limitation Act* (Report No. 61, July 2000) at paragraph 10.

¹⁸⁵ *Trustees Executors Ltd v Murray* [2007] NZSC 27.

¹⁸⁶ *Ibid* at paragraphs 64-68.

But that does not mean that the straining can properly be continued in a way which would take it well past breaking point.”¹⁸⁷

1.123 The New Zealand Law Commission has published Reports on limitation legislation in 1988, 2000, and 2007.¹⁸⁸ The 2007 Report, published a month after the decision of the New Zealand Supreme Court in *Trustees Executors Ltd v Murray*, recommended that a type of core limitation law be introduced. The main recommendations were¹⁸⁹:

- The primary limitation period should, in general, be 6 years, subject to limited exceptions, for example, that the limitation for a claim for bodily injury remain at 2 years¹⁹⁰;
- The start date of the primary or ultimate limitation period was to be the date of the act or omission on which the claim was based;
- The ultimate limitation period was to be 15 years. Upon expiry, this ultimate limitation period bars a claim completely unless “the fraud or concealment period applies”¹⁹¹;
- The start date for an extension to the primary limitation period was the date the plaintiff first acquires knowledge of relevant matters. The purpose of the knowledge period was to give time to the plaintiff who was not aware of his cause of action before the primary limitation period expired.¹⁹² The knowledge period was recommended to be based “on discovery (or knowledge) of the injury, loss or damage, nothing more.”¹⁹³ It was also recommended that there be no knowledge period for a contract claim.¹⁹⁴

1.124 The Commission’s 2007 recommendations were, broadly, implemented in the New Zealand *Limitation Act 2010*. The 2010 Act introduced a 6 year primary limitation period and a 15 year ultimate limitation period, both running from the date of the act or omission. The 2010 Act applies to ‘money claims’, meaning “a claim for monetary relief at common law, in equity, or under an enactment”.¹⁹⁵ After the expiry of the initial 6 year primary limitation period, a ‘late knowledge period’ allows a claimant to take claim within 3 years of discovering their claim.¹⁹⁶ However, the ultimate limitation period of 15 years still operates as against both the primary and late knowledge periods.

1.125 Section 17 of the *Limitation Act 2010* introduced judicial discretion to deal with two specific categories of claims, child abuse (sexual or non-sexual) and claims for relief caused by gradual process, disease or infection. In such types of claims, even where the relevant statute-barred defence has been or could be established, the court may “if it thinks it just to do so on an application made to it for the purpose, order that monetary relief may be granted in respect of the claim as if no defence under this Part applies to it.”¹⁹⁷

¹⁸⁷ *Ibid* at 68.

¹⁸⁸ New Zealand Law Commission *Limitation Defences in Civil Proceedings* (NZLC Report No. 6, 1988), New Zealand Law Commission *Tidying the Limitation Act* (NZLC Report No. 61, July 2000), and New Zealand Law Commission *Limitation Defences in Civil Cases: Update Report for the Law Commission, Miscellaneous Paper prepared by Chris Corry, Barrister* (NZLC MP16, June 2007).

¹⁸⁹ New Zealand Law Commission *Limitation Defences in Civil Cases: Update Report for the Law Commission, Miscellaneous Paper prepared by Chris Corry, Barrister* (NZLC MP16, June 2007) at paragraph 2.

¹⁹⁰ *Ibid* at 89.

¹⁹¹ *Ibid* at 117.

¹⁹² *Ibid* at 115-116.

¹⁹³ *Ibid* at 137.

¹⁹⁴ *Ibid* at 144.

¹⁹⁵ Section 12(1) *Limitation Act 2010*, Public Act 2010, No. 110.

¹⁹⁶ See sections 11 and 14 of *Limitation Act 2010*.

¹⁹⁷ Section 17(6) *Limitation Act 2010*.

1.126 Section 18 of the *Limitation Act 2010* lists certain factors which the court may take into account when considering such an application. These factors include considerations such as any hardship that such an order could cause to the plaintiff and defendant if it were made or was not made), the length and reasons for delay on the part of the plaintiff, the effects of the delay, the defendant's conduct, any steps taken by the plaintiff to seek relevant expert advice, and so on.¹⁹⁸

(6) Model for Reform: A Core Limitations Regime

1.127 The wide range of disparate provisions outlined in Part A demonstrates that the *Statute of Limitations 1957* is a very complex piece of legislation. This is because it attempts to provide a multitude of separate limitation rules for many different actions, and also due to a lack of any cohesive reform of limitations law. Introducing a new Limitations Act with the aim of simplifying the limitation rules which apply to the vast majority of actions in the courts system, the civil law actions, would allow an element of clarity to be re-introduced to this area of the law.

1.128 The Commission is of the view that the current problems of the 1957 Statute cannot be rectified by modestly revising the law as it stands. The Commission considers that a fundamental root and branch reform would be more effective, introducing a conceptually different approach to limitations.

1.129 Having regard to the review above of models of reform in other jurisdictions, including England and Wales, Canada and New Zealand, the Commission acknowledges that there is a strong case in favour of a core limitations regime".¹⁹⁹ A core regime is essentially a uniform approach to limitations law, with fairness, clarity and simplicity at its foundation. The key feature of the various core regimes recommended by other jurisdictions has been the introduction of the following three standards for the majority of civil actions:

- A uniform basic limitation period;
- A uniform commencement date;
- A uniform ultimate limitation period.

1.130 The Commission remains of the view expressed in the Consultation Paper that the introduction of such a 'core limitations regime' would provide the fundamental reform required. The Commission has accordingly concluded, and so recommends, that there is a need to introduce a limitations law based on the model of a "core limitation regime", consisting of a uniform basic limitation period; a uniform commencement date; a uniform ultimate limitation period set of uniform limitation periods applying to common law actions. The introduction of this model for reform would have the result of remedying a number of anomalies that exist under the current limitations legislation applicable to the high-volume common law actions.

1.131 *The Commission recommends the introduction of a limitations law based on the model of a "core limitation regime", comprising: a uniform basic limitation period, a uniform commencement date; and a uniform ultimate limitation period, and which would apply to the types of claims discussed in this Report.*

F Procedural Issues

1.132 The Commission does not intend in this Part to diverge from the main focus of this Report by discussing in detail matters of practice and procedure in relation to limitation periods. Nonetheless, the Commission considers it relevant to address a small number of significant issues of procedure.²⁰⁰

(1) Pleading the Statute of Limitations 1957

1.133 The objective of a limitations system is to encourage the timely resolution of legal proceedings. This objective is achieved by limiting the time available to a plaintiff in seeking a judicial remedy. If a claim is not brought within the relevant limitation period, the defendant can choose to avail of a defence based

¹⁹⁸ Section 18 (a) - (g) *Limitation Act 2010*.

¹⁹⁹ See also *Consultation Paper on Limitation of Actions* (LRC CP 54-2009), Chapter 3.

²⁰⁰ See also *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraphs 2.235-2.248.

solely on the *Statute of Limitations 1957* by arguing that the claim is out of time and therefore “statute-barred.”

1.134 It is well-established that the defendant must expressly plead the *Statute of Limitations 1957* in order to avail of the limitation defence; the defence is not self-executing upon the expiry of the limitation period.²⁰¹ A court will not, therefore, raise the question of time of its own motion. Thus, it is open to a defendant who might otherwise plead the *Statute* to choose not to do so. If the defendant elects to contest the case on its merits, and chooses not to plead the *Statute*, or through oversight fails to plead the *Statute*, the plaintiff may still obtain his or her remedy, even though the limitation period has expired. In this way, the *Statute* has no effect unless and until pleaded. If the defendant specifically pleads that the relevant limitation period has expired, and is successful, the result is that the plaintiff’s proceedings are dismissed, and the defendant is given immunity from any liability under the claim. Thus, the validity or the merits of the plaintiff’s proceedings is not really at issue.

1.135 As already noted, in most common law jurisdictions, such as Ireland, this procedural aspect to the law of limitations is to be contrasted with the complete extinguishment of a substantive right, which is associated with the concept of prescription. Because limitations law operates at the procedural level only, some aspects of the substantive rights involved in a claim may “survive” the limitation period. Thus, if a debtor pays what turns out to be a statute-barred debt, the debtor cannot subsequently claim back the money on the ground that it was not due.²⁰²

1.136 The Commission notes here, to avoid any doubt, that these long-established procedural effects of limitations periods should continue to apply in the context of the draft *Limitations Bill* in the Appendix.

(2) Effect of Expiry of the Limitation Period

1.137 Failure to initiate proceedings within the relevant period does not extinguish the plaintiff’s rights. The right asserted will remain intact; it is merely the method of enforcement of that right that is affected. Thus, where the defendant chooses to plead the *Statute*, the plaintiff retains other options to enforce his or her right outside of the courts. In this sense, the effects of the *Statute* is, in general, procedural rather than substantive in nature. As already discussed, this marks a clear distinction between “limitation” and “prescription.”

1.138 There are important exceptions to this general rule, the most important of which applies to actions to recover land. In such cases, the expiry of the limitation period extinguishes the title of the property of the legal owner along with the remedy after the limitation period has expired.²⁰³

(3) Calculating the Limitation Period

1.139 In *McGuinness v Armstrong Patents Ltd*,²⁰⁴ McMahon J held that the date on which the cause of action accrues is included in the limitation period. This is also now dealt with in section 18(h) of the *Interpretation Act 2005*, which provides:

“*Periods of time.* Where a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall be deemed to be included in the period.”²⁰⁵

²⁰¹ See, for example, *AB v Minister for Justice, Equality and Law Reform* [2002] 1 IR 296, 305.

²⁰² See the discussion of the substantive/procedural distinction in Brady and Kerr, *The Limitation of Actions*, 2nd ed (Law Society of Ireland, 1994), Chapter 1.

²⁰³ See also section 24 of the *Statute of Limitations 1957*. The Commission intends to publish in 2012 a separate *Report on Adverse Possession* under its *Third Programme of Law Reform 2008-2014* (Project 20).

²⁰⁴ [1980] IR 289.

²⁰⁵ The 2005 Act repealed the *Interpretation Act 1937*. Section 11(h) of the 1937 Act contained a definition which was similar in effect to section 18(h) of the 2005 Act.

(4) Concurrent wrongdoers and third party notices

1.140 The Commission is aware from submissions received that an issue arises in connection with the reforms proposed in this Report and the related issue of concurrent wrongdoers and third party notices. Section 27(1)(b) of the *Civil Liability Act 1961*, as amended by section 3 of the *Civil Liability (Amendment) Act 1964*, provides that a third party notice must be served “as soon as reasonably possible.” In addition, O.16, r.1(3) of the *Rules of the Superior Courts 1986* deals with the detailed procedure for third party notices. The Commission accepts that this area has given rise to significant case law and that the phrase “as soon as reasonably possible” gives rise to difficulties of interpretation.²⁰⁶ The Commission considers, however, that this matter would need to be considered in the context of a general review of the *Civil Liability Act 1961*, as amended, and has concluded that the current Report does not present a suitable setting within which this can be addressed.

²⁰⁶ See generally Kerr, *The Civil Liability Acts* (Round Hall, 1999).

CHAPTER 2 UNIFORM BASIC LIMITATION PERIOD

A Introduction

2.01 This Chapter examines the first element of the proposed core limitation regime, the uniform basic limitation period. In Part B, the Commission briefly summarises the advantages of introducing a uniform basic limitation period. In Part C, the Commission looks at the recommended length of a uniform basic limitation period of two years. Finally, in Part D, the Commission discusses the recommended commencement date of the uniform basic limitation period, the date of discoverability.

B A Uniform Basic Limitation Period

2.02 As discussed in Chapter 1 of this Report, the Alberta Institute of Law Research pioneered the first element of a 'core limitations regime', the concept of a uniform basic limitation period. It is worth reiterating that the Institute noted in 1986 that "there is neither a sound theoretical nor practical foundation for the practice of assigning different fixed limitation periods to different categories of claim."¹

2.03 The Institute also noted that this practice often works to the disadvantage of both plaintiffs and defendants:

"Not only do we think that the use of different limitation periods for different categories of claims serves no useful purpose; we think that the practice results in limitation periods which are too often unreasonable, either to claimants or to defendants."²

2.04 The difficulties resulting from the *Statute of Limitations 1957* (as amended) arise from the large number of disparate provisions setting out complex rules for the application of various limitation periods. As the Alberta Institute emphatically stated, there is no rational basis for such an approach to the limitation of actions.

2.05 As provisionally recommended by the Commission in the Consultation Paper,³ a new Limitations Act setting out a core limitation regime would eliminate the majority of these difficulties, the first element of such a regime being the introduction of one basic limitation period.

2.06 Such a streamlined and simpler Limitation Act would allow for much needed clarity in this area of the law, and enable greater efficiency in the initiation and administration of civil proceedings.

2.07 As discussed in Chapter 1, the Consultation Paper focused on what the *Statute of Limitations 1957* describes as common law actions. This category covers a broad range of civil claims including a breach of contract and actions concerning debt recovery. It also includes tort actions, notably personal injuries actions. From a practical point of view, these actions make up a large portion of the civil business of the courts.⁴ These common law actions are the focus point of the Commission in this Report when discussing the application of a core limitations regime to a range of civil or common law actions.

2.08 Practically speaking, no jurisdiction has managed to reduce all limitation periods to just one uniform basic limitation period, but a basic limitation period could be applied to a wide range of civil actions which form the bulk of civil litigation.

¹ Alberta Institute of Law Research and Reform *Limitations (Report for Discussion No 4 1986)* at paragraph 2.63.

² *Ibid* at 2.63.

³ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 4.13.

⁴ See the discussion in Chapter 1, above.

2.09 It is clear that the introduction of a basic limitation period would also introduce greater clarity and coherence to the law of limitations. A core limitations regime with a basic limitation period will prove more straightforward to interpret and to apply practically, and greatly contribute to the overall simplification of the limitations regime.

2.10 *The Commission recommends the introduction of a uniform basic limitation period, which would apply to the common law actions as defined in this Report.*

C Length of the Uniform Basic Limitation Period

2.11 The next consideration is the length of the uniform basic limitation period. To a certain extent, fixing on any particular period cannot be straightforward as the interests of both the plaintiff and the defendant have to be balanced. As discussed in Chapter 1, the plaintiff's right of access to the courts is an unenumerated personal right guaranteed by Article 40.3.1° of the Constitution. The right to litigate has also been recognised as a property right, which must be vindicated under Article 40.3.2° of the Constitution. The defendant's right to a speedy trial is a facet of the constitutional right to fair procedures and is protected under Article 40.3.1° of the Constitution. It can also be said to be a facet of the "judicial duty to ensure the timely administration of justice which is derived from Article 34.1".⁵

2.12 Dealing with civil litigation in an efficient and timely manner is also an inherent part of the court's jurisdiction under Article 34.1. A limitation period should support the plaintiff's right of access to the courts, as prescribed by the Constitution, while also encouraging plaintiffs to make claims without undue delay, thus protecting defendants from the unjust pursuit of stale claims.⁶ It must be the aim of limitations legislation to strike a fair balance between these interests. As summarised by the Law Commission for England and Wales, a limitation period must generally encompass the following points; it must give the plaintiff adequate time to consider their position, take legal advice, investigate the claim, and begin preparing their case, but not so much time that they can be in a position to delay unreasonably in issuing proceedings.⁷

2.13 Some of the basic limitation periods which apply in other jurisdictions can be summarised as follows, and they give a general indication of what the trends are:

⁵ *Donnellan v Westport Textiles Limited & Ors* [2011] IEHC 11 at paragraph 37.

⁶ See Law Commission *Consultation Draft: Limitation Defences in Civil Proceedings 2007* (Miscellaneous Paper, prepared by Chris Corry, Barrister, NZLC MP 16, 2007), at paragraph 7 for a list of grounds justifying limitation defences.

⁷ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 282. See also, Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 4.16 and 4.17.

Uniform Basic Limitation Periods:		Running from:
Alberta ⁸	2 years	Discoverability
Ontario ⁹	2 years	Discoverability
Saskatchewan ¹⁰	2 years	Discoverability
Uniform Law Conference of Canada ¹¹ ("ULCC")	2 years	Discoverability
England and Wales (as recommended by the Law Commission in 2001)	3 years ¹²	Discoverability ¹³
Western Australia	6 years ¹⁴	Accrual
New Zealand ¹⁵	6 years	The date of the act or the omission on which the claim is based. ¹⁶

⁸ See *Limitations Act, Revised Statutes of Alberta 2000, Chapter L-12*, current as of November 1, 2010. Available at <http://www.qp.alberta.ca/documents/Acts/L12.pdf>

⁹ See *Limitations Act, 2002, S.O. 2002, Chapter 24, Schedule B*, at section 4. Available at <http://www.search.e-laws.gov.on.ca/en/isysquery/0ab197c2-ca4b-4845-a78f-e2db42c28060/2/doc/?search=browseStatutes&context=#hit1>

¹⁰ See *The Limitations Act, Chapter L-16.1* of The Statutes of Saskatchewan, 2004 (effective May 1, 2005)*, as amended by the *Statutes of Saskatchewan, 2007, c.28*, at section 5. Available at <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/L16-1.pdf>

¹¹ See the *Uniform Limitations Act 2005*, at section 4, available at http://www.ulcc.ca/en/us/Uniform_Limitations_Act_En.pdf.

For general information, see <http://www.ulcc.ca/en/about/>. The Uniform Law Conference of Canada makes recommendations for changes to federal legislation based on deficiencies in the existing law, or based on problems arising from the interpretation of existing law. Its work is done by delegates appointed by member governments. The Conference adopts a "model statute" which it offers as a recommended method of harmonization for the use of member governments if they wish to do so.

¹² The Law Commission for England and Wales recommended that a basic or 'primary limitation period' of three years be introduced. See Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at iii. Plans to introduce the proposed reform of introducing a core limitations regime appear to have been postponed indefinitely. In November 2009, Parliamentary Under-Secretary of State for Justice (Bridget Prentice) announced by way of ministerial statement that the proposed draft *Civil Law Reform Bill* would not include provisions to reform the law of limitation of actions. In 2011, the UK Government announced that even the remaining elements of the draft *Civil Law Reform Bill* were not being proceeded with.

¹³ The Law Commission for England and Wales recommended that the starting date for the recommended basic limitation period be the date of discoverability. See Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at paragraphs 3.5 - 3.7.

¹⁴ Section 13(1) *Limitation Act 2005* WA No. 19 of 2005.

¹⁵ *Limitation Act 2010 (no. 110)*, section 11. Available at <http://www.legislation.govt.nz/act/public/2010/0110/11.0/viewpdf.aspx>

2.14 The Consultation Paper included a discussion of the advantages of different length basic limitation periods, from one year to 6 years, or even using a variety of fixed lengths¹⁷; and invited submissions in this regard.

2.15 The Commission concluded that there were two options for consideration in determining the appropriate length of a basic limitation period; either a two year basic limitation period, or three basic limitations periods of specific application of one, two or six years respectively. A two year basic limitation period was favoured, as it was thought that this would be sufficient for the majority of tort or contract based actions.

2.16 The rationale for favouring a 2 year limitation period reflects a pragmatic approach. To begin with, a 2 year limitation period already applies to a variety of civil actions in Ireland, including personal injuries actions.¹⁸ A further advantage is that plaintiffs will be encouraged to act upon their rights, and bring proceedings without delay (though without placing undue pressure on them to initiate proceedings).

2.17 This was also the view of the Committee on Court Practice and Procedure at the time of the reduction in 2004 of the limitation period for personal injuries from three years to two.¹⁹ The Committee stated that the reduction of the limitation period for personal injuries actions was “consistent with the desired objective of developing an efficient and effective system of personal injuries claims determination”.²⁰

2.18 *The Commission recommends the introduction of a 2 year basic limitation period, which would apply to the common law actions as defined in this Report.*

D Running the Basic Limitation Period

2.19 The Commission considered a wide range of applicable limitation periods in the Consultation Paper.²¹ From this analysis it is clear that the majority of limitation periods contained in the *Statute of Limitations 1957* run from the date of accrual of the cause of action. However, there are some exceptions. Discoverability principles apply in personal injuries actions²², wrongful death actions²³, and defective

¹⁶ See also section 14 *Limitation Act 2010 (no. 110)*, the plaintiff can still initiate proceedings after this basic six year period, provided they can prove that they had ‘late knowledge’ of their cause of action. ‘Late knowledge’ is determined using discoverability. Under section 11 of the same Act, it is a defence to a claim for a defendant, if he can prove that the plaintiff did not initiate proceedings within three years of this date of ‘late knowledge’.

¹⁷ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraphs 4.20 to 4.48.

¹⁸ The 2 year limitation period for personal injuries actions is set out in section 3 of the *Statute of Limitations (Amendment) Act 1991* (replacing section 11(2)(b) of the 1957 Statute), as amended by section 7 of the *Civil Liability and Courts Act 2004*. A 2 year limitation period also applies to actions claiming damages for personal injuries caused by a dangerous defect in a vehicle (section 13(8) *Sale of Goods and Supply of Services Act 1980*), actions claiming damages for personal injuries caused by a dog (section 21(4)(b) *Control of Dogs Act 1986*), actions claiming damages in respect of the wrongful death of a person (section 48 *Civil Liability Act 1961*).

¹⁹ The reduction of the limitation period for personal injuries actions from 3 years to 2 years was introduced by section 7 of the *Civil Liability and Courts Act 2004* (amending section 3 of the *Statute of Limitations (Amendment) Act 1991*), which came into force in March 2005: *Civil Liability and Courts Act 2004 (Commencement) Order 2004* (S.I No.544 of 2004).

²⁰ Committee on Court Practice and Procedure, *29th Report: Personal Injuries Litigation* (June 2004), at section 5.2.

²¹ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at Chapter 2.

²² *Statute of Limitations (Amendment) Act 1991*.

²³ *Civil Liability Act 1961*.

products actions²⁴. This piecemeal approach to commencing limitation periods serves to exaggerate distinctions between categories of actions, and perpetuates difficulties between overlapping actions in contract and tort. The introduction of an easily-identifiable starting point for most types of actions would greatly ease these problems.

2.20 There were four possible options, discussed by the Commission in the Consultation Paper²⁵, from which a basic limitation period could run, namely:

- (1) Date of accrual²⁶
- (2) Date of the act or omission giving rise to the cause of action
- (3) Date of discoverability
- (4) Alternative starting dates (a combination of the above).

2.21 The Commission favoured a start date of the date of discoverability; this means that the limitation period would run from the date when the plaintiff becomes aware – or could have become aware if exercising reasonable diligence – of the existence of a cause of action and the relevant facts relating to the cause of action.²⁷

2.22 Discoverability rules are based solely on the state of the plaintiff's knowledge, and thus the defendant's conduct is irrelevant. The limitation period would start to run from the date when the plaintiff becomes aware – or could have become aware if exercising reasonable diligence – of the existence of the cause of action. This essentially means that the relevant facts must be within the plaintiff's means of knowledge for the limitation period to begin running against them.

2.23 The principal reasoning in favour of using this start date is the advantage that the plaintiff cannot be expected to bring an action until he or she is aware, or ought to have been aware, of the existence of a cause of action. This means that the length of a basic limitation period does not have to be as long as a limitation period that would run from the date of accrual as there is no need to allow the plaintiff time to 'discover' his or her cause of action. This test reduces the risk of possible injustice which exists in circumstances where a limitation period runs from the date of the act or omission as such a limitation period may expire before the plaintiff realises that they have a cause of action.

2.24 Furthermore, as stated by the Law Reform Commission of Western Australia in relation to adopting such a discoverability test, "if such a rule were adopted, there would be no need for extension provisions to cater for cases in which the damage was not immediately discoverable, because they would be taken care of by the general rule."²⁸

2.25 As discoverability does not distinguish between different kinds of damage (that is, between obvious or patent damage which materialises more or less immediately, and latent damage which takes longer to become apparent), it also allows a uniform approach to be taken to the application of the basic limitation period to a wide variety of actions.

²⁴ *Liability for Defective Products Act 1991*. Claims commenced under the *Liability for Defective Products Act 1991* in relation to defective products supplement (rather than replace) the existing common law remedies in contract and tort for product liability claims.

²⁵ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraphs 4.57 to 4.125.

²⁶ Date of accrual means the date on which the cause of action is complete, that is, when it becomes possible for a plaintiff to commence proceedings.

²⁷ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 4.160.

²⁸ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No. 36II, 1997) at paragraph 7.17.

2.26 The Consultation Paper also referred to the Commission's 2001 *Report on Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)*,²⁹ in which the Commission had already acknowledged that "the introduction of discoverability as the sole starting point of a limitation period has much to offer in terms of simplicity and certainty in the law."

2.27 In terms of determining how this 'date of knowledge' or date of discoverability should be calculated, there have been many different formulations in various jurisdictions of what knowledge is required in order for a claim to be deemed 'discoverable', some of which are summarised below.³⁰

2.28 Typically, discoverability tests depend upon the acquisition of knowledge of specified matters and issues by the plaintiff. This leads to interpretative problems, such as what is meant by 'knowledge', and whether a plaintiff can be fixed with constructive notice of facts.

(i) Ireland

2.29 In Ireland, discoverability principles apply to personal injuries actions³¹, wrongful death actions³², and defective products actions³³. Where discoverability principles apply, the limitation period runs from a defined "date of knowledge". The "date of knowledge" test was first introduced under the *Statute of Limitations (Amendment) Act 1991* and is applicable to personal injuries and wrongful death actions. It consists of a mix of actual and constructive knowledge. Under section 2(1) of the 1991 Act, a person has actual knowledge if he or she knows the following:

- a. That the person alleged to have been injured had been injured;
- b. That the injury in question was significant;
- c. That the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance, or breach of duty;
- d. The identity of the defendant; and
- e. If it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.³⁴

2.30 The term "significant" is not defined in the 1991 Act. The English *Limitation Act 1980* contains an almost identical date of knowledge test consisting of requirements (b) to (e) as listed in the paragraph above.³⁵ However, the 1980 Act goes on to define what is meant by the requirement of a "significant injury". Under section 14(2) of the English 1980 Act, an injury is "significant" if the plaintiff would "reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment."³⁶

²⁹ Law Reform Commission *Report on Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001) at paragraph 3.02.

³⁰ The *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) dealt with this in detail at paragraphs 4.93 - 4.158.

³¹ *Statute of Limitations (Amendment) Act 1991*.

³² *Civil Liability Act 1961*.

³³ *Liability for Defective Products 1991*. Under the *Liability for Defective Products Act 1991*, discoverability principles are applied, along with a "long-stop" limitation period of 10 years, reflecting its origins in the 1985 EU Directive on Product Liability, 85/374/EEC. Actions commenced under the *Liability for Defective Products Act 1991* in relation to defective products supplement (rather than replace) the existing common law remedies in contract and tort for product liability claims.

³⁴ Section 2(1), *Statute of Limitations (Amendment) Act 1991*.

³⁵ Section 14(1), *Limitation Act 1980*.

³⁶ *Ibid*, section 14(2).

2.31 *Whitely v Minister for Defence*³⁷ was the first case to deal extensively with the interpretation of section 2 of the 1991 Act. It was one of the many “Army deafness” claims of the 1990s, a noise-induced hearing loss case. The plaintiff had been a member of the Defence Forces from 1957 to 1978. During this period, he was exposed to excessive noise, with no hearing protection. After the plaintiff left the Defence Forces in 1978, he suffered from tinnitus and other hearing related problems. His claim was not commenced until 1995, and the crucial question was whether his claim was statute barred by the three year limitation period for personal injuries claims at this time; in other words, at what point in time did the plaintiff ‘discover’ his claim. Quirke J considered the application of section 2 in detail.

2.32 The approach adopted to section 2 in *Whitely* was firstly to interpret the lack of a definition for “significant injury” as indicating an intention on the part of the Oireachtas that section 2(1) of the 1991 Act should not be confined to the meaning as attributed to “significant” under the English 1980 Act. Quirke J stated:

“Accordingly, s. 2 of the Act of 1991 expressly avoids any attempt to define what is meant by a ‘significant’ injury within the meaning of s. 2(1)(b) of the Act, and I take the view that by excluding any definition it was the intention of the legislature to avoid confining the sense in which the word ‘significant’ ought to be understood to the terms of the definition contained in s. 14(2) of the English Act or to any particular terms. *If I am correct and if it was intended that a broader test should be applied than was contemplated by the definition contained within s. 14(2) of the English Act, then it would seem to follow that the test to be applied should be primarily subjective and that the court should take into account the state of mind of the particular plaintiff at the particular time having regard to his particular circumstances at that time.*”³⁸ (emphasis added)

2.33 Thus Quirke J was of the opinion that a ‘broader and more subjective test’ had to be applied.³⁹ However, he did not consider the test to be wholly subjective, rather he described the date of knowledge test as “*primarily* subjective because it must be qualified to a certain extent by the provisions of s.2(2) of the Act of 1991”⁴⁰, that a person’s “knowledge” includes knowledge that he or she might reasonably have been expected to acquire:

- (a) from facts ascertainable by him, or
- (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.⁴¹

2.34 He felt that section 2(2) introduced “a degree of objectivity into the test”.⁴² Section 2(2) essentially introduces the ‘reasonable man’ standard; or an element of constructive knowledge into the discoverability test by providing that a person’s knowledge includes knowledge which he might reasonably have been expected to have been aware of.

2.35 Quirke J was of the opinion that the plaintiff knew or ought reasonably have known from facts which were observable by him alone, that he had sustained an injury which was significant. From the facts of the case, Quirke J was of the view that as early as 1979 or 1980, the plaintiff would have considered his hearing loss and tinnitus sufficiently serious to justify his instituting proceedings for damages.⁴³ As a result, the plaintiff’s claim was dismissed on the basis that it was statute-barred.

2.36 The following overview was given of this interpretation of section 2:

³⁷ *Whitely v Minister for Defence* [1998] 4 IR 442.

³⁸ *Whitely v Minister for Defence* [1998] 4 I.R. 442 at 453.

³⁹ *Ibid* at 454.

⁴⁰ *Ibid* at 453.

⁴¹ Section 2(2), *Statute of Limitations (Amendment) Act 1991*. This is similar to the English act, at section 14(2) of the *Limitation Act 1980*.

⁴² *Whitely v Minister for Defence* [1998] 4 I.R. 442 at 453.

⁴³ *Whitely v Minister for Defence* [1998] 4 I.R. 442 at 453.

“While there are references in Quirke J’s judgment to the subjective quality of the test prescribed by the 1991 Act, in truth the effect of section 2(2) is to render it largely an objective one. The test is, however, centred on the circumstances of the plaintiff in determining whether *this* plaintiff, in the light of his or her experience ought to have known of the facts which are deemed crucial by section 2(1).”⁴⁴

2.37 Thus, in the *Whitely* case, the interpretation of what is meant by “significant injury” in the ‘date of knowledge’ test is really an objective test, but the court does take account of the plaintiff’s individual circumstances in determining whether it was reasonable for that particular plaintiff to have constructive knowledge of the facts necessary under section 2(1). This interpretation was accepted by the Supreme Court in *Bolger v O’Brien*,⁴⁵ with emphasis once again placed on the objective element of the requirement of “significant injury”.

2.38 In *Bolger v O’Brien*, the plaintiff suffered injuries in a road traffic accident in early 1990. He suffered extensive bruising and lacerations, had physiotherapy for several weeks and was unfit to return to work for several months due to the back injuries he sustained. He did not commence proceedings until late 1993. The High Court dismissed the defendant’s claim that the proceedings were statute barred as on the basis that the plaintiff did not realise the full significance of his injuries until late 1992. The Supreme Court upheld the defendant’s appeal. The Supreme Court stated that the test of constructive knowledge was as follows:

“The test is when he knew or ought reasonably to have known ‘from facts observable or ascertainable by him’ that he had suffered a significant injury ...

By any standards, subjective or objective, the plaintiff had suffered a significant injury and he must have been so aware certainly from the time of his return to work and his realisation that he was not fit for manual work.

The fact that the respondent did not realise the full significance of the effect of such injury is not of relevance once it is established that he knew that the injury was significant.”⁴⁶

2.39 A final point to note in regard to section 2 of the 1991 Act is that the largely objective nature of the date of knowledge test is also somewhat tempered by section 2(3) of the *Statute of Limitations (Amendment) Act 1991*.⁴⁷ Under section 2(3), a person will not be fixed with knowledge of a fact that could only be ascertained with the help of expert advice, so long as he or she has taken all reasonable steps to obtain that advice.⁴⁸ Additionally, no person will be fixed with knowledge of a fact relevant to the injury suffered, where he or she has failed to acquire this knowledge because of the injury in question.⁴⁹

2.40 This subsection arose from one of the recommendations made by the Commission in its 1987 *Report on the Statute of Limitations: Claims in respect of latent personal injuries*.⁵⁰

(aa) *Previous Law Reform Commission Recommendations: 1987, 2001 and 2009*

2.41 The Commission’s 1987 *Report on the Statute of Limitations: Claims in respect of latent personal injuries* recommended that a test of discoverability be introduced in respect of personal injuries

⁴⁴ Byrne and Binchy, *Annual Review of Irish Law 1997* (Round Hall, 1998), at 543.

⁴⁵ [1999] 2 IR 431.

⁴⁶ *Bolger v O’Brien* [1999] 2 IR 431 at p 439. This approach was followed in the High Court in the case of *Martin v Irish Express Cargo Limited* [2007] IEHC 224.

⁴⁷ Section 2(3) of the *Statute of Limitations (Amendment) Act 1991* is identical to section 14(3) of the English *Limitation Act 1980*.

⁴⁸ Section 2(3)(a) *Statute of Limitations (Amendment) Act 1991*.

⁴⁹ Section 2(3)(b) *Statute of Limitations (Amendment) Act 1991*.

⁵⁰ Law Reform Commission *Report on The Statute of Limitations: Claims in respect of latent personal injuries* (LRC 21-1987) at p.46.

actions.⁵¹ The Commission considered each aspect of the discoverability test in detail. The definition of the 'date of knowledge test' as outlined in its 'Draft Scheme of a Bill to amend the Statute of Limitations 1957' was the formula adopted almost exactly by the Oireachtas in section 2 of the *Statute of Limitations (Amendment) Act 1991*.⁵²

2.42 In this 1987 Report, the Commission considered the question of whether the discoverability test was subjective or objective in nature. The view of the Commission was very similar to the conclusions reached in both the *Whitely* and *Bolger* cases, discussed above. Essentially, this view is that the test could be considered in terms of what a reasonable man ought to have known whilst in the circumstances of the plaintiff. The Commission stated as follows:

"It can be argued that there is not in general a great deal of difference between an objective and a subjective approach in this context. The test of what a reasonable man should know is in one sense undoubtedly objective, but it also must take account of at least some aspects of the particular person's subjective experience."

2.43 In 2001, the Commission formulated a date of knowledge test for legal actions other than personal injury claims. In the *Report on Actions in Contract and Tort in Respect of Latent Damage (other than Personal Injury)*,⁵³ the Commission recommended the introduction of a date of knowledge test consisting of the date on which the plaintiff first knew or in the circumstances ought reasonably to have known the following:

- That the loss for which the plaintiff seeks a remedy had occurred;
- That the damage was attributable to the conduct of the defendant; and
- That the loss, assuming liability on the part of the defendant, warrants bringing proceedings.⁵⁴

2.44 This formula of the proposed date of knowledge test for non-personal injury actions in tort and contract is similar to the date of knowledge test used in personal injuries actions; however, it is simpler in structure and perhaps easier to interpret as a result. Furthermore, this formulation does not contain any requirement that the plaintiff should know that the injury is "significant".⁵⁵

2.45 The Commission considered that the existing date of knowledge test, as applicable to personal injuries actions, was unnecessarily complex and that its interpretation had caused difficulty, and therefore a new model for this test should be introduced.⁵⁶

2.46 The Commission favoured the introduction of an objective test of reasonableness tempered only by certain subjective elements, such as the date of which the plaintiff first knew, or in the circumstances ought to have known of the relevant facts. The Commission considered extensively, and was greatly influenced by, the work of the Alberta Law Reform Institute on the topic of limitations. The Alberta Institute explains this type of test as follows:

"The discovery rule incorporates a constructive knowledge test which charges the claimant with knowledge of facts which, in his circumstances he ought to have known. This is the reasonable man standard."⁵⁷

⁵¹ *Ibid* at p.43.

⁵² Law Reform Commission *Report on The Statute of Limitations: Claims in respect of latent personal injuries* (LRC 21-1987) at p.59. See also section 2 *Statute of Limitations (Amendment) Act 1991*.

⁵³ Law Reform Commission *Report on The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001).

⁵⁴ Law Reform Commission *Report on The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001) at paragraphs 2.54 and 2.50.

⁵⁵ *Ibid* at 2.45.

⁵⁶ *Ibid* at 2.50 - 2.52.

⁵⁷ *Ibid* at 2.26.

2.47 Thus, under this formulation, a constructive knowledge test employs a “reasonable man” standard, equivalent to the “reasonable man” test that has developed in the law of torts. The relevant question becomes “when should the plaintiff, as a reasonable person, have known” of the relevant facts?⁵⁸ The Commission considered that this option strikes “desired balance between a purely objective and a subjective standard of reasonableness.”⁵⁹ The recommendations of the Commission in the 2001 *Report on the Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage* were not implemented.

2.48 In the admittedly different setting of the partial defence of provocation to a charge of homicide, which the Commission discussed in its 2009 *Report on Defences in Criminal Law*, the Commission considered in detail the ‘reasonable man’ test. The Commission considered that, in the context of provocation, significant confusion was caused by using language such as ‘objective’ and ‘subjective’ and by declaring any test incorporating the reasonable or ordinary man standard to be one or the other, or a mixture of the two elements. The Commission stated that “it would be preferable if the expressions ‘objective’ and ‘subjective’ were avoided.”⁶⁰

2.49 The Commission considered that the ‘reasonable man’ standard should be included in its proposed test for provocation, as it is “important to apply a community test to reflect a reasonable standard of behaviour in society.”⁶¹ Thus, the Commission felt that an entirely subjective approach to the test of provocation could not be recommended, even though this was the test applied historically. The Commission preferred an approach which takes into consideration the characteristics of the accused, but only to a limited extent, as the ‘reasonable standard’ still had to be taken into account as well. This allows for the personal or individual elements of the accused to be taken into consideration, against the background of the reasonable or community standard.⁶²

2.50 The Commission favours a similar approach to the discoverability test in the context of this project, in terms of the constructive knowledge element of what the claimant ought to have known. The Commission is of the view that it is not of importance whether the test can be categorised as subjective, objective or a mixture of both; rather the reasonable man standard should be applied in terms of what the reasonable man would have done in the circumstances of the plaintiff.

(ii) Alberta

2.51 The Alberta *Limitations Act* (RSA 2000) broadly enacted the recommendations of the Alberta Institute’s seminal work of 1986 and 1989.⁶³ Under section 3(1)(a), the date of knowledge is the date on which the claimant first knew, or in circumstances ought to have known, all of the following:

- (i) That the injury had occurred; and
- (ii) That the injury was attributable to conduct of the defendant; and
- (iii) That the injury warrants bringing proceedings, assuming liability.⁶⁴

2.52 This formulation of the date of knowledge test is a great deal simpler than the Irish or English current tests, and it omits the requirement of the injury being significant. Moreover it focuses on what the

⁵⁸ *Ibid* at 2.26

⁵⁹ Law Reform Commission *Report on The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64- 2001) at paragraph 2.27.

⁶⁰ Law Reform Commission *Report on Defences in Criminal Law* (LRC 95-2009) at paragraph 4.60.

⁶¹ *Ibid* at 4.111.

⁶² *Ibid* at 4.113 - 4.116.

⁶³ Alberta Institute for Law Research and Reform, *Limitations*, (Report for Discussion No. 4, September 1986); Alberta Institute for Law Research and Reform, *Limitations*, (Report No. 55, December 1989).

⁶⁴ Section 3(1)(a) *Limitations Act* RSA 2000, c. L - 12.

claimant actually knew, or should have known in the circumstances, and not on what a fictional reasonable man ought to have discovered.⁶⁵

(iii) England and Wales

2.53 The Law Commission for England and Wales published its final recommendations on the introduction of a core limitations regime in 2001. It recommended that the 'date of knowledge' test should be the date on which the claimant has actual or constructive knowledge of the facts that give rise to the cause of action, the identity of the defendant, and that the injury, loss or damage that has occurred be significant.⁶⁶ It followed the current approach (in England and Wales) to the definition of "significant" in that it proposed that a claimant would be aware of such injury, loss or damage being significant where the claimant knew the full extent of the injury, loss or damage, or a reasonable person would think that a civil claim was worth making in respect of such injury, loss or damage (on the assumption that the defendant does not dispute liability and is able to satisfy a judgment).⁶⁷

2.54 The Law Commission also considered in detail what the constructive knowledge element of the 'date of knowledge' test was to consist of. It stated that a completely objective test for constructive knowledge which took no account of the claimant's personal circumstances could be devised, but it would be difficult to apply. It summarised the problem with this purely objective approach as follows:

"Preventing the courts from giving any consideration at all to any characteristic of the claimant (which is what would be required by a wholly objective test) runs counter to the justification for a discoverability test; that the limitation period should only start when the claimant has had reasonable opportunity to discover the facts which give rise to the cause of action. Although all tests for the date of knowledge provide for the constructive knowledge of the claimant, the purpose of this is to fix the claimant with knowledge which he or she would have had if he or she had acted reasonably, not to fix the claimant with knowledge which he or she could not possibly have."⁶⁸

2.55 The Commission recommended that the "claimant should be considered to have constructive knowledge of the relevant facts when the claimant in his or her circumstances and with his or her abilities ought reasonably to have known of the relevant facts."⁶⁹

2.56 Since the publication of the report in 2001, it has become clear that the recommendations of the England and Wales Law Commission will not be implemented. Plans to introduce the proposed reform of introducing a core limitations regime appear to have been postponed indefinitely for the time being. In November 2009, Parliamentary Under-Secretary of State for Justice (Bridget Prentice) announced by way of ministerial statement that the proposed draft *Civil Law Reform Bill* would not include provisions to reform the law of limitation of actions. The reasons given were as follows:

These provisions were based on a Law Commission Report of 2001. But a recent consultation with key stakeholders has demonstrated that there are insufficient benefits and potentially large-scale costs associated with the reform. In addition, the courts have remedied some of the most significant difficulties with the law that the Law Commission identified, for example, in relation to the limitation aspects of child abuse cases. The limitation reforms will therefore not now be taken forward.⁷⁰

⁶⁵ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 4.131.

⁶⁶ Law Commission for England and Wales *Limitation of Actions* (Report no. 270 2001) at paragraph 3.32.

⁶⁷ Law Commission for England and Wales *Limitation of Actions* (Report no. 270 2001) at paragraph 3.33.

⁶⁸ *Ibid* at 3.48.

⁶⁹ *Ibid* at 3.50.

⁷⁰ HC Deb 19 November 2009 c13WS. Accessed at <http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snha-04209.pdf> and, <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm091119/wmstext/91119m0003.htm#0911194400028>

2.57 The draft *Civil Law Reform Bill* published in December 2009 did not contain any provisions relating to the reform of the limitation of actions,⁷¹ and it appears that the government has decided against making any changes to the current limitations regime in England and Wales. Indeed, in 2011, the UK Government announced it did not intend to proceed with even the remaining provisions of the draft *Civil Law Reform Bill*.

2.58 In the past, there has been some difference in opinion in the English courts as to whether the test of constructive knowledge in section 14(3) of the *Limitation Act 1980* is objective or subjective.⁷² Since the publication of the 2001 Report by the England and Wales Law Commission, it appears that the previously divergent views of the English Court of Appeal regarding how to approach the constructive knowledge test, have since been settled, as the UK Supreme Court now favours the strictly objective approach, as indicated by its decision in *London Strategic Health Authority v Whiston*,⁷³ which broadly confirms the decision of its predecessor, the UK House of Lords, in *Adams v Bracknell Forest Borough Council*.⁷⁴

2.59 The UK Supreme Court seems to have placed particular emphasis on the 'saver' provision of section 33 of the English *Limitation Act 1980* in the context of how to interpret the requirements of section 14(3) (the constructive knowledge of the claimant). Section 33 allows the court to use its discretion to disregard the expiry of a limitation period in cases involving personal injuries or death, where it considers it equitable to do so. Lord Dyson accepted "that the decision in *Adams* case requires the court to expect a heightened degree of curiosity of the reasonable claimant than it would absent s.33." Therefore, the UK Supreme Court considered that the existence of section 33 allowed the court to take a stricter and more objective view of the constructive knowledge test, than it might otherwise have done but for section 33 providing judicial discretion to disregard strict adherence to limitation periods.

2.60 In the *Whiston* case, Lord Dyson summed up the decision in *Adams* regarding the objective approach as follows:

"In my judgment, the ratio of *Adams* is that section 14(3) requires an objective test to be applied. It was accurately summarised by Eady J at paras 10 and 36 of his judgment. The importance of *Adams* is that it settled the difference between the objective (or mainly objective) test applied in *Forbes* and the subjective test enunciated in the earlier cases to which I have referred in favour of the former... Thus the court should consider what is reasonably to have been expected of the claimant in all the circumstances of the case. That is not to say that the court should overlook the fact that it must apply an objective test. I also accept that, in deciding whether in all the circumstances of the case, the claimant should reasonably have made appropriate inquiries, the court should bear in mind that the House of Lords has "tightened up" the requirements of constructive knowledge in the light of the existence of the discretion in section 33 and the policy of the 1980 Act to avoid the injustice to defendants of vexing them with stale claims."⁷⁵

⁷¹ Draft *Civil Law Reform A Draft Bill*, published December 2009, accessed at <http://www.justice.gov.uk/publications/docs/draft-civil-law-reform-bill.pdf>

⁷² See the subjective interpretation of the constructive knowledge test given by Lord Denning MR in *Newton v Cammell Laird & Co (Shipbuilders and Engineers) Ltd* [1969] 1 WLR 415, at 419: "You do not ask: At what date would a reasonable person have taken advice? You ask: At what date was it reasonable for this man to take it." See also *Smith v Central Asbestos Co Ltd* [1973] AC 518, at 530, where Lord Reid said: "I agree with the view expressed in the Court of Appeal that this test is subjective." To the same effect see *Nash and Ors v Eli Lilly & Co and Ors* [1993] 1 WLR 782. The objective interpretation seemed to emerge following the consolidation of the earlier *Limitation Act 1975* into the current *Limitation Act 1980*. A strictly objective view was followed in *Forbes v Wandsworth Health Authority* [1997] QB 402.

⁷³ *London Strategic Health Authority v Whiston* [2010] 3 All ER 452.

⁷⁴ *Adams v Bracknell Forest Borough Council* [2004] UKHL 29, [2005] 1 AC 76.

⁷⁵ *London Strategic Health Authority v Whiston* [2010] 3 All ER 452, at 468-9 (paragraphs 54 and 59).

2.61 The approach of the UK Supreme Court is similar in construction and practical effect to the date of knowledge test as applied by the Irish High Court and Supreme Court in the *Whitely* and *Bolger* cases. Although it is an objective test, the circumstances of the plaintiff are taken into consideration in determining what a reasonable person *in the circumstances of the plaintiff* would do.

(iv) Conclusion

2.62 In the *Consultation Paper on the Limitation of Actions*, the Commission was of the view that the proposed reform should clearly state what knowledge is required for discoverability, or in other words, the date of knowledge test. It was also of the opinion that this test should be easily understood so that it would be clear when the limitation period begins to run.⁷⁶

2.63 In the Consultation Paper, the Commission came to the general conclusion that a starting date for the basic limitation period should be chosen which would:

- (a) Eliminate the difficulties associated with using the date of accrual as a starting date;
- (b) Ensure that the limitation period does not begin to run before the plaintiff knows of its existence; and
- (c) Remedy any injustice that could arise if a short limitation period was to run from the date of the act or omission.⁷⁷

2.64 The Commission remains of the view that a commencement date which uses a simplified formulation of the existing date of knowledge test (that is, discoverability principles) would meet these requirements, and thus be the preferable commencement date for a uniform basic limitation period. As stated above in relation to the Alberta date of knowledge/discoverability test, following this approach to phrasing the test brings the focus to bear on what the claimant actually knows, or should have known in the circumstances, and not on what a fictional reasonable man ought to have discovered.

2.65 The Commission is also of the view that the discoverability or date of knowledge test should be primarily an objective test with a subjective element of considering what a reasonable person ought to have done, in the particular circumstances of the plaintiff. Thus, the standard in the date of knowledge test (discoverability test) is objective, but it does not prohibit consideration of certain particular characteristics of the plaintiff. As the Commission previously summarised in its 2001 *Report on Latent Damage in Contract and Tort (excluding Personal Injuries)*:

“The phrase, ‘in the circumstances’ in the proposed test is intended to take into account those factors which cannot be divorced from the facts of the case. The law could not fail to do otherwise; the frequently quoted example is that a blind person will not be required to see... The plaintiff’s blindness will be one of the ‘circumstances’ in which the reasonable person finds himself.”⁷⁸

2.66 Subjectivity is permitted only to the extent that the characteristics or circumstances cannot be separated from an analysis of the situation. The standard overall is an objective one in that “little peculiarities or foibles will not be tolerated... The reasonable person is not naive or unobservant.”⁷⁹

(b) Recommendations

2.67 *The Commission recommends that the basic limitation period should run from the date of knowledge of the plaintiff, and that the date of knowledge should be calculated by reference to the date on which the plaintiff first knew, or ought reasonably to have known, the following:*

- (a) *that the injury, loss, or damage had occurred;*

⁷⁶ *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 4.126.

⁷⁷ *Ibid* at 4.159.

⁷⁸ Law Reform Commission *Report The Statutes of Limitation: Claims in Contract and Tort in respect of Latent Damage (other than Personal Injury)* (LRC 64-2001), at paragraph 2.32. Footnotes omitted.

⁷⁹ *Ibid* at 2.36.

- (b) *that the injury, loss, or damage is attributable to the conduct of the defendant;*
- (c) *that the injury, loss, or damage warrants bringing proceedings, assuming liability on the part of the defendant;*
- (d) *the identity of the defendant; and*
- (e) *if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.*

2.68 *The Commission recommends that determining a person's knowledge under the 'date of knowledge test' for the commencement of the basic limitation period should include both actual and constructive knowledge.*

2.69 *The Commission recommends that constructive knowledge should be knowledge that a person might reasonably have been expected to acquire from facts observable or ascertainable by him or her, or from facts ascertainable by him or her with the help of professional expert advice.*

2.70 *The Commission recommends that the plaintiff should be considered to have constructive knowledge of the relevant facts when he or she, in his or her circumstances, ought reasonably to have known of the relevant facts.*

2.71 *The Commission recommends that the test for determining the date of discoverability should be based on the test in section 2(1) of the Statute of Limitations (Amendment) Act 1991. The Commission therefore recommends that the start date for the commencement of the 2 year basic limitation period applicable to the common law actions as already defined in this Report should include actual and constructive knowledge and be stated in the following manner:*

"The commencement date of the basic limitation period consists of the date of knowledge of the person (whether he or she is the person injured or a personal representative or dependant of the person injured), and meaning the date on which the person first knew, or ought reasonably to have known in the circumstances, of the following facts:

- (a) That the injury, loss or damage had occurred;*
- (b) That the injury, loss or damage in question warrants the bringing of proceedings against the defendant;*
- (c) That the injury, loss or damage, was attributable in whole or in part to the act or omission of the defendant which is alleged to constitute negligence, nuisance, or breach of duty or otherwise give rise to a claim;*
- (d) the identity of the defendant, and*
- (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant,*

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant."

2.72 *The Commission also recommends that the definition of constructive knowledge in sections 2(2) and 2(3) of the Statute of Limitations (Amendment) Act 1991 should be applied, using the following formula:*

"Constructive knowledge is knowledge that a person might reasonably have been expected to acquire either:

- (a) from facts observable or ascertainable by him or her; or*
- (b) from facts ascertainable by him or her with the help of medical or other appropriate expert advice which it is reasonable for him or her to seek.*

Notwithstanding this:

(a) a person will not be fixed with knowledge of a fact ascertainable only with the help of expert advice so long as he or she has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice; and

(b) a person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he or she has failed to acquire as a result of that injury.”

CHAPTER 3 UNIFORM ULTIMATE LIMITATION PERIOD

A Introduction

3.01 An 'ultimate limitation period' is a limitation period which acts as a final cut-off point for legal proceedings. Beyond this 'long-stop' period of limitation, no action can be brought regardless of whether the plaintiff has either discovered his cause of action or whether a cause of action has accrued. This is, however, subject to the consideration of exceptional circumstances, which the Commission discusses in Chapter 4, below.

3.02 In Part B, the Commission examines the history and function of the ultimate limitation period. In Part C, the Commission considers the appropriate length of a long-stop limitation period after summarising the range of ultimate limitation periods applicable in other States. In Part D, the appropriate starting date of an ultimate limitation period is analysed, and Part E consider its application to personal injuries actions.

B History and Function of the Ultimate Limitation Period

3.03 An ultimate limitation period is a limitation period beyond which no action can be brought, even if the cause of action has not yet accrued or is not yet discoverable. The concept of an ultimate limitation period is not a novel one. This type of limitation period dates back, in Ireland, to the *Real Property Limitation Act 1833*, under which it was possible to extend limitation periods for actions to recover land in the event of infancy or disability only up to a period of 40 years from the date on which the cause of action accrued.¹ This ultimate limitation period was later reduced to 30 years.² Furthermore, a 10 year ultimate limitation period applies to product liability claims under the *Liability for Defective Products Acts 1991*.³

3.04 The Commission has previously considered ultimate limitation periods. In 2001, it recommended the introduction of ultimate limitation periods for tort and contract actions in respect of latent damage (excluding personal injuries)⁴ and, in 2000, for actions in respect of non-sexual child abuse.⁵ By contrast, in 1987, the Commission did not recommend the introduction of an ultimate limitation period in respect of latent personal injuries actions⁶ or, in 1982, for actions relating to defective premises.⁷

3.05 In recent times, a trend has emerged in other jurisdictions of applying an ultimate limitation period to a wider range of actions. For example, New South Wales was one of the first to introduce the

¹ Section 17, *Real Property Limitation Act 1833* (3 & 4 Will IV, c 27). See also Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 5.03.

² Section 5, *Real Property Limitation Act 1874* (37 & 38 Vic, c 57).

³ Section 7(2)(a), *Liability for Defective Products Act 1991*. This long stop limitation period was required by the 1985 EC Directive on Product Liability (Directive 85/374/EEC.) Actions commenced under the *Liability for Defective Products Act 1991* in relation to defective products supplement (rather than replace) the existing common law remedies in contract and tort for product liability claims.

⁴ Law Reform Commission *Report on The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injuries)* (LRC 64-2001) at 4.12.

⁵ Law Reform Commission *Consultation Paper on the Law of Limitations arising from Non-Sexual Abuse of Children* (LRC CP 16-2000) at paragraph 3.39.

⁶ Law Reform Commission *Report on The Statute of Limitations: Claims in Respect of Latent Personal Injuries* (LRC 21-1987) at p.48.

⁷ Law Reform Commission *Report on Defective Premises* (LRC 3-1982) at paragraph 12.

concept of an ultimate limitation period in its limitations legislation. In its report of 1967, the Law Reform Commission of New South Wales, recommended a 'major change in principle' in limitations law with the proposal "that it be made a general rule that, on the expiration of the limitation period for a cause of action, the personal right to debt, damages or other money, or the right of property which the cause of action would enforce is to be extinguished."⁸ This meant that the overriding principle was now to be one of certainty and finality as regards the extent of limitation periods.

3.06 The Law Reform Commission of New South Wales also considered that even in cases involving a disability on the part of the claimant, or other circumstances which would usually allow or justify the extension or postponement of a limitation period (such as mistake, or fraud), a limitation period should not be allowed to be of indefinite duration and a final cut-off point should be imposed beyond which no claims could be brought. It stated:

"We think, however, that, quite apart from questions of title to land, a statute of limitations ought not to allow an indefinite time for the bringing of actions even if the disabilities and other matters dealt with in Part III of the Bill do exist. These disabilities and other grounds of postponement may well be outside the knowledge of the defendant, and we think it right that, after a period of thirty years has elapsed, there should be no further postponement of the statutory bar on any ground."⁹

3.07 This approach was reflected in the resulting New South Wales legislation, the *Limitation Act 1969*. Thus, although a limitation period can be extended under the usual exceptions relating to disability, fraud or mistake, any action (excluding personal injuries actions) is nonetheless subject to an 'ultimate bar' of 30 years "from the date from which the limitation period for that cause of action fixed by or under Part 2 runs."¹⁰ No other jurisdiction in Australia has a similar provision.¹¹

3.08 Personal injuries actions in New South Wales are also subject to a 'long-stop' period of 12 years, but this can be extended by application to the court for up to three years.¹² A similar provision is in effect in Victoria, Australia, also in respect of personal injuries actions.¹³

3.09 Other jurisdictions followed suit over time. In British Columbia, an ultimate limitation period of 30 years was introduced in 1975¹⁴ following a recommendation of the British Columbia Law Institute in 1974.¹⁵ Other Canadian provinces such as Alberta¹⁶, Saskatchewan¹⁷, Ontario¹⁸ and New Brunswick¹⁹ more recently reformed their limitation regimes in the 1980s and each introduced ultimate limitation periods of shorter duration; 10 years in Alberta, and 15 years in Saskatchewan, Ontario and New Brunswick. Most recently, New Zealand enacted the *Limitation Act 2010*, which included an ultimate

⁸ New South Wales Law Reform Commission *First Report on the Limitation of Actions* (Report no. 3, 1967) at paragraph 306.

⁹ *Ibid* at 241.

¹⁰ Section 51(1) *Limitation Act 1969* (No. 31) (New South Wales).

¹¹ Hansford *Limitation of Actions: The Laws of Australia 2nd ed* (Thomson 2007) at 253.

¹² Sections 50C(1)(b) and 62A, *Limitation Act 1969* (No. 31) (New South Wales).

¹³ Sections 27K and L, *Limitations of Actions Act 1958* (Victoria).

¹⁴ Section 8(2) *Limitation Act R.S.B.C. 1996*, c. 266. (Originally *Limitation Act S.B.C 1975*, c. 37) (British Columbia).

¹⁵ Law Reform Commission of British Columbia *Report on Limitations (Project No. 6) 1974 Part II - General* (LRC 15, 1974) at Chapter VI, s. D, pg 123.

¹⁶ Section 3(1)(b) *Limitation of Actions Act RSA 2000*, c. L-12 (Alberta).

¹⁷ Section 7 *Limitations Act 2002*, S.S 2004, c.L16.1 (Saskatchewan).

¹⁸ Section 15 *Limitations Act 2002*, S.O 2002, c.24, Schedule B (Ontario).

¹⁹ Section 5(1)(b) *Limitations of Actions Act 2009*, S.N.B. 2009, c.L-8.5 (New Brunswick).

limitation period of 15 years of general application,²⁰ excluding only certain actions to recover land and actions in respect of trust property.²¹

3.10 The objective of an ultimate limitation period has been said to be defendant orientated, as “its objective is to benefit the entire society of potential defendants by cleansing the slate as to any alleged breach of duty at some fixed point in time after it occurred.”²²

3.11 As discussed in Chapter 2, the application of a basic limitation period with a starting date of the date of knowledge of the plaintiff has the clear advantage of being very fair to plaintiffs, as “time will not run against them until they know, or could reasonably be expected to know, the facts necessary to bring a claim.”²³ Conversely, it also introduces a level of uncertainty for defendants in respect of the extent, or duration, of their liability for potential claims. There is “a theoretical possibility that a defendant could be faced with a claim long after he could reasonably have assumed that the matter is at an end.”²⁴ Including an ultimate limitation period in any proposed legislation would work to lessen the impact of this increased uncertainty for defendants.

3.12 An ultimate limitation period re-introduces an element of certainty for defendants. The defendant will not be unfairly asked to respond to, and defend, a claim after a significant period of time.

3.13 The ultimate limitation period goes to the core of the arguments in favour of limitation periods. The Alberta Institute summarised these principles in its influential 1986 paper:²⁵

- Evidentiary Reasons: a claimant alleges that he had a right, and that the defendant violated that right. To assess the truth of these allegations, the facts must be considered, however, naturally, evidence will deteriorate with the passage of time. “When a point in time has been reached when evidence has become to unreliable to furnish a sound basis for a judicial decision, out of fairness to the defendant, public policy dictates that a claim should not be adjudicated at all.”²⁶
- Certainty Reasons (or ‘peace and repose’): there ought to be a point in time after the occurrence of conduct which might have been legally wrongful, at which time the defendant is entitled to peace of mind. We are, each of us, a potential defendant and claimant, and it serves society as a whole to have the slate wiped clean periodically.
- Economic Reasons: many people engage in providing goods and services to others, and may be subject to claims. These persons usually preserve records of their activities and usually maintain liability insurance. These records are often maintained in cycles, for example, six year cycles. If businesses and professionals are required to maintain insurance and records for an indefinite period of time, with no cut-off point, these maintenance costs will probably increase as opposed to the cost of maintaining records and insurance coverage for a set period of time.
- Judgmental reasons: cultural values change, conduct which may have been acceptable in the past may no longer be acceptable today. It may be difficult for a judge and/or jury to determine what may or may not have been reasonable.

3.14 The New Zealand Law Commission summarised these principles generally:

“Memories can dim. Witnesses can die or disappear. Records can be disposed of. Changes (in land values for example, or professional standards) can make it very difficult for expert

²⁰ Sections 11 & 12 *Limitation Act 2010* (no. 110).

²¹ See Part III of the *Limitation Act 2010* (no. 110), entitled ‘Defences to Other Claims, Claims in Respect of Land’.

²² Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No 4 1986) at paragraph 2.195.

²³ Law Commission for England and Wales *Limitation of Actions* (Report no. 270, 2001) at paragraph 3.6.

²⁴ New Zealand Law Commission *Tidying the Limitation Act* (Report 61, July 2000), at paragraph 13

²⁵ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No 4 1986) at Part I, pp.2-4.

²⁶ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No 4 1986) at Part I, p.3.

witnesses to take their minds back to what the situation was some years previously. It can be difficult or impossible for civil engineers (for example) to assess the position if land or chattels are no longer available either in the state they were in at the relevant time or at all.”²⁷

3.15 Thus, the longer the limitation period, the greater the risk of injustice to the parties involved. This then affects the integrity of the right to a fair trial. Ultimate limitation periods reduce the risk of injustice to defendants, and protect the right to a fair trial within a reasonable time.

3.16 In the Commission’s view, any proposed reform of the system of limitations must be clear and comprehensible. Introducing a basic limitation period commencing from the date of knowledge of the claimant, and an ultimate limitation period commencing from the date of the act or omission giving rise to the cause of action, both of general application to the common law actions discussed in this Report, would greatly streamline limitations law.

3.17 The ultimate limitation period works to complement the effects of the basic limitation period. If a defendant could be perpetually subject to a claim given that the basic limitation period only runs from the date of the claimant’s discovery of their claim, the ultimate limitation period is required to ensure that the original objectives of limitation periods are met, that is, that legal actions be brought within a reasonable period of time such that people are not subject to an indefinite liability. As paraphrased by the Ontario Law Reform Commission:

“Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes. These laws are designed to prevent persons from beginning actions once that reasonable time has passed. Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter. Nor is it in the interests of the community that disputes should be capable of dragging on interminably.”²⁸

3.18 *The Commission recommends the introduction of a uniform ultimate limitation period, which would apply to the common law actions as defined in this Report.*

C Length of an ultimate limitation period

3.19 The length of an ultimate limitation period must be chosen carefully in order to balance the needs of the plaintiff and the defendant. It must be long enough to ensure that it does not rule out most claims before they become discoverable, however, it must also not be so long as to adversely impact insurance costs.

3.20 In general, the ultimate limitation periods enacted in other jurisdictions have been of 10, 15, or 30 years’ duration. The following are some examples.

²⁷ New Zealand Law Commission *Tidying the Limitation Act* (Report 61, July 2000) at paragraph 6.

²⁸ Ontario Law Reform Commission *Report of the on Limitation of Actions* (1969) at p.9.

JURISDICTION	APPLICATION	LENGTH
England and Wales	<i>Latent Damage</i>	15 years ²⁹
	<i>Defective products</i>	10 years ³⁰
Manitoba	<i>Civil actions, generally</i>	30 years ³¹
New South Wales	<i>Civil actions, generally</i>	30 years ³²
	<i>Personal Injuries</i>	12 years ³³
Victoria	<i>Personal Injuries</i>	12 years ³⁴
Australian Capital Territory	<i>Latent Damage</i>	15 years ³⁵
Western Australia	<i>Civil actions in which the defendant is in a close relationship with the claimant and the claimant has a mental disability</i>	30 years ³⁶
New Zealand	<i>Civil actions, generally</i>	15 years ³⁷
Alberta	<i>Civil actions, generally</i>	10 years ³⁸
Ontario	<i>Civil actions, generally</i>	15 years ³⁹
Saskatchewan	<i>Civil actions, generally</i>	15 years ⁴⁰
British Columbia	<i>Civil actions, generally</i>	30 years ⁴¹
	<i>Certain actions against medical professionals</i>	6 years ⁴²

²⁹ Section 14B(1) *Limitation Act 1980*.

³⁰ Section 11A(3) *Limitation Act 1980*

³¹ Section 14(4) *Limitation of Actions Act CCSM*, c. L150. But see the proposals made by the Manitoba Law Reform Commission in its report *Limitations* (Report #123, July 2010) at pg 30; it recommended that the ultimate limitation period be reduced to 15 years.

³² Section 51(1) *Limitation Act 1969* (No. 31).

³³ Section 50C(1)(b) *Limitation Act 1969* (No. 31). The 12-year long-stop limitation period may be subject to extension upon application to court under section 62A of the Act.

³⁴ Section 27D(1)(b) *Limitation of Actions Act 1958*. See sections 27K and 27L *Limitation of Actions Act 1958* regarding the possible extension of the 12-year long-stop limitation period upon application to court.

³⁵ Section 40(1) *Limitation Act 1985* (A1985-66); Republication No. 20, effective 24 December 2010.

³⁶ Section 36(3) *Limitation Act 2005* (No. 19).

³⁷ Section 11 (3)(b) *Limitation Act 2010* (2010 no. 110).

³⁸ Section 3(1)(b) *Limitation Act RSA 2000*, c.L-12. The Alberta Law Reform Institute recommended an ultimate limitation period of 15 years; Alberta Law Reform Institute *Limitations* (Report No. 55, 1989) at 65 - 66.

³⁹ Section 15(1) *Limitations Act, 2002*. S.O 2002, Chapter 24, Schedule B.

⁴⁰ Section 7(1) *Limitation Act, SS 2004*, c. L.16.1.

⁴¹ Section 8(1) *Limitation Act RSBC 1996*, c.266. But see recommendation of the Attorney General that the general limitation period of 30 years be reduced to 10 or 15 years in the Ministry of Attorney General Justice Services Branch *White Paper on Limitation Act Reform: Finding the Balance* September 2010 at p.39.

⁴² Sections 8(1)(a) and (b), *Limitation Act RSBC 1996*, c.266.

JURISDICTION	APPLICATION	LENGTH
New Brunswick	<i>Civil actions, generally</i>	15 years ⁴³
Uniform Law Conference Canada	<i>Civil actions, generally</i>	15 years ⁴⁴

(1) 10, 12, 15 or 30 years?

3.21 The Commission considered the approaches taken by some of the above jurisdictions in further detail in the Consultation Paper.⁴⁵ Some of the main observations can be summarised as follows;

- i) Alberta: In 1986 the Alberta Institute recommended that an ultimate limitation period of 10 years ‘after the claim arose’ be introduced. It felt that “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, or become subject to a limitations defence under the discovery rule.”⁴⁶ The Institute’s Report in 1989 recommended a 15 year period instead as it felt that a 10 year period was “too short and would operate unfairly against claimants.”⁴⁷ Nonetheless, the Alberta Legislature favoured a 10 year ultimate limitation period in the limitations legislation when enacting the recommendations in 1996.⁴⁸ The Uniform Law Conference of Canada recommended a 15 year period⁴⁹, and this was also introduced in Ontario⁵⁰ and Saskatchewan⁵¹.
- ii) New Zealand: The New Zealand Law Commission (NZLC) recommended the introduction of a 10 year ultimate limitation period in 2001. They stated that arriving at “an appropriate long-stop date cannot be a matter of exactitude” and for consistency purposes they decided to “recommend the adoption of the Building Act’s 10 years.”⁵² An earlier report recommended an ultimate limitation period of 15 years and it was this time period that the NZLC eventually

⁴³ New Brunswick’s limitations legislation was reformed along the lines of the systems employed in Ontario and Saskatchewan: section 5(1)(b) *Limitations of Actions Act*, S.N.B. 2009, c. L-8.5. This Act was commenced on 1 May 2010.

⁴⁴ Section 6(2) *ULCC Uniform Limitations Act* (adopted 2005) (accessible at http://www.ulcc.ca/en/us/Uniform_Limitations_Act_En.pdf). The Uniform Law Conference of Canada (<http://www.ulcc.ca/en/about/>) makes recommendations for changes to federal legislation based on deficiencies in the existing law, or based on problems arising from the interpretation of existing law. Its work is done by delegates appointed by member governments. The Conference adopts a “model statute” which it offers as a recommended method of harmonization for the use of member governments if they wish to do so.

⁴⁵ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at 5.30 -5.58.

⁴⁶ Alberta Law Reform Institute *Limitations (Report for Discussion No. 4, Sept 1986)* at 2.197.

⁴⁷ Alberta Law Reform Institute *Limitations* (Report No. 55, 1989) at 35.

⁴⁸ Section 3(1)(b) *Limitation Act* RSA 2000, c.L-12.

⁴⁹ Section 6 *ULCC Uniform Limitations Act* (adopted 2005) (accessible at http://www.ulcc.ca/en/us/Uniform_Limitations_Act_En.pdf).

⁵⁰ Section 15(2) *Limitations Act* SO 2002, c.24, Schedule B.

⁵¹ Section 7(1) *Limitations Act* S.S. 2004 c.L-16.1, as amended by S.S. 2007, c.28.

⁵² New Zealand Law Commission *Tidying the Limitation Act* (Report 61, July 2000) at paragraph 13.

favoured.⁵³ Thus, in 2007, the NZLC changed its recommendation to a 15 year long-stop period.⁵⁴

- iii) British Columbia: Currently a 30 year ultimate limitation period applies to most claims in British Columbia.⁵⁵ The British Columbia Law Reform Commission in 1990 recommended the reduction of the 30 year period to 10 years.⁵⁶ Its successor - the British Columbia Law Institute - reiterated this recommendation in 2001, stating that the 30 year period is “far too long”.⁵⁷ It also noted:

“The 30 year ULP imposes significant expenses on defendants with regard to maintaining records, evidence and insurance until the period has been exhausted. Higher costs in the provision of goods and services form part of the overhead that are typically passed on to clients through increased prices. [...] In some cases access to protective insurance is elusive as a professional person may be susceptible to liability long after retirement, but may not be able to obtain insurance coverage or may only be able to do so at great expense.”⁵⁸

The British Columbia Attorney General issued a white paper on this matter of reforming the law of limitations, and recommended the ultimate limitation period be reduced from 30 years to either 10 or 15 years.⁵⁹ It made reference to these reports of the British Columbia Law Institute,⁶⁰ and in particular it noted that the Institute had stated that the “uncertainty inherent in such a lengthy period weakens the limitations system, while the eventuality for which it provides is unlikely to materialize in all but a minority of cases.”⁶¹

(2) Previous Recommendations (10 or 15 years)

3.22 In the *Consultation Paper on Actions Arising from the Non-Sexual Abuse of Children*, the Commission invited submissions on two options for an ultimate limitation period: either a fixed limitation period of 12 years subject to the extension by the courts for up to three years running from the age of majority or a fixed limitation period of 15 years running from the age of majority (18 years of age).

3.23 In its Consultation Paper relating to claims in contract and tort in respect of latent damage, the Commission recommended that a period of 15 years would be preferable to 10 years.

“[A] period of ten years is insufficient to cover many building cases, and in cases of professional advice, such as where a defective will or conveyance is at issue, the period is certainly too short.”⁶²

⁵³ New Zealand Law Commission *Limitation Defences in Civil Proceedings* (Report 6, October 1988) at paragraph 302.

⁵⁴ New Zealand Law Commission *Limitation Defences in Civil Cases: Update Report for the Law Commission, Miscellaneous Paper prepared by Chris Corry, Barrister* (NZLC MP16, June 2007) at paragraphs 148-149.

⁵⁵ Section 8(1) *Limitation Act* RSBC 1996, c.266.

⁵⁶ Law Reform Commission of British Columbia *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (LRC 112, 1990) at 31.

⁵⁷ British Columbia Law Institute *The Ultimate Limitation Period: Updating the Limitation Act* (Report No. 19, July 2002) at 6.

⁵⁸ British Columbia Law Institute *The Ultimate Limitation Period: Updating the Limitation Act* (Report No. 19, July 2002) at 6.

⁵⁹ British Columbia Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office ‘*White Paper on Limitation Act Reform: Finding the Balance*’ September 2010 at p.39 (part 2, section III (3)).

⁶⁰ *Ibid* at 34.

⁶¹ British Columbia Law Institute *The Ultimate Limitation Period: Updating the Limitation Act* (Report No. 19, July 2002) at 7.

⁶² Law Reform Commission *The Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC CP 13-1998) at paragraph 4.46.

3.24 Following consultation, however, the Commission altered its view in the subsequent Report, and favoured a 10 year long-stop.⁶³ This followed recommendations made at a colloquium that the ultimate limitation period should not be 15 years long, based on the evidentiary difficulties experienced after a long lapse of time, and increased insurance costs. The Commission was of the view that “the advantage of 10 years is that it is consistent with: the growing trend in the construction sector to take out ten year insurance over, the legislation on Product Liability, and the HomeBond guarantee scheme.”⁶⁴ The Commission was also influenced by the fact that professional indemnity insurance must be maintained for a run off period of six years.⁶⁵ Studies carried out in Ireland, Germany and France indicated that the majority of latent defects manifest themselves within 10 years after accrual.⁶⁶

3.25 As against this approach, it must be noted that the majority of jurisdictions seem to favour the slightly longer ultimate limitation period of 15 years duration.

3.26 The New Zealand Law Commission had initially also taken a similar view when recommending a 10 year ultimate limitation period in its report in 2001, which was based on the 10 year periods in its *Building Act* at the time.⁶⁷ By 2007, it had changed its recommendation to 15 years on the basis that this would be a more appropriate length of time. It stated that there “is no absolute right answer. It is a matter of striking a balance between plaintiff and defendant.”⁶⁸

3.27 The Commission is of the view that 15 years would be the preferable length in terms of striking a balance between ensuring the plaintiff has adequate time in which to take advice, prepare medical reports, and commence their proceedings, and also without requiring the defendant to wait a particularly protracted length of time before acquiring some certainty and repose with the conclusion of an ultimate limitation period which is reasonable in length.

(3) Conclusion

3.28 After careful consideration of the analysis of the approach of other jurisdictions, and in light of the Commission’s previous analysis and recommendations in this regard, the Commission is of the view that the ultimate limitation period should be 15 years duration.

3.29 The Commission is of the view that 10 years would be too short in duration to provide claimants with adequate time to commence proceedings. A longer ultimate limitation period is likely to have the effect of barring plaintiffs from initiating proceedings in circumstances where plaintiffs are relying on a basic limitation period running from their date of knowledge.

3.30 The Commission also considers it notable that the majority of jurisdictions applying an ultimate limitation period have opted for 15 years.

3.31 *The Commission recommends the introduction an ultimate limitation period of 15 years duration.*

D Starting date of an ultimate limitation period

3.32 There has been some divergence in approach in other jurisdictions in relation to setting the starting date of an ultimate limitation period. The Consultation Paper set out examples of these approaches in the following chart.

⁶³ Law Reform Commission *The Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 64-2001) at 4.16.

⁶⁴ Law Reform Commission *The Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 64-2001) at 4.15.

⁶⁵ *Ibid* at 4.07.

⁶⁶ *Ibid* at 4.14.

⁶⁷ New Zealand Law Commission *Tidying the Limitation Act* (Report 61, July 2000) at paragraph 13.

⁶⁸ New Zealand Law Commission *Limitation Defences in Civil Cases: Update Report for the Law Commission, Miscellaneous Paper prepared by Chris Corry, Barrister* (NZLC MP16, June 2007) at paragraph 148.

JURISDICTION	RUNNING FROM:
Alberta <i>Civil Actions, generally</i>	Date on which the claim arose. ⁶⁹ Although this would appear to suggest that the start date is the date of accrual, in reality it is the date of the act or omission giving rise to the claim which is the start date for the majority of civil actions. The Alberta Model is discussed below.
Australian Capital Territory <i>Latent Damage</i>	Date of the act or omission that gave rise to the cause of action. ⁷⁰
British Columbia <i>Civil actions, generally</i>	Date on accrual (the date on which the right to bring an action arose). ⁷¹
England and Wales <i>Latent Damage</i>	Date of the last act or omission of negligence. ⁷²
England and Wales <i>Defective products</i>	Date on which product was last supplied. ⁷³
Manitoba <i>Civil actions, generally</i>	Date of the acts or omissions that gave rise to the cause of action. ⁷⁴ This has been interpreted by the Manitoba Court of Appeal as meaning the date of accrual. ⁷⁵
New South Wales <i>(civil actions generally)</i>	Date from which the limitation period ran (as fixed under Part II of the <i>Limitation Act 1969</i>). ⁷⁶

⁶⁹ Section 3(1)(b) *Limitation Act* RSA 2000, c.L-12.

⁷⁰ Section 40(1) *Limitation Act 1985* (No 66); Republication No. 20, effective 24 December 2010.

⁷¹ Section 8(1) *Limitation Act* RSBC 1996, c.266. See the British Columbia Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office '*White Paper on Limitation Act Reform: Finding the Balance*' September 2010 at p.39 (part 2, section III (1)) for discussion of this accrual based model.

⁷² Section 14B(1) *Limitation Act 1980*.

⁷³ Section 11A(3), *Limitation Act 1980*. The "relevant" time is the date from which the product in question was last supplied by someone to whom section 2(2) of the 1987 Act applies, namely any person who is the producer of the product in question or who has held himself out as the producer by applying his own distinguishing mark to it or who has imported the product into the EU from outside the EU.

⁷⁴ Section 14(4) *Limitation of Actions Act* CCSM, c. L150. See, however, the proposals made by the Manitoba Law Reform Commission in its report *Limitations* (Report #123, July 2010) at p.28, in which it recommended that the ultimate limitation commence from the date of the act or omission on which the claim is based.

⁷⁵ See Manitoba Law Reform Commission *Limitations* (Report #123, July 2010) at p.27 fn 64, citing *M.M. v Roman Catholic Church of Canada* 2001 MBCA 148, in which the Manitoba Court of Appeal considered the calculation of time for the purposes of the ultimate limitation period under the current Manitoba Act. The court held that "the 'right to bring proceedings' crystallizes when the injured party first suffers damage or loss, while under the current Act, 'the completion of time begins from the completion of the events giving rise to the cause of action detached from the issues of loss or damage', at paragraph. 56."

⁷⁶ Section 51(1) *Limitation Act 1969* (No. 31).

JURISDICTION	RUNNING FROM:
New South Wales <i>Personal Injuries (excluding cases of wrongful death or personal injury in which the court has made an order extending the limitation period in circumstances where the court is satisfied that there is an element of latent injury involved.)</i>	Date of the act or omission that gave rise to the cause of action. ⁷⁷
Ontario <i>Civil actions, generally</i>	Day on which the act or omission on which the claim is based took place. ⁷⁸
Saskatchewan <i>Civil actions, generally</i>	Day on which the act or omission on which the claim is based took place. ⁷⁹
New Brunswick <i>Civil actions, generally</i>	Day on which the act or omission on which the claim is based took place. ⁸⁰
Victoria <i>Personal Injuries</i>	Date of the act or omission alleged to have resulted in the death or personal injury with which the action is concerned. ⁸¹
Uniform Law Conference Canada 2005 <i>Civil actions, generally</i>	Date of the act or omission that gave rise to the cause of action. ⁸²
Western Australia <i>Civil actions in which the defendant is in a close relationship with the claimant and the claimant has a mental disability</i>	Date of Accrual. ⁸³
New Zealand <i>Civil actions, generally</i>	Date of the act or omission on which the claim is based. ⁸⁴

⁷⁷ Section 50C(1)(b) *Limitation Act 1969* (No. 31).

⁷⁸ Section 15(2) *Limitations Act, 2002*. S.O 2002, Chapter 24, Schedule B.

⁷⁹ Section 7(1) *Limitation Act*, SS 2004, c. L.16.1.

⁸⁰ Section 5(1)(b) *Limitations of Actions Act*, S.N.B. 2009, c. L-8.5.

⁸¹ Section 27D(1)(b) *Limitation of Actions Act 1958*.

⁸² Section 6(2) *ULCC Uniform Limitations Act* (adopted 2005) (accessible at http://www.ulcc.ca/en/us/Uniform_Limitations_Act_En.pdf).

⁸³ Section 36(3) *Limitation Act 2005* (No. 19).

⁸⁴ Section 11 (3)(b) *Limitation Act 2010* (2010 no. 110).

(1) Selected Models for Reform

3.33 In order for a long-stop limitation period to provide certainty, its start date must be easily ascertainable. It is clear that the majority of jurisdictions, as listed in the above chart, have not favoured the approach of using the ‘accrual date’ as the start date. This is due to the nature of the accrual rule. “A cause of action does not accrue until every element of the cause of action is present.”⁸⁵ This means that different types of action accrue at different times, therefore using this date as the start date would not lead to greater consistency and certainty in the application of an ultimate limitation period. Some of the models for reform considered by the Commission are summarised below.

(a) Alberta (1986): Date on which the claim arose

3.34 In its 1986 Report, the Alberta Institute recommended that the ultimate limitation period should generally run from the date of accrual of the relevant cause of action. It stated that in order to achieve the objective of the ultimate limitation period as a “provision of repose, the ultimate limitation period must begin when a person did, or failed to do, something.”⁸⁶ This start date was discussed and analysed in detail in the 1986 Report, and it is apparent that where it was possible, the intended start date would consist simply of the date of the act or omission giving rise to the cause of action. The emphasis was placed on the passing of time after the occurrence of the events which give rise to the claim.

“By the time that ten years have passed after the occurrence of the events on which a claim is based, we believe that the evidence of the true facts will have so deteriorated that it will not be sufficiently complete and reliable to support a fair judicial decision.”⁸⁷

3.35 The recommendation stated that “unless a claim subject to this Act is brought within ten years after the claim arose, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability under the claim.”⁸⁸ Section 3(1)(b) of the *Limitation Act* RSA 2000 implemented this recommendation stating that a limitation period runs for ‘10 years after the claim arose’.

3.36 However, the Alberta Institute recognised that, although most claims will naturally accrue at the time of the defendant’s conduct, by his act or omission, some claims will accrue at a different time. To combat this difficulty, the Institute identified five types of claims for which the accrual rule had proved particularly complicated to interpret and apply, and set out specific provisions stating when the ultimate limitation period should be for each of these claims. Thus, special rules were formulated for the start date of an ultimate limitation period for specified actions as follows:

- (i) Claims resulting from a continuing course of conduct or a series of related acts - the recommended long-stop start date was the date on which the “conduct terminated, or the last act or omission occurred”⁸⁹;
- (ii) Claims based on a breach of duty of care - the recommended long-stop start date was the date on which the “when the careless conduct occurred”⁹⁰;
- (iii) Fatal injuries actions - the recommended long-stop start date was the date on which the conduct which caused the death occurred”⁹¹;

⁸⁵ *Read v Brown* (1888) 22 QBD 128, at 131.

⁸⁶ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at paragraph 2.195.

⁸⁷ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at paragraph 2.198.

⁸⁸ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at paragraph 2.198.

⁸⁹ *Ibid* at 2.213.

⁹⁰ *Ibid* at 2.213.

⁹¹ *Ibid* at 2.213.

- (iv) Claims based on a demand obligation - the recommended long-stop start date was the date on which the “default in performance occurred after a demand for performance was made”⁹²;
- (v) Claims for contribution - the recommended long-stop start date was the date “when the claimant for contribution was made a defendant under, or incurred liability through the settlement, of a claim seeking to impose liability upon which the claim for contribution could be based.”⁹³

3.37 Section 3(3) of the *Limitation Act* RSA 2000 followed the Institute’s recommendations in respect of these special rules.

“(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 a duty 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) a claim in respect of a proceeding under the Fatal Accidents Act arises when the conduct that causes the death, on which the claim is based, occurs;

(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 on which the claim for contribution can be based, whichever first occurs;

(f) a claim for a remedial order for the recovery of possession of real property arises when the claimant is dispossessed of the real property.”

3.38 Thus the recommendations of the Institute and the subsequent legislative provisions regarding the commencement of the ultimate limitation period were constructed in a manner to ensure that the date on which “the claim arose” consists of the date of the act or omission giving rise to the claim. In circumstances where this date is difficult to identify, special rules apply setting out the relevant start-date.

(b) *New Zealand (1988): Date of the defendant’s act or omission*

3.39 In 1988, the New Zealand Law Commission recommended an overhaul of the limitations system with the introduction of basic and ultimate limitation periods (3 years and 15 years in duration respectively), both commencing on the date of the defendant’s act or omission.⁹⁴ It favoured this approach as it felt it added clarity and certainty to a limitations regime. “In most cases, the date of the ‘act or omission’ will be clear. It refers to that conduct of the defendant of which the claimant complains.”⁹⁵

3.40 The New Zealand Law Commission did acknowledge that there could be some difficulties with continuing acts or omissions, and provided special provisions dealing with claims based on demands, conversion, contribution, indemnity and certain intellectual property claims.⁹⁶

3.41 The recommendations of this 1988 Report were not acted upon, and so it appeared that this ‘root and branch’ approach of overhauling the limitations system was not the preferred means of reform by the legislature. In 2000, the New Zealand Law Commission published a shorter Report, “confining our recommendations to urgently needed changes expressed as amendments to the existing statute.”⁹⁷ The

⁹² *Ibid* at 2.213.

⁹³ *Ibid* at 2.213.

⁹⁴ New Zealand Law Commission *Limitation Defences in Civil Proceedings* (Report No. 6, 1988) at paragraph 128.

⁹⁵ *Ibid* at 169.

⁹⁶ *Ibid* at 171.

⁹⁷ New Zealand Law Commission *Tidying the Limitation Act* (Report No. 61, July 2000) at paragraph 2.

Commission recommended the introduction of an 'ultimate cut-off point' 10 years "after the date on which the cause of action accrued."⁹⁸

3.42 A later Miscellaneous Paper commissioned by the New Zealand Law Commission in 2007 recommended an ultimate period of 15 years to start on "the date of the act or omission on which the claim is based."⁹⁹ It was this recommendation which was favoured by the New Zealand Parliament as regards a start date for the ultimate limitation period enacted in 2010, that is: "15 years after the date of the act or omission on which the claim is based (the claim's longstop period)."¹⁰⁰

3.43 The Miscellaneous Paper considered the previous recommendation of 2000 of a 10 year ultimate limitation period starting on the date of accrual. It felt that as a cause of action in negligence or nuisance does not accrue until damage occurs, this meant that there could be a long period of time between the date of the act or omission and the actual damage, and therefore, a long interval of time between the act or omission on which the claim is based and the actual commencement of the ultimate limitation period.¹⁰¹ The more certain start date of the date of the act or omission of the defendant was preferred, as the "start date should be objective and ascertainable."

(c) England and Wales (2001): Alternative starting dates.

3.44 The Law Commission for England and Wales has recommended that the ultimate limitation period should generally run from the date of accrual, with an alternative start date of the date of the act or omission (giving rise to the cause of action) for actions in tort and breach of statutory duty where loss is an essential element of the cause of action.

3.45 In its 1998 Consultation Paper on the *Limitation of Actions*, the Law Commission provisionally recommended that the ultimate limitation period for all causes of action should run from the date of the act or omission giving rise to the cause of action. It acknowledged that this starting point could possibly cause hardship to plaintiffs where the damage was incurred at a time after the date of the act or omission, for example where a disease is contracted as a result of employment.¹⁰² Nevertheless, it considered that as the discoverability rule for the provisionally recommended basic limitation period swings the balance in favour of the plaintiff, "the interests of defendants should be preferred over those of plaintiffs in fixing the starting point for the long-stop limitation period."

3.46 In choosing this start point, the Law Commission was influenced by the fact that the ultimate limitation period that currently applies for latent damage claims in England and Wales starts from the date of the act or omission that is alleged to constitute negligence. Also, the ultimate limitation period for actions under the *Consumer Protection Act 1987* starts to run from the date of the act giving rise to the claim.¹⁰³

3.47 The Law Commission was also of the view that the accrual test could "reintroduce the complexity and incoherence caused by the different rules on the date of accrual for different causes of action."¹⁰⁴ It also was of the view that using an accrual start date could destroy the purpose of the proposed ultimate limitation period as defendants would not be protected if the cause of action did not accrue until many years after the date of the act or omission giving rise to the cause of action.¹⁰⁵

⁹⁸ *Ibid* at 14.

⁹⁹ New Zealand Law Commission *Limitation Defences in Civil Cases: Update Report for the Law Commission, Miscellaneous Paper by Chris Corry, Barrister* (NZLC MP 16, June 2007) at paragraph 146.

¹⁰⁰ Section 11(3)(b) *Limitation Act 2010* (2010 no. 110).

¹⁰¹ New Zealand Law Commission *Limitation Defences in Civil Cases: Update Report for the Law Commission, Miscellaneous Paper by Chris Corry, Barrister* (NZLC MP 16, June 2007) at paragraph 147.

¹⁰² Law Commission for England & Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 12.105.

¹⁰³ *Consumer Protection Act 1987*, s 6(6), Schedule 1, paragraph 1, inserting new section 11A into the *Limitation Act 1980*.

¹⁰⁴ Law Commission for England & Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 12.107.

¹⁰⁵ *Ibid* at 12.1207.

3.48 In its 2001 Report¹⁰⁶, the Law Commission noted that a “substantial majority of consultees” supported these proposals.¹⁰⁷ It stated:

“The date of the act or omission giving rise to the cause of action has the advantage that it is easier to ascertain than the date on which the claimant suffers loss. The disadvantage is that in some cases loss is an essential element of the cause of action and there is therefore no cause of action until the claimant has suffered loss, which may be some time after the date of the act or omission giving rise to the cause of action.”¹⁰⁸

3.49 The Law Commission sought to address a concern which arose during the consultation period; the difficulty in ascertaining the date of the act or omission “giving rise” to the cause of action where there have been a number of acts or omissions by the defendant. To minimise difficulties in this regard, it recommended that the ultimate limitation period should, in general, run from the date of the accrual of the cause of action:

“When loss is not an essential element of the cause of action, the date on which the cause of action accrues will in most cases be the date of the act or omission which gives rise to the cause of action. The courts will, however, be able to draw on the guidance of the current law as to when a cause of action accrues to identify this date.”¹⁰⁹

3.50 The Law Commission, however, retained an exception to the general rule for those causes of action in tort and breach of statutory duty where loss is an essential element of the cause of action. In such circumstances, the starting date for the long-stop will remain the date of the act or omission giving rise to the cause of action.¹¹⁰

3.51 In 2001, the Commission recommended¹¹¹ special treatment of construction claims. It proposed that a long-stop period be introduced for latent damage claims (excluding personal injury claims) for a period of 10 years, running from the date of accrual of the cause of action.¹¹² However, it proposed a special start date for construction claims due to the “frequency of the disputes arising in the construction industry and because of the difficulties in insuring against latent defects”.¹¹³ The Commission was of the view that the starting point of a long-stop period for such claims should be the date of practical or purported completion, that is, the date of the issue of the certificate of completion.¹¹⁴ These recommendations were not implemented.

¹⁰⁶ As already noted, plans to introduce the proposed reform of introducing a core limitations regime as recommended by the Law Commission of England and Wales in its 2001 *Report on Limitation of Actions* appear to have been postponed indefinitely for the time being. In November 2009, Parliamentary Under-Secretary of State for Justice (Bridget Prentice) announced by way of ministerial statement that the proposed draft *Civil Law Reform Bill* would not include provisions to reform the law of limitation of actions.

¹⁰⁷ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 3.108.

¹⁰⁸ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at paragraph 3.108.

¹⁰⁹ *Ibid* at 3.109.

¹¹⁰ *Ibid* at 3.109.

¹¹¹ Law Reform Commission *Report on The Statutes of Limitation: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001) at paragraphs 4.16 - 4.21.

¹¹² The Commission recommended that a dual test be retained for the basic limitation period; a plaintiff could take action within 6 years from the accrual of the cause of action, or, three years from “the date the cause of action is or ought to be discoverable by the plaintiff, whichever expires later.” (Paragraph 3.05) The Commission recommended using the date of accrual as the start date as “the date of accrual is an established concept, on which there has been much discussion and case-law. (...) The introduction of a third commencement date for the long-stop would only further complicate the calculation of limitation periods” (Paragraph 4.20).

¹¹³ Law Reform Commission *Report on The Statutes of Limitation: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (64-2001) at paragraph 6.40.

¹¹⁴ *Ibid* at 6.40 - 6.41.

3.52 In relation to construction cases, the Law Commission for England and Wales also discussed a special starting point for a long-stop in this area. It was proposed that the date of the act or omission could be defined as the 'date of completion' of the construction works.

3.53 In the Consultation Paper, the Commission summarised the analysis undertaken by the Law Commission of England and Wales as follows¹¹⁵:

"The Law Commission observed that in major construction projects, a negligent act that causes damage may take place a considerable time before the building work is completed. It will often be even longer before a plaintiff has the opportunity to uncover the damage. There may be hardship to the plaintiff if the ultimate period runs from the date of the negligent act rather than the date of accrual (that is, the date on which the damage is incurred). In England and Wales, there is a statutory duty to build dwellings properly.¹¹⁶ The basic limitation period for actions in respect of a breach of this duty accrues at the time when the dwelling was completed. If that person carries out further work after that time to rectify the work already done, actions in respect of the further work accrue at the time when the further work was finished... The Law Commission agreed with the Law Revision Committee, however, that there would be problems of demarcation if a special limitation provision was introduced for a particular industry. Moreover, this would detract from the uniformity of the proposed core regime."

3.54 The Law Commission decided against introducing a special start date as it considered that it would "wrong to ring-fence a particular industry".¹¹⁷ Ultimately, the Commission was "not convinced that the additional complexity which would be caused by a separate regime for construction-related claims would be justified by the benefits it would bring."¹¹⁸

(d) Manitoba

3.55 The Law Reform Commission of Manitoba considered limitations law reform in 2010. The Manitoba limitation legislation dates from 1931, and although amended over the years, the Manitoba Commission considered that "it is in need of simplification and modernisation."¹¹⁹

3.56 The current Manitoba Act contains an ultimate limitation period of 30 years from the occurrence of the acts or omissions that give rise to the cause of action.¹²⁰ Under section 7(5), there is also an ultimate limitation period applicable to actions taken by a person with a disability (or an action brought on the behalf of a person with a disability) "after the expiration of 30 years after the occurrence of the act or omission that gave rise to the cause of action".

3.57 The Manitoba Law Reform Commission recommended that a "general ultimate limitations running from the act or omission giving rise to the claim occurred, rather than from the date the damage was suffered" be introduced, as it was of the view that such an ultimate limitation is "necessary and desirable."¹²¹

¹¹⁵ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraphs 5.94 and 5.95 (footnotes omitted).

¹¹⁶ See section 1(1), *Defective Premises Act 1972* (c. 35). The person must "see that the work which he takes on is done in a workmanlike or professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."

¹¹⁷ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 3.112.

¹¹⁸ *Ibid* at 3.112.

¹¹⁹ Manitoba Law Reform Commission *Report Limitations* (Report #123, July 2010) at p.11.

¹²⁰ Section 14(4) *The Limitation of Actions Act*, C.C.S.M. c. L150.

¹²¹ Manitoba Law Reform Commission *Report Limitations* (Report #123, July 2010) at pp.27-28.

(e) British Columbia

3.58 At present, the ultimate limitation period runs for a period of 30 years from the date of accrual of the action.¹²² The British Columbia Law Institute favoured a move away from this accrual model to using a start date of the date of the act or omission giving rise to the cause of action. It supported its view as follows:

“The advantages of this approach are threefold. It avoids the difficulties of having to determine when a plaintiff has suffered damage for those causes of action where damage is an essential element. Consequently, the maximum duration of the defendant’s liability is more easily ascertainable than under the accrual system and this creates greater certainty for the parties involved. The defendant is protected from stale claims in cases where the date of accrual occurs many years after the date of the act or omission that constitutes a breach of duty. Moreover, this date provides a common starting point for the ULP with regard to claims in both tort and contract.”¹²³

3.59 The British Columbia Law Institute did acknowledge that in certain cases, using this start date could lead to problems where the crucial element of the cause of action is the damage suffered, thus, “where damage is an essential element of the cause of action...time could run with respect to a cause of action, and perhaps extinguish it, before the plaintiff has any legal right to bring an action.”¹²⁴ The Institute was of the view that this “anomaly” would only occur in “a few cases”, and favoured the start date of the date of the act or omission that constitutes a breach of duty in order to bring “far greater certainty, predictability and simplicity to limitations law than the existing accrual scheme.”¹²⁵

3.60 The Ministry of Attorney General of British Columbia published a White Paper on the subject of *Limitation Act Reform: Finding the Balance* in September 2010. It too favoured this approach of using “act or omission model of commencement” rather than the date of accrual. It also stated that the majority of respondents to its Green Paper¹²⁶ on this topic were also in favour of this model.¹²⁷

3.61 The White Paper stated that though some respondents requested that there be different commencement dates based on the type of industry-related claim, this was felt to be “contrary to the reform goals of creating simplicity and internal consistency within the new Act.” However, it recognised that not all claims would easily fit in the act or omission commencement model and so it proposed that

¹²² British Columbia Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office *White Paper on Limitation Act Reform: Finding the Balance* September 2010 at p.30. See also - British Columbia Law Institute *Report on The Ultimate Limitation Period: Updating the Limitation Act* (BCLI Report No. 19, 2002) at p.16.

¹²³ British Columbia Law Institute *Report on The Ultimate Limitation Period: Updating the Limitation Act* (BCLI Report No. 19, 2002) at 18.

¹²⁴ *Ibid* at 18.

¹²⁵ British Columbia Law Institute *Report on The Ultimate Limitation Period: Updating the Limitation Act* (BCLI Report No. 19, 2002) at 18.

¹²⁶ British Columbia Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office *White Paper on Limitation Act Reform: Finding the Balance* September 2010 at p.1.

“Beginning in 2007, the Province launched the first comprehensive review of the Limitation Act since its introduction. The law reform project began with a Green Paper, entitled “Reforming British Columbia’s Limitation Act.” The Green Paper was used in public consultations in 2007, in which 290 external stakeholders provided feedback. The project responded to calls for change made by a broad range of stakeholders, including the building design and construction sectors (architects, engineers, builders, developers, etc.), the Union of British Columbia Municipalities, local governments, the British Columbia Dental Association and the College of Dental Surgeons of British Columbia. Each of these stakeholders continues to lobby strongly for change.”

¹²⁷ British Columbia Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office *White Paper on Limitation Act Reform: Finding the Balance* September 2010 at p.32.

this model be adopted with “a provision that sets out when the ultimate limitation period starts to run for certain types of claims that do not fit easily within the model”, for example, continuous acts or omissions and series of acts or omissions.¹²⁸

(2) Recommendation

3.62 The Commission remains of the view that running the ultimate limitation period from the date of the act or omission is the preferable option. There are many difficulties associated with the interpretation of the accrual test, and using the date of the act or omission commencement model would complement the running of the basic limitation period from the date of knowledge of the plaintiff.

3.63 *The Commission recommends that the ultimate limitation period should run from the date of the act or omission giving rise to the cause of action.*

E Application of the Ultimate Limitation Period to Personal Injuries Actions

3.64 The Commission considers that special consideration ought to be given to the application of the ultimate limitation period to personal injuries actions.

(a) Concerns in respect of personal injuries actions

3.65 Case law in all jurisdictions reveals that many forms of personal injuries are latent in nature, and can lay dormant for many years due to the nature of the injuries. To impose an ultimate limitation period on such actions may be unduly harsh for people who do not, and cannot, realise that they have suffered an injury until after the expiration of the limitation period given the latent nature of the injuries suffered.

3.66 Notwithstanding these concerns, there is also the need to safeguard against prosecutions of civil actions taking place long after the act or omission which gave rise to the cause of action. Such prosecutions carry an inherent risk of unfairness to defendants. The Courts are more than aware of the threat such prosecutions can pose to the administration of justice.

3.67 The defendant’s right to a speedy trial is one aspect of the personal constitutional right to fair procedures, which is protected under Article 40.3.1° of the Constitution. The Courts have an inherent jurisdiction to preserve the process of the administration of justice and safeguard the right to fair procedures; to this end, the Courts may strike out claims for want of prosecution, for inexcusable and inordinate delay, or to protect against prejudice to the defendant, even in circumstances where the relevant limitation period has not yet expired. As Peart J observed in *Byrne v Minister for Defence*:¹²⁹

“I believe it would be proper to consider what interests are there to be considered and protected by the court’s inherent jurisdiction to dismiss a claim on the grounds of inordinate and inexcusable delay. Certainly there are competing interests. There is first of all the plaintiff’s undoubted right of access to the courts. There is also the defendant’s right to an expeditious hearing of any claim brought against him and to finality. Linked to this consideration is the defendant’s right not to be adversely prejudiced in such defence by delay for which he bears no responsibility.”

(b) Previous Recommendations

3.68 In the past, the Commission has been of the view that the long-stop should not apply to personal injuries,¹³⁰ and stated that “in cases of personal injury, the right of the plaintiff should be ascribed a greater weight than that of a defendant - at least as an initial point of departure.”¹³¹

¹²⁸ *Ibid* at 33 and 49.

¹²⁹ [2005] 1 IR 577 at 585.

¹³⁰ Law Reform Commission *Report on the Statute of Limitations: Claims in respect of Latent Personal Injury* (LRC 21-1987); *Report on Defective Premises* (LRC 3-1982).

¹³¹ Law Reform Commission *Consultation Paper on the Statutes of Limitations: Claims in Contract and Tort in respect of Latent Damage (other than Personal Injury)* (1999) at paragraph 4.41.

3.69 In its Report *The Statute of Limitations: Claims in respect of Latent Personal Injuries*, the Commission recommended that a discoverability test be introduced for personal injuries actions. At that point in 1987, under section 11(2)(b) of the *Statute of Limitations 1957*, a three year limitation period applied to personal injuries actions from the date of accrual. This was interpreted as meaning that a cause of action accrued as soon as a wrongful act caused personal injury, even when the injury was unknown to and could not be discovered by the sufferer.¹³² In *Cahill v Sutton*¹³³, it had been argued that the imposition of a time limit having this effect was unconstitutional. Henchy J stated that the court was unable to rule on the validity of the claim made against the constitutionality of the relevant section of the 1957 Statute, but nonetheless he observed that the matter merited “urgent consideration”.¹³⁴ The matter of latent personal injuries and the 1957 Statute was eventually referred to the Commission. The resulting 1987 Report led to the enactment in *the Statute of Limitations (Amendment) Act 1991* of the ‘date of knowledge’ test for personal injuries actions.¹³⁵

3.70 In the 1987 Report, the Commission was strongly of the view that the introduction of a long-stop would undermine “the overriding objective of our other objectives - to endeavour to prevent injustice arising from the absence of a ‘discoverability’ rule - could be frustrated in at least some cases if such a provision were to be introduced.” It considered that “however long or short the ‘long-stop’ period ultimately settled on may be, it must of its nature be crude and arbitrary and have no regard to the requirements of justice as they arise in individual cases.” This statement must be looked at in the context of the primary focus of the Commission in the 1987 Report, which was that of latent personal injuries actions.

(c) The approach of other jurisdictions

3.71 The Consultation Paper considered the approach of other jurisdictions to personal injuries actions and long-stop provisions, including Western Australia, England and Wales and New Zealand.¹³⁶

(I) Western Australia

3.72 The Law Reform Commission of Western Australia in considering the application of a long-stop provision to personal injuries actions noted that the only Australian jurisdiction to apply such a provision was New South Wales, and that it was of limited application.¹³⁷

(II) Canada

3.73 A number of Canadian provinces apply an ultimate limitation period (of varying lengths) to personal injuries actions in their limitations legislation; including Ontario¹³⁸, Saskatchewan¹³⁹, Alberta¹⁴⁰,

¹³² Law Reform Commission *Report on the Statute of Limitations: Claims in respect of Latent Personal Injury* (LRC 21-1987) at p.2.

¹³³ *Cahill v Sutton* [1980] IR 269.

¹³⁴ *Cahill v Sutton* [1980] I.R. 269 at 288.

¹³⁵ Section 3 *Statute of Limitations (Amendment) Act 1991*.

¹³⁶ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraphs 5.111 - 5.123.

¹³⁷ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No. 36, Part II, January 1997) at paragraph 5.68. The long-stop does not apply to personal injuries actions and wrongful death actions where a court order under section 60F has been granted to extend time. Essentially, the court may extend time where it appears that there is an element of latent injury involved. See the relevant New South Wales legislation at section 51(2) of *Limitation Act 1969* (No. 31).

¹³⁸ Sections 2 and 15 *Limitations Act 2002*, S.O. 2002, Chapter 24, Schedule B, for the definition of a claim and the relevant ultimate limitation period.

¹³⁹ Sections 2(a) & 7 *Limitations Act S.S. 2004*, c.L-16.1, for the definition of a claim and the relevant ultimate limitation period.

¹⁴⁰ Sections 1(e) & 3(1) *Limitations Act*, R.S.A 2000, c.L-12, for the definition of a claim and the relevant ultimate limitation period.

British Columbia¹⁴¹ and Manitoba¹⁴². The Uniform Law Conference of Canada in its model Uniform Limitations Act also recommends that the ultimate limitation period apply to the majority of actions, including personal injuries actions.¹⁴³

(III) *England and Wales*

3.74 The Law Commission of England and Wales was of the view that their recommended ultimate limitation period of 10 years should not apply to personal injuries claims.¹⁴⁴

3.75 Previously, in its Consultation Paper, the Law Commission provisionally recommended that the proposed core regime should include a long-stop limitation period of 10 years applicable to all claims other than personal injury claims, and that personal injury claims should be subject to a long-stop limitation period of 30 years.¹⁴⁵

3.76 In the 2001 Report, the Law Commission considered that in relation to “claims other than personal injuries”, there could be a “risk of serious injustice to the defendant” in circumstances where a claim is brought after many years. It also stated that the use of a long-stop “compensates for the loss of certainty which is inherent in the adoption of a limitation regime dependent on the date of knowledge of the relevant facts by the claimant.”¹⁴⁶ Nevertheless, the Law Commission was of the view that different considerations applied to personal injuries claims and that despite the arguments it made in favour of the long-stop generally, the Law Commission “was minded to exempt such claims from the long-stop period”. Its provisional proposal that a 30-year long-stop apply was rejected by “around fifty-five per cent of consultees”. It stated that the major concern was in relation to latent injury personal injuries actions, particularly asbestos-related diseases such as mesothelioma and victims of sexual abuse.¹⁴⁷ It stated that a long-stop limitation period of thirty years would prevent most claimants suffering from mesothelioma from recovering damages for that disease. Also, many victims of sexual abuse “frequently need time to recover sufficiently from the trauma consequent upon the abuse to be able to contemplate bringing a claim.”¹⁴⁸

3.77 The Law Commission’s final recommendation was that “no long-stop limitation period should be applied to claims in respect of personal injuries”.¹⁴⁹

(IV) *New Zealand*

3.78 The approach adopted by New Zealand is worthy of mention. In 2007 the New Zealand Law Commission did not recommend exempting personal injuries actions from the application of an ultimate limitation period. Originally, in its Report of 2001, it considered that “claims for exemplary damages by victims of child abuse” should be included in a special disability provision which would stop time running against an intending plaintiff with such a disability.

“It seems entirely fair to both plaintiffs and defendants that the statute should make it clear that its definition of disability covers the situation where the abuse complained of has been

¹⁴¹ Sections 1 & 8 *Limitation Act*, RSBC, 1996, c.266, for the definition of a claim and the relevant ultimate limitation period.

¹⁴² Sections 1 & 14(4) *The Limitation of Actions Act*, CCSM, C.L150, for the definition of a claim and the relevant ultimate limitation period.

¹⁴³ See the *Uniform Limitations Act 2005*, sections 2 and 6, available at http://www.ulcc.ca/en/us/Uniform_Limitations_Act_En.pdf.

¹⁴⁴ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 3.101.

¹⁴⁵ Law Commission of England and Wales *Limitation of Actions* (CP No. 151, 1998) at 12.97 - 12.113.

¹⁴⁶ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 3.100.

¹⁴⁷ *Ibid* at 3.102 - 3.103.

¹⁴⁸ *Ibid* at 3.103.

¹⁴⁹ *Ibid* at 3.107.

causative of such absence of resolution as has left the plaintiff out of time for bringing a claim.”¹⁵⁰

3.79 However, in a Miscellaneous Paper prepared for the New Zealand Law Commission in 2007, it was recommended that no special provision be made to introduce a special disability provision in cases of child abuse, as had been proposed in the 2001 Report. It was recommended that the ultimate limitation period should apply to such actions with only the general exceptions of minority and/or incapacity allowing for any extension of the ultimate limitation period.

“It is recommended that abuse claims be specially provided for (simply to ensure the limitation rules are clear). It is recommended that the primary period, the same as for bodily injury, be two years which will run from the date of the act or omission on which the claim is based, and that the knowledge period will apply up to the end of the fifteen year ultimate period. If either (or both) the minority disability period and the incapacity disability period apply, time will be extended in accordance with the recommendations pertaining to them. There will be no other ground for extending the primary or the ultimate periods.”¹⁵¹

3.80 Although the New Zealand Law Commission ultimately did not favour exempting any personal injuries actions from the ambit of the ultimate limitation period, the Justice and Electoral Committee was of a slightly different view in its review of the *Limitation Bill 2009*. The Committee recommended certain changes to the text, which were later adopted and enacted in the *Limitation Act 2010*. The Committee recommended that a judicial discretion be retained to allow the courts to grant relief in cases involving child abuse (sexual and/or non-sexual), or claims of gradual process, disease, or infection “even when a limitation defence had been or could be established against the claim”.¹⁵² Thus, the court could still grant relief to a claimant in such a case, though the case is statute barred by the expiry of the ultimate limitation period.

“The specified court or tribunal may, if it thinks it just to do so on an application made to it for the purpose, order that monetary relief may be granted in respect of the claim as if no defence under this Part applies to it.”¹⁵³

3.81 The 2010 Act goes on to set out a list of factors which the court “must take into account” in coming to its decision about whether or not to grant this relief to the statute-barred claimant. These factors include:

- (a) any hardship that would be caused to the defendant if the order were made, and any hardship caused to the claimant if the order were not made;
- (b) the length of and reasons for the delay on the claimant’s part;
- (c) the effects or likely effects of the delay on the defendants ability to defend the claim, and the cogency of the evidence offered or likely to be offered by the claimant or the defendant;
- (d) the defendant’s conduct on and after the date of the act or omission on which the claim is based;
- (e) the extent to which prompt and reasonable steps were taken by or on behalf of the claimant;
- (f) any steps taken by claimant to obtain relevant medical legal or other expert advice and the nature of any such expert advice received; and

¹⁵⁰ New Zealand Law Commission *Tidying the Limitation Act* (Report 61, July 2000) at paragraph 22.

¹⁵¹ New Zealand Law Commission *Limitation Defences in Civil Cases: Update Report for the Law Commission Miscellaneous Paper by Chris Corry, Barrister*, (NZLC MP 16, June 2007) at paragraph 37.

¹⁵² Commentary of the Justice and Electoral Committee, accessible at <http://www.legislation.govt.nz/bill/government/2009/0033/latest/DLM3074500.html>

¹⁵³ Section 17(6) *Limitation Act 2010* (No. 110)

(g) any other matters the court considers relevant.¹⁵⁴

3.82 Thus the New Zealand legislature in its *Limitation Act 2010* adopted the approach of applying the ultimate limitation period generally to personal injuries claims but with two narrow exceptions to this general rule, the parameters of which are clearly defined by way of legislative provision.

(d) Conclusion

3.83 The Commission remains of the view that the ultimate limitation period should apply to personal injuries actions.¹⁵⁵ There is naturally some concern about the application of an ultimate limitation period to 'special cases' of personal injuries, and the possible hardship its strict application could cause claimants. Two of the prevailing aims in reforming limitations legislation are; firstly, to provide for a more precise and coherent system which is accessible and comprehensible, and secondly, to ensure that a balance is struck between the plaintiff's right of access to justice and the defendant's right to fair procedure. In order to best meet both of these objectives, the reforms cannot consist entirely of a stringent and narrow adherence to the proposed limitation periods no matter what the type of action is involved.

3.84 Nonetheless, the Commission does not consider that the overall scheme of proposed reform should be sacrificed to protect the small minority of special interests or special cases with the introduction of various exceptions for certain categories of claims. The general principles underlying the reform do not have to be distorted by attempting to accommodate each 'special interests'.

3.85 The Commission is of the view that such concerns relating to the application of an ultimate limitation period to personal injuries action can be dealt with by the introduction of a statutory discretion. This is discussed in more detail in Chapter 4, below.

3.86 *The Commission recommends that the ultimate limitation period should apply to personal injuries actions.*

¹⁵⁴ *Ibid* section 18(a-g).

¹⁵⁵ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 5.126.

CHAPTER 4 DISCRETION TO DISMISS CLAIMS, DISCRETION TO DISAPPLY LIMITATION PERIODS AND EXCEPTIONAL CIRCUMSTANCES

A Introduction

4.01 In this Chapter, the Commission examines how exceptional instances are to be dealt with in the proposed core limitations regime. Virtually all limitations laws (including the traditional type of which the *Statute of Limitations 1957* is an example) include at least some provision for these unusual and exceptional circumstances. In the *Statute of Limitations 1957* as enacted, this was done through a series of provisions dealing with “postponement” of the limitation periods for a variety of specified reasons, such as the plaintiff’s “disability” (being under 18 or by virtue of intellectual disability). The introduction of a “discoverability” rule in the *Statute of Limitations (Amendment) Act 1991* was intended to deal with another type of exceptional case, namely, where the plaintiff is not in a position to discover their cause of action until after a limitation period had passed because, for example, the consequences of exposure to asbestos fibres (or excessive noise) can be symptomless for up to 40 years.

4.02 These exceptional circumstances often mean that quite old cases could still be litigated, and this therefore raises the priority to be given to, on the one hand, the plaintiff’s right to litigate a claim and, on the other, the defendant’s right to be presented with a claim within a reasonable period of time. In this respect, the courts have also developed, independently of the limitations legislation, various approaches which allow them to determine, using a principles-based discretion, whether a claim should, or should not, be allowed to proceed.

4.03 The Commission begins in Part B by examining the various discretion-based principles developed by the courts to determine whether an old claim should be allowed to proceed. This includes the discretion to dismiss a civil claim on grounds of delay even in cases where the limitation period has not yet expired, or, separately, as being an abuse of the court process. The impact of the *European Convention on Human Rights Act 2003* is also considered. In Part C, the Commission considers whether a specific statutory discretion to “postpone” or otherwise extend the “long-stop” ultimate limitation period is required in the Commission’s proposed limitations legislation. The Commission discusses whether such a limited “safety valve” provision would operate by reference to a limited discretion for “exceptional circumstances” or by reference to specific instances. In Part D, the Commission then considers whether the existing postponement provisions in the *Statute of Limitations 1957* need to be retained.

B Judicial Discretion to Dismiss Claims

4.04 As already mentioned, the courts have an inherent jurisdiction to control their own procedure, and this includes, for example, the discretion to dismiss a civil claim on grounds of prejudicial delay even in cases where the limitation period has not yet expired, or, separately, as being an abuse of the court process. This form of discretion arises from the obligation of the courts to ensure the timely administration of justice, derived from Article 34.1 of the Constitution and also the constitutional right to fair procedures derived from Article 40.3.1°.

(1) *Very old claims not allowed to proceed even if within Statute of Limitations*

4.05 The Commission considers that this inherent jurisdiction protects the interests of the defendant in striking out claims for want of prosecution where there has been inordinate and inexcusable delay, even where a limitation period has not yet expired. Thus, in *Ó Domhnaill v Merrick*,¹ the plaintiff had suffered injuries as a result of a road traffic accident at the age of 3, in 1961. Proceedings were initially struck out as being statute barred for not having been brought within 3 years of the accident under

¹ *Ó Domhnaill v Merrick* [1984] IR 151.

section 49(2)(ii) of the *Statute of Limitations 1957*. This section was later challenged in *O'Brien v Keogh*² where the Supreme Court held that a minor would be allowed to bring proceedings within 3 years of reaching majority. As a result, in *Ó Domhnaill* proceedings were initiated for a second time in 1977. By 1982, however, no statement of claim had been delivered by the plaintiff. The defendant applied to have the action dismissed for want of prosecution.

4.06 In the Supreme Court, Henchy J found the delay was both inordinate and inexcusable, with no countervailing circumstances to justify the delay. He noted that “while justice delayed may not always be justice denied, it usually means justice diminished”.³ He considered that it would be “contrary to natural justice and an abuse of the process of the courts”⁴ to allow the claim to continue. He stated that in this case where the accident had occurred 24 years before the trial; it would put “justice to the hazard to such an extent that to allow the case to proceed to trial would be an abrogation of basic fairness.”⁵

4.07 The High Court decision in *Donnellan v Westport Textiles Ltd & Ors*⁶ applied the principle in *Ó Domhnaill*. The plaintiff claimed he was exposed to excessive noise during two separate periods of employment (as a former member of the Defence Forces for 10 months in 1974, and as a cone-winder in 1978-1979) and sustained hearing loss as a result. The proceedings commenced in 2000. In the High Court, Hogan J considered that the critical point was not whether the matter was statute-barred, but that the proceedings were instituted some 26 years after the events in question. He stated that:⁷

“while I am conscious that the plaintiff has, in fact, suffered some appreciable hearing loss, the post-commencement delays simply compounded a problem which was inherent from the start, namely, that the 26 year delay involved in commencing the litigation in the first place was simply too long for the administration of justice to tolerate, even if the proceedings were technically within the Statute of Limitations.”

4.08 This type of judicial discretion may, therefore, be used to dismiss claims which are not statute-barred, and which are still within the limitation period, but where there has been such delay or such a great lapse of time that the court considers that it would be unjust to allow the claim to proceed. The discretion has not, however, been used to overlook the expiry of a limitation period. To the Commission’s knowledge, an Irish court has not stated that, where a claim is clearly statute-barred by the expiry of the limitation period, the court could use its judicial discretion to allow the matter to proceed.

4.09 In *Byrne v Minister for Defence and Others*⁸, Peart J made an important observation in relation to how this inherent jurisdiction of the court interacts with the *Statute of Limitations*, and how the competing interests of the plaintiff, the defendant and the public, must be carefully balanced:

“The Court’s jurisdiction to dismiss such an old claim is an important power in the public interest, regardless of prejudice to the defendant, yet one which must be used sparingly lest a plaintiff might unreasonably be deprived of a remedy to which he is entitled. If the court were never to invoke that power it would send the wrong message, namely that the courts will tolerate and indulge unreasonable delay in the bringing of claims where a defendant cannot show prejudice. That consideration must exist regardless of the existence of a defendant’s right to plead the Statute of Limitations by way of defence pleading. That statute has the capacity to protect the defendant’s rights which I have identified, but it serves no purpose in the protection of the public interest to which I have referred.”⁹

² *O'Brien v Keogh* [1972] IR 144.

³ *O'Domhnaill v Merrick* [1985] ILRM 40 at 44.

⁴ [1985] ILRM 40 at 44.

⁵ *Ibid*

⁶ [2011] IEHC 11.

⁷ [2011] IEHC 11 at paragraph 37.

⁸ [2005] 1 IR 577.

⁹ *Ibid* at 586.

4.10 The Commission also notes that the case law derived from *O Domhnaill v Merrick*¹⁰ was expressly recognised in section 3 of the *Statute of Limitations (Amendment) Act 2000*, which provides that nothing in the 2000 Act “shall be construed as affecting any power of a court to dismiss an action on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal.”

(2) Dismissal for abuse of process

4.11 The constitutionally-derived jurisdiction of the court to control its own procedure can also take the form of dismissal on the grounds of the proceedings being frivolous and vexatious¹¹, dismissal due to abuse of process¹², or dismissal due to failure to observe the *Rules of the Superior Courts 1986* in conducting a claim.¹³ Shiels summarises the underlying rationale of the jurisdiction related to abuse of process as follows:

“Thus the use of the processes of the courts to occasion unfairness, prejudice or hardship on defendants will justify the strike out of proceedings. It may be that proceedings are not inconsistent with a literal application of the rules of court but are, nevertheless, manifestly unfair to a party before the court or may indeed bring the administration of justice into disrepute among “right thinking people” (footnote omitted).”¹⁴

4.12 Most commonly, the abuse of process concept arise in cases involving frivolous or vexatious proceedings, rather than proceedings involving delay alone. For example, in *MP v Attorney General and Others*,¹⁵ the plaintiff applied, pursuant to section 73 of the *Mental Health Act 2001*, for leave to institute proceedings regarding her involuntary detention in 2009. Judgment had previously been issued on 27 April 2010 in relation to a very similar application brought by the plaintiff. MacMenamin J was of the view that the current application was largely repetitious of the earlier set of proceedings. He stated that a perusal of the chronology of events in these proceedings clearly indicated that the plaintiff, “whether wittingly or not, sought to re-ignite proceedings held to be frivolous and vexatious” and that she had also “engaged in abuse of the court process by repeatedly seeking to litigate the same matter”.¹⁶

4.13 MacMenamin J also highlighted that there was a public interest aspect to litigation, and the use of court time. He relied on the following observations of Denham J in *Bula Ltd (in receivership) v Crowley & Ors*:¹⁷

“There is a constitutional right to access the courts. However, it is not an absolute right. With that right comes responsibility. Circumstances may arise where a person loses the right to initiate proceedings. For example, if there has been an excessive amount of litigation initiated

¹⁰ [1984] IR 151.

¹¹ See *J O’M v O’Neill & Regan* [2010] IEHC 273.

¹² Shiels, *Abuse of Process* (First Law, 2002), p.1, comments that an abuse of process consists of using “the processes of the court to occasion unfairness, prejudice or hardship on defendants”. Proceedings which can be considered to be an ‘abuse of process’ include proceedings which disclose no cause of action or where the cause of action cannot succeed, re-litigation, champerty (a form of maintenance by which litigation is improperly ‘stirred up’ by giving aid to one party to bring or defend a claim without just cause or excuse), collateral purposes (instituting proceedings with an ulterior motive to gain an advantage which differs in nature, or goes beyond the relief which the court could award) and delay.

¹³ For example, under O.27, r.1 of the *Rules of the Superior Courts 1986*, a court may dismiss an action during proceedings due to failure to deliver a statement of claim by the plaintiff.

¹⁴ Shiels, *Abuse of Process* (First Law, 2002) at paragraph 1.1.

¹⁵ [2010] IEHC 473.

¹⁶ [2010] IEHC 473 at paragraph 22.

¹⁷ [2009] IESC 35.

by a person, or on his behalf, the courts have an inherent jurisdiction, and indeed, a duty, to review the use of court time. Court time is limited and there is a duty to use it justly.”¹⁸

4.14 This qualifying of the right to litigate is at the heart of the delicate balancing of the plaintiff’s right of access to the courts and the defendant’s right to be protected from an abuse of this right. As stated by Cooke J in *Kenny v An Bord Pleanála*,¹⁹ a citizen “has a constitutional right of access to the High Court but no entitlement to abuse that right.” In that case, the plaintiff had previously been the subject of an ‘Isaac Wunder order’ which had the purpose of restraining the plaintiff from issuing any further proceedings against certain named parties, one of which included the defendant in this case. The court refused the plaintiff’s application to institute proceedings against the defendant on the grounds that the claim was ‘manifestly unfounded or unstateable’ and so the Isaac Wunder Order remained in place. Cooke J stated that the purpose of the Isaac Wunder Order was two-fold:

“It safeguards the integrity of that constitutional right by preventing its abuse by the repeated introduction of unfounded or vexatious claims against the same party; and secondly, it protects a defendant from being unjustifiably exposed to unnecessary costs by having to meet unfounded claims brought by the same litigant.”²⁰

4.15 The Commission recommended, in its *Report on the Consolidation and Reform of the Courts Acts*,²¹ that the jurisdiction of the courts to restrict this specific type of abuse of process be placed on a statutory footing. Thus, section 80 of the draft *Courts (Consolidation and Reform) Bill* in the Report places on a statutory footing the existing power of the High Court and the Supreme Court to provide that any person who, without any reasonable ground, has repeatedly instituted vexatious legal proceedings in any Court, may not commence, or continue, proceedings in any Court without the leave of the High Court. As already noted, such a restriction is currently commonly referred to as an Isaac Wunder Order.²²

4.16 As noted by Shiels, applying the abuse of process concept to cases involving delay, and the court’s inherent jurisdiction to dismiss such claims, has often been “overlooked by the Irish courts in favour of the more principled test of ‘inordinate and inexcusable’ delay as set out in cases such as, *Primor v Stokes Kennedy Crowley*.”²³ The Commission now turns to discuss the test for considering whether the delay is both inexcusable and inordinate, often called the *Primor* test.

(3) The Primor Test and Dismissal for Want of Prosecution or Delay

4.17 The test applied by the courts in considering a dismissal for want of prosecution was first set out in detail by the Supreme Court in *Primor plc v Stokes Kennedy Crowley*.²⁴ The Court set out the following test (the *Primor* test): whether the delay was inexcusable and inordinate, and whether such delay affects the balance of justice (this involves an analysis of issues of prejudice to the plaintiff and to the defendant).

4.18 In *Donnellan v Westport Textiles Ltd & Ors*,²⁵ Hogan J considered two over-lapping strands of case law dealing with the issue of what the consideration of the balance of justice entails. Hogan J stated that the first line of case law derives from the judgment of Henchy J in *Ó Domhnaill v Merrick*, already discussed.²⁶ This line of case law “stresses the inherent duty of the courts arising from the Constitution to

¹⁸ [2009] IESC 35 at paragraph 59.

¹⁹ *Kenny v An Bord Pleanála* [2010] IEHC 321 at paragraph 9.

²⁰ *Ibid.*

²¹ Law Reform Commission *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010) at paragraph 2.43.

²² *Ibid* ‘Explanatory Notes to Part 2 of the Bill: Jurisdiction’ at pp.456-457.

²³ Shiels, *Abuse of Process* (First Law, 2002) at paragraph 6.5.

²⁴ *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459.

²⁵ *Donnellan v Westport Textiles Ltd & Ors* [2011] IEHC 11.

²⁶ *O’Domhnaill v Merrick* [1984] IR 151.

put an end to stale claims in order to ensure the effective administration of justice and basic fairness of procedures and in order to secure compliance with the requirements of Article 6 ECHR.”²⁷ The second line of authority extends from the judgment of Finlay J in *Rainsford v Limerick Corporation*, but found “its full exposition in the seminal judgment of the Supreme Court in *Primor plc*.”²⁸

4.19 Hogan J also considered the Supreme Court decision in *McBrearty v North Western Health Board*²⁹ (2010). In *McBrearty*, the Supreme Court also analysed the different authorities in the area of dismissal for want of prosecution, and the courts’ inherent jurisdiction to administer justice. Hogan J considered that the *McBrearty* case was of great significance as it confirmed the primacy of the *Primor* test while making clear that “the *Primor* principles were not to be regarded as exclusive or all-encompassing and, secondly, it confirmed that the Court’s constitutionality derived inherent jurisdiction could be exercised even though some elements of the *Primor* test had not been established.”³⁰ Thus it clarified that “there are, in fact, two separate – albeit overlapping – strands of jurisprudence in this area.”³¹ Both of these strands appear to be of equal importance in considering whether the court should exercise its discretion in applying its inherent jurisdiction to ensure effective administration of justice for the purpose of dismissing a claim.

4.20 Hogan J also made brief reference to the protection provided by Article 6 of the European Convention on Human Rights which protects this right to a hearing within a reasonable time in parallel to the principles derived from the Irish case law.³²

4.21 Diverging judicial views have emerged in relation to the exact extent of the impact which the *European Convention on Human Rights Act 2003* has had on this inherent jurisdiction of the court. This issue will be dealt with in further detail in the following section.

4.22 The protection afforded by the European Convention on Human Rights (ECHR) was first referred to by Hardiman J in *Gilroy v Flynn*.³³ In relation to the court’s inherent jurisdiction to dismiss stale claims, and the relevant test and principles set out in the seminal *Primor* case, Hardiman J noted that the law in this area had undergone significant developments since the decision in the *Primor* case in 1996. He stated that there was an increased awareness on the part of the courts:

“of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued.”³⁴

4.23 He also referred to the *European Convention on Human Rights Act 2003*, and cases such as *McMullen v Ireland*,³⁵ which had the consequence that “the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time.”³⁶

²⁷ *Donnellan v Westport Textiles Ltd & Ors* [2011] IEHC 11 at paragraph 24.

²⁸ *Donnellan v Westport Textiles Ltd & Ors* [2011] IEHC 11 at paragraph 25.

²⁹ *McBrearty v North Western Health Board* [2010] IESC 27. This case was taken by the severely disabled plaintiff against a health board (now the Health Service Executive) and two clinicians on the grounds that his disabilities had been caused by the negligence of these clinicians in attending the plaintiff’s mother as she was giving birth.

³⁰ *Ibid* at paragraph 29.

³¹ *Donnellan v Westport Textiles Ltd & Ors* [2011] IEHC 11 at paragraph 26.

³² *Donnellan v Westport Textiles Ltd & Ors* [2011] IEHC 11 at paragraph 31.

³³ *Gilroy v Flynn* [2005] 1 ILRM 290.

³⁴ *Ibid* at 294.

³⁵ *McMullen v Ireland*, (App. No. 42297/98, judgment of 29 July 2004), [2004] ECHR 422.

³⁶ *Gilroy v Flynn* [2005] 1 ILRM 290, at 294.

4.24 In *W v W*, the High Court considered the issue of delay in tort litigation both from the point of view of the Statute of Limitations and the *European Convention on Human Rights Act 2003*.³⁷ The plaintiff claimed that the defendant, her brother, sexually assaulted, abused, assaulted and battered her between 1969 and 1972, from the age of 11. Proceedings were commenced by way of plenary summons at the end of 2006. The matter had been ready for a date to be fixed for trial but the plaintiff contended that she was physically and psychologically unfit to give evidence at trial at the time and in the future.³⁸ The defendant applied for an order dismissing the plaintiff's claim for want of prosecution.

4.25 Kearns P held that it would "unfair to the highest degree" to allow the plaintiff to proceed with her claim, given that the proceedings were in existence since 2006, and dismissed the plaintiff's claim on the grounds of both want of prosecution and the Statute of Limitations.³⁹

4.26 Under the *Statute of Limitations (Amendment) Act 2000* the period within which a person can bring a claim in tort arising out of child sexual abuse can be extended until that person ceases to be under a disability. The disability is defined as suffering a psychological injury caused by the abuse and which affects their ability to make a reasoned decision to bring an action. Kearns P was of the view that, in this case, the only injury the plaintiff appeared to be relying on was a physical injury, a rare genetic disorder, but no psychological injury as such. He found that "the symptoms associated with this condition as experienced by the plaintiff are purely physical, and do not ostensibly impact on the behaviour of the plaintiff or constitute a psychological impediment to the prosecution of proceedings."⁴⁰

4.27 Kearns P then went on to consider the issue of dismissal for want of prosecution. He summarised the approach to this issue as consisting of the "traditional formulation for the exercise of the court's discretion" as set out in *Rainsford v Limerick Corporation*⁴¹, and as later expanded and developed in *Primor plc v Stokes Kennedy Crowley*⁴². As regards the *European Convention on Human Rights Act 2003*, Kearns P stated:

"There have been different views expressed in our recent jurisprudence as to the change, if any, made to our existing Irish jurisprudence in relation to delay following the enactment of the ECHR Act 2003."⁴³

4.28 Kearns P referred to *Gilroy v Flynn* and also *Desmond v MGN Ltd*⁴⁴. In the *Desmond* case, Kearns P expressed a minority view "that the requirement to move legal proceedings forward with expedition in this jurisdiction has necessarily become more stringent following the coming into operation of the *European Convention on Human Rights Act 2003*."⁴⁵ In *W v W*, Kearns P also went on to refer to the decision of the European Court of Human Rights in *McFarlane v Ireland*,⁴⁶ in which the Court awarded damages against the State for delay in processing legal proceedings. Kearns P stated that this reinforced his view in relation to problems of delay.⁴⁷

4.29 Kearns P clearly was of the opinion that greater weight should be given to a consideration of the protection afforded by the *European Convention on Human Rights Act 2003*, particularly in light of the

³⁷ [2011] IEHC 201.

³⁸ *Ibid* at p.2.

³⁹ *Ibid* at p.8.

⁴⁰ *W v W* [2011] IEHC 201 at p.4.

⁴¹ *Rainsford v Limerick Corporation* [1995] 2 ILRM 561

⁴² *Primor plc v Stokes Kennedy Crowley*. [1996] 2 IR 459.

⁴³ *W v W* [2011] IEHC 201 at p.6.

⁴⁴ *Desmond v MGN Ltd* [2009] 1 IR 737.

⁴⁵ *W v W* [2011] IEHC 201 at p.6.

⁴⁶ *McFarlane v Ireland*, (App. No. 31333/06, judgment of 10 September 2010), [2010] ECHR 1272.

⁴⁷ *W v W* [2011] IEHC 201 at p.6.

findings against the State by the European Court of Human Rights in regard to lengthy legal delays. Kearns P stated:

“I am of the view that, in addition to the central tests laid down in the Irish cases cited above – first that the court be satisfied that the delay is inordinate and inexcusable, and second that, where inordinate and inexcusable delay is established, the court must decide where the balance of justice lies – regard should be had to the requirements of Art. 6 of the ECHR and that consideration of the ECHR requirements should be added to the non-exhaustive list of factors to which regard should be had by the court in the exercise of its discretion, as set out in *Rainsford* and *Primor*. At present two decisions of the Supreme Court support this view while one adheres to the view that the traditional Irish jurisprudence, as enunciated in *Rainsford* and *Primor*, adequately and comprehensively state all of the relevant principles.”

4.30 The two decisions of the Supreme Court to which Kearns P refers are *Gilroy v Flynn*⁴⁸ and *Stephens v Paul Flynn Ltd*⁴⁹. Kearns P had given the judgment of the Supreme Court in the *Stephens* case.

4.31 In *McBrearty v North Western Health Board*⁵⁰ Geoghegan J also analysed the different authorities in the area of dismissal for want of prosecution, and the courts’ inherent jurisdiction to administer justice. As a “footnote to the view already expressed”, he was of the view that the main principles that had to be foremost in consideration of this inherent jurisdiction of the court to dismiss claims for delay, were the principles set out by the *Primor* test. He considered that there was no need for any ‘recalibration’ of the test required due to the *European Convention on Human Rights Act 2003*. In light of the judgment in *W v W*, it would appear that there remains a degree of ambiguity as to the degree to which the incorporation of the ECHR into domestic law will, in fact, impact on the courts’ practices. The general principles set out in *Primor* and *Rainsford* still represent the watermark, albeit that the weight to be given to the various factors set out therein is in a state of flux.⁵¹

(4) Equitable discretion and limitation periods

4.32 There is also the matter of the court exercising its inherent jurisdiction, or its discretion, to apply equitable principles to the application of limitation periods. The decision of the Supreme Court in *Murphy v Grealish*⁵² highlights this issue.

4.33 In this case, in the High Court MacMenamin J had refused the defendant’s application for an order dismissing the plaintiff’s proceedings pursuant to section 11(2)(a) of the *Statute of Limitations 1957* (as amended by section 3 of the *Statute of Limitations (Amendment) Act 1991*). The plaintiff argued that the defendant had admitted liability prior to the expiry of the limitation period, and negotiations had been ongoing with a view to settlement. MacMenamin J held that an equitable estoppel arose and refused the defendant’s application. The Supreme Court upheld this decision.

4.34 Geoghegan J gave the main judgment of the Supreme Court. He noted that while an admission of liability is important in considering the issue of estoppel preventing reliance on the Statute, it could not be said that the plaintiff could ignore the Statute of Limitations based on such an admission. He also discussed two earlier cases of the High Court⁵³, and although they had been appealed to the Supreme Court, he noted as follows:

“... it does not seem to me that they had any criticism of the basic approach of the High Court judges which was essentially to consider whether there was an equitable estoppel by reason of

⁴⁸ *Gilroy v Flynn* [2005] 1 ILRM 290.

⁴⁹ *Stephens v Paul Flynn Ltd* [2008] 4 IR 31.

⁵⁰ *McBrearty v North Western Health Board* [2010] IESC 27.

⁵¹ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 7.32.

⁵² *Murphy v Grealish* [2009] 3 IR 366.

⁵³ *Doran v Thompson Ltd* [1978] IR 223 and *Ryan v Connolly* [2001] 1 IR 627.

the general surrounding circumstances, those circumstances constituting an implied representation rendering it unconscionable to allow the reliance on the statute.”⁵⁴

4.35 Geoghegan J considered an observation of Walsh J in an earlier Supreme Court decision, *O’Reilly v Granville*, which MacMenamin J had also referred to in his decision. Walsh J had stated as follows:

“The Statute of Limitations does not exist for the purpose of aiding unconscionable and dishonest conduct and I fully agree with the view expressed by the Chief Justice that, in the circumstances of this case, if the Statute of Limitations were to be invoked it would be for the purpose of sustaining and maintaining unconscionable and dishonest conduct.”⁵⁵

4.36 MacMenamin J said that it was “sufficient” in his view that “on the facts the plea of the Statute is unconscionable”. Geoghegan J felt that this was perhaps a step too far as this case was confined to a plea of estoppel.⁵⁶ However, he concluded his judgment by “leaving open the question” of whether a plea of statute bar could be defeated by unconscionable conduct falling short of estoppel, given the right circumstances.

4.37 This case would seem to create the possibility of extending the discretion of the court in applying equitable principles to cases pleading the statute, whereby purely “unconscionable conduct” could result in a limitation period being dis-applied.

4.38 Furthermore, while statutes of limitation have not traditionally applied to all equitable claims, equitable principles can nonetheless be applied to systems of limitation law by the courts.

(5) Conclusion

4.39 It is clear that an element of judicial discretion will always be present in any reformed system of limitations arising from the courts’ constitutionally derived and inherent jurisdiction to regulate its proceedings. Indeed, the Commission notes that the case law derived from *O Domhnaill v Merrick*,⁵⁷ discussed above, was expressly recognised in section 3 of the *Statute of Limitations (Amendment) Act 2000*, which provides that nothing in the 2000 Act “shall be construed as affecting any power of a court to dismiss an action on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal.” The Commission considers that a similar provision should be included in the proposed limitations legislation recommended in this Report. The Commission also considers that reference should also be included to the jurisdiction to dismiss claims for inordinate, inexcusable and prejudicial delay, or for abuse of process or the vexatious nature of the claim, also discussed above.

4.40 *The Commission recommends that the proposed limitations legislation recommended in this Report should include an express statement that it is without prejudice to any power of a court to dismiss an action on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal, or for inordinate, inexcusable and prejudicial delay, or for abuse of process or the vexatious nature of the claim.*

C Statutory Discretion to Extend Limitation Periods

4.41 In this Part, the Commission considers whether a specific statutory discretion to “postpone” or otherwise extend the “long-stop” ultimate limitation period is required in the Commission’s proposed limitations legislation. The Commission discusses whether such a limited “safety valve” provision would operate by reference to a limited discretion for “exceptional circumstances” or by reference to specific instances. The Consultation Paper contained a detailed analysis of how other states have dealt with this type of judicial discretion in the context of limitations law, including how the approach has evolved over

⁵⁴ *Murphy v Grealish* [2009] 3 IR 366, 374.

⁵⁵ *O’Reilly v Granville* [1971] IR 90 at 100.

⁵⁶ *Murphy v Grealish* [2009] 3 IR 366, 376.

⁵⁷ [1984] IR 151.

the years. In the Consultation Paper, the Commission provisionally concluded that there was no need for the inclusion of a statutory based judicial discretion to extend or dis-apply a limitation period.

4.42 Some states favour including explicit provisions in their limitations legislation allowing for the courts to exercise judicial discretion to extend or dis-apply a limitation period. Others do not allow for any judicial discretion in relation to limitation periods, and strictly observe their expiry, while others allow for a limited discretion in certain circumstances.

(1) Ireland

4.43 In Ireland, the *Defamation Act 2009* introduced a one year basic limitation period for the tort of defamation, which may be extended at the discretion of the courts for up to one further year.⁵⁸ The court's discretion is capped at this maximum possible extension of one year. The limitation period runs from the date of publication.

4.44 In exercising this discretion, the court is required by section 11(3A) of the *Statute of Limitations 1957*⁵⁹ to consider firstly whether the interests of justice require the extension of the limitation period, and, secondly where the balance of 'prejudice' lies. This means that the court must be satisfied that the prejudice the plaintiff would suffer if the extension was not granted would greatly outweigh the prejudice the defendant will suffer if the extension is granted. Both of these elements are broadly similar to the requirements under sections 32A and 33 of the English *Limitation Act 1980* in relation to personal injuries actions.

4.45 This is the second instance of a statutory limited judicial discretion in Ireland, the first being section 46(3) of the *Civil Liability Act 1961*, which deals with admiralty and salvage cases. Although a two year limitation period is applicable to such claims, section 46(3) allows the court ("subject to any rules of court") to extend the limitation period as it sees fit.

4.46 In other states a more generally applicable discretion has been included in reformed limitation laws.

(2) England and Wales

4.47 In England and Wales, the court has a discretion under the *Limitation Act 1980* to dis-apply the relevant limitation period in respect of personal injuries or death⁶⁰, and (as in Ireland since the enactment of the *Defamation Act 2009*) in claims for defamation⁶¹. This essentially has the effect of the court extending the relevant limitation period beyond its expiry date, and thus preventing the limitation period from extinguishing the claim. Each of the provisions relevant to personal injuries claims or claims for defamation, contain a list of factors which the court can take account of in exercising this discretion. For example, under section 33(3) of the 1980 Act the court can consider the following factors in relation to actions involving personal injuries or death:

"In acting under this section the court shall have regard to all the circumstances of the case and in particular to -

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 or (as the case may be) by section 12;

(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

⁵⁸ Section 11(2)(c) of the *Statute of Limitations Act 1957*, inserted by *Defamation Act 2009*, section 38(1).

⁵⁹ As inserted into the *Statute of Limitations 1957* by section 38(1)(b) of the *Defamation Act 2009*.

⁶⁰ Section 33 *Limitation Act 1980*.

⁶¹ Section 32A *Limitation Act 1980*.

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not 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;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.”

4.48 The English Law Commission considered whether or not this judicial discretion should be extended to apply to a wide range of causes of action in 1998 and 2001. In its Report in 2001⁶², it considered that the level of uncertainty this would involve outweighed any potential benefits. It recommended that the current position of discretion applying to personal injuries actions continue unchanged.⁶³

4.49 To this end, the Law Commission recommended that judicial discretion be retained in the area of personal injuries actions.⁶⁴ It noted that a plaintiff who has suffered a personal injury can be viewed as having suffered a more extreme form of harm than someone who has suffered purely economic loss or property damage. It went on to state the following:

“The loss of the opportunity to bring proceedings against the defendant because of the expiry of a limitation period is therefore, in general terms, more serious for a claimant with a personal injury claim than any other claimant. There is therefore an argument for giving the court, in personal injury claims, but not in other cases, the power to dis-apply the limitation period in exceptional circumstances, depending on the merits of a particular claim.”⁶⁵

4.50 The Law Commission stated that as section 33, which provides for this judicial discretion in relation to actions for personal injuries and death, has been in existence and operation since the *Limitation Act 1975*, and it would be difficult to “turn the clock back” and remove this judicial discretion.⁶⁶

4.51 Given that this broad judicial discretion in relation to actions involving personal injuries or death had been in place for many years, the Law Commission did not think it would be practical to remove this discretion with a narrower provision for discretion to apply only to certain restricted categories. Instead, the Law Commission favoured that section 33 be retained with only minimal changes being proposed, one such change being the addition of two further factors to the list of factors the court may consider under section 33(3).⁶⁷

(3) Scotland

4.52 Under section 19A of the *Prescription and Limitation (Scotland) Act 1973* the court has discretion to dis-apply the three year limitation period applicable to actions involving personal injuries (including personal injuries resulting in death), defamation, and harassment.⁶⁸ In its 2007 *Report on Personal Injury Actions: Limitation and Prescribed Claims*, the Scottish Law Commission noted that despite each case turning on its own facts, “judges have tended to develop similar approaches” to how

⁶² As already noted, plans to introduce the proposed reform of introducing a core limitations regime as recommended by the Law Commission of England and Wales in its 2001 Report *Limitation of Actions* appear to have been postponed indefinitely for the time being. In November 2009, Parliamentary Under-Secretary of State for Justice (Bridget Prentice) announced by way of ministerial statement that the proposed draft *Civil Law Reform Bill* would not include provisions to reform the law of limitation of actions.

⁶³ Law Commission *Limitation of Actions* (Law Com No. 270) 2001 at paragraph 3.159.

⁶⁴ *Ibid* at 3.165 and 3.169.

⁶⁵ *Ibid* at 3.160.

⁶⁶ *Ibid* at 3.161.

⁶⁷ *Ibid* at 3.165.

⁶⁸ Section 19A *Prescription and Limitation (Scotland) Act 1973*.

they approach the application of this discretion.⁶⁹ Thus concerns expressed upon the introduction of the discretion that it would lead to increasing uncertainty and inconsistency in how the courts apply this discretion, do not appear to have materialised.⁷⁰

4.53 The Scottish Commission noted that the main disadvantage of retaining this discretionary power was that it created uncertainty, but nevertheless, it noted that its main advantage is that of flexibility. It felt that it tempered the arbitrariness inherent in a time limit, “enabling actions to proceed where the limitation period is overshot by only a short period without any material impairment to the defender’s ability to resist the claim.”⁷¹

4.54 The Scottish Commission recommended that this judicial discretion to allow a time-barred action to proceed should be retained.⁷² However, it did also recommend that section 19A be amended to include a list of non-exhaustive factors which the court could have regard to in exercising its discretion in determining whether to allow a time-barred action to proceed.⁷³

(4) New Zealand

4.55 In the Consultation Paper, the Commission analysed the New Zealand *Limitation Bill* published in 2009.⁷⁴ This Bill underwent significant amendments, and was ultimately enacted as the *Limitation Act 2010*.⁷⁵ One of the amendments relates to the retention of judicial discretion. The commentary accompanying the amended Bill clearly states the rationale for this amendment:

“We appreciate that to give the courts a general discretion for claims for personal injuries caused by gradual process, disease, or infection (when the Accident Compensation Act does not prevent the making of, or the granting on relief in respect of, the claims) could create uncertainty and increase some insurance and record-keeping costs for defendants. However, we consider that in the interests of justice it would be appropriate to give the courts a discretion to allow monetary relief to be granted for a claim in relation to personal injury caused by gradual process, disease, or infection (when the Accident Compensation Act does not stop the claim being made or relief being granted). In applying this discretion the courts would have the flexibility to take into account the individual merits of a particular case and to balance the interests of all parties involved.”⁷⁶

4.56 This judicial discretion was also extended to cases involving abuse of a minor: “to give the court or tribunal the discretion to allow monetary relief to be granted in respect of a claim of sexual abuse of a minor, even when a limitation defence had been or could be established against the claim. We recommend amending clause 16 to cover claims of non-sexual abuse of a minor as these may have the same long-term effects as sexual abuse.”⁷⁷

⁶⁹ *Ibid* at 3.11.

⁷⁰ *Ibid* at 3.23.

⁷¹ *Ibid* at 3.18 - 3.19.

⁷² *Ibid* at 3.24.

⁷³ *Ibid* at 3.37.

⁷⁴ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 3.52 onwards.

⁷⁵ *Limitation Act 2010* (Public Act 2010 No. 110), accessible at http://www.legislation.govt.nz/act/public/2010/0110/latest/DLM2033120.html?search=ts_act_limitation_rese&p=1&sr=1

⁷⁶ Commentary’, Justice and Electoral Committee, *Limitation 33-2* (2009), Government Bill, accessible at <http://www.legislation.govt.nz/bill/government/2009/0033/latest/DLM3074500.html>

⁷⁷ Commentary’, Justice and Electoral Committee, *Limitation 33-2* (2009), Government Bill, accessible at <http://www.legislation.govt.nz/bill/government/2009/0033/latest/DLM3074500.html>

4.57 Thus, the New Zealand Parliament took the view in the 2010 Act that it would better serve the interests of justice if the judiciary were to retain a discretion to overlook the expiry of the ultimate limitation period and allow relief in specific cases involving personal injuries caused by “gradual process, disease or infection”, and also cases involving child abuse.

4.58 The 2010 Act goes on to set out a list of factors which the court “must take into account” in coming to its decision about whether or not to grant this discretionary relief to the statute-barred claimant. These factors include:

- (a) any hardship that would be caused to the defendant if the order were made, and any hardship caused to the claimant if the order were not made;
- (b) the length of and reasons for the delay on the claimant’s part;
- (c) the effects or likely effects of the delay on the defendant’s ability to defend the claim, and the cogency of the evidence offered or likely to be offered by the claimant or the defendant;
- (d) the defendant’s conduct on and after the date of the act or omission on which the claim is based;
- (e) the extent to which prompt and reasonable steps were taken by or on behalf of the claimant;
- (f) any steps taken by claimant to obtain relevant medical legal or other expert advice and the nature of any such expert advice received; and
- (g) any other matters the court considers relevant.⁷⁸

(5) Manitoba

4.59 The Manitoba Law Reform Commission published a Report in 2010, on the subject of the Province’s limitations legislation.⁷⁹ In relation to judicial discretion, the approach favoured was vastly different to the approach adopted in New Zealand, or England and Wales. It took quite a strict approach to the matter of judicial discretion.

4.60 The Manitoba Commission acknowledged the view that applying a strict ultimate limitation period leaves the Court without “the necessary flexibility within the limitations statute to alleviate what might be unnecessarily harsh results in individual circumstances”.⁸⁰ Nonetheless, the Manitoba Law Reform Commission made the following observations about the general approach to discretion within limitation regimes in Canada:

“None of the modern Canadian limitations regimes, however, have included such discretion. The general consensus in Canada appears to be that permitting courts to waive or extend limitations creates too much uncertainty. The comments of the Saskatchewan Department of Justice are typical: ‘Introduction of a substantial discretionary element would leave limitations law in an unpredictable state. Without a strong argument in favour of the use of discretion, this approach should be abandoned.’”⁸¹

4.61 The Manitoba Commission recommended that judicial discretion should not be retained to allow for the extension of a limitation period. The rationale for excluding such discretion was stated as follows:

“The Commission is not persuaded that there is sufficient reason to leave the court any residual discretion to extend a limitation where no proceeding has been commenced within the limitation. Permitting any discretion simply invites applications to extend, unnecessarily

⁷⁸ Section 18(a-g) *Limitation Act 2010* (Public Act 2010 No. 110).

⁷⁹ Manitoba Law Reform Commission *Limitations* (Report #123, July 2010).

⁸⁰ *Ibid* at section F(1) p. 40.

⁸¹ *Ibid* at section F(1) p. 40.

increasing both the burden on the courts and the cost and unpredictability of litigation. The potential difficulties created by such a provision are too great to make additional discretion desirable, and the flexibility built into the new limitations regime is sufficiently broad in any event.”⁸²

4.62 The Manitoba Commission felt that this strict approach was in line with other modern Canadian limitations regimes and recommended that a residual discretion in the court to extend a limitation should not be retained in the proposed limitations legislation.

(6) Advantages and disadvantages of Judicial Discretion

(a) Advantages

4.63 Generally speaking, this type of judicial discretion brings an element of flexibility to a limitations system, as it allows judges to balance the numerous factors in each unique case, and consider the balance of prejudice between both parties.

4.64 The Scottish Law Commission concluded in its Report of 2007 that discretion-based provisions could be employed by the courts without necessarily creating greater uncertainty or inconsistency. It stated that “several Inner House appellate decisions” gave rise to “a number of settled propositions”⁸³ which are summarised in the case of *B v Murray (No. 2)*⁸⁴. Thus there are a number of factors which the Scottish appellate courts consider relevant to the exercise of its judicial discretion, some of which include the following; where do the equities of the situation lie, the conduct of the plaintiff’s solicitor, and the conduct of the plaintiff since the accident which caused the injury.⁸⁵ In the view of the Scottish Law Commission, the result of this common approach was that:

“Although the very nature of an unfettered discretionary power means that the outcome of each case turns on its facts, judges have tended to develop similar approaches to some of the settled propositions mentioned above.”⁸⁶

4.65 A certain level of flexibility has the advantage of perhaps greater fairness overall, though it may create some uncertainty. It has the advantage of “tempering the arbitrariness inherent in a time limit, enabling actions to proceed where the limitation period is overshot by only a short period without any material impairment to the defender’s ability to resist the claim.”⁸⁷

⁸² Manitoba Law Reform Commission *Limitations* (Report #123, July 2010) at section F(1) p 41.

⁸³ *Ibid* at paragraph 3.9. See also Scottish Law Commission *Discussion Paper on Personal Injury Actions: Limitation and Prescribed Claims* February 2006 (Discussion Paper No. 132) at paragraph 3.9.

⁸⁴ *B v Murray (No. 2)* [2005] CSOH 70; 2005 SLT 982.

⁸⁵ In *B v Murray (No. 2)* 2005 SLT 982, Lord Drummond Young at paragraph [29], affirmed at [2007] CSIH 39, 2007 SLT 605 stated. “Section 19A has been the subject of considerable judicial discussion... A number of matters have been clearly established. First, the court has a general discretion under section 19A, the crucial question that must be considered has been stated to be ‘where do the equities lie?’... Secondly, the onus is on the pursuer to satisfy the court that it would be equitable to allow his claim to proceed... Thirdly, the conduct of a pursuer’s solicitor may be relevant to the exercise of the court’s discretion, and the pursuer must take the consequences of his solicitor’s actings... Fourthly, relevant factors that the court may take into account include, but are not restricted to, three matters... these are ‘(1) the conduct of the pursuer since the accident and up to the time of his seeking the Court’s authority to bring the action out of time, including any explanation for his not having brought the action timeously; (2) any likely prejudice to the pursuer if authority to bring the action out of time were not granted; and (3) any likely prejudice to the other party from granting authority to bring the action out of time’. Fifthly, each case ultimately turns on its own facts, a principle which applies even if a number of claimants present similar claims against the same person.”

⁸⁶ Scottish Law Commission *Report on Personal Injury Actions Limitation and Prescribed Claims* December 2007 (Scot Law Com No. 207) at paragraph 3.11.

⁸⁷ Scottish Law Commission *Report on Personal Injury Actions Limitation and Prescribed Claims* December 2007 (Scot Law Com No. 207) at 3.18.

(b) Disadvantages

4.66 The main disadvantage of judicial discretion is there will be a certain degree of uncertainty accompanying this kind of flexibility. This undermines the main aim of the limitations system, which is to give plaintiffs and defendants a degree of certainty in initiating and conducting claims. For defendants, this uncertainty can lead to higher insurance costs, because the liability they face is essentially open-ended. The defendant will remain unsure as to when he is able to safely dispose of records, and for long he should maintain insurance.

4.67 The very nature of a discretionary power means that it can be exercised differently in each case. How judicial discretion is applied depends upon a judge's perception of the balance of prejudice, and the equity of the situation, a viewpoint which can differ from the views of other judges. This leaves a large margin for variation between cases which could affect both plaintiffs and defendants.

(c) Conclusion

4.68 In the Consultation Paper, the Commission concluded that a general judicial discretion should not be retained within any proposed legislation to reform limitations law. The Commission agreed with the observations of the Alberta Institute that there was no need for judicial discretion in a regime which consisted of a short basic limitation period, a longer ultimate limitation period, and supplementary rules regarding postponement.

4.69 The Commission favoured the advantage of certainty as being the first and foremost consideration of any reform of the system. It was stated in the Consultation Paper that the Commission had "previously expressed the view that reliance on judicial discretion in the application of limitation law would result in unnecessary uncertainty, and it remains firmly of that view."⁸⁸

4.70 The Commission acknowledges, nonetheless, that an element of judicial discretion will always be present in any reformed system of limitations arising from the courts' constitutionally derived and inherent jurisdiction to regulate its proceedings. This element of judicial discretion will naturally impose an element of flexibility, in some respect uncertainty, to the proposed reforms. The Commission notes, however, that this discretion has been limited in application, in that it allows a court to dismiss a claim even where it is, strictly speaking, still within a limitation period, but that it has not been used to extend or disapply a limitation period. As discussed, this discretion consists of the courts' inherent jurisdiction to dismiss proceedings on the grounds of inordinate or inexcusable delay, or on the grounds of there being some sort of an abuse of process, even if the proceedings were brought within the relevant limitation period.

4.71 In this light and in assessing the overall impact of the core limitation regime being proposed, the Commission has ultimately concluded that there is a limited place for a second form of statutory-based discretion similar to that provided for in other jurisdictions, such as England and Wales, New Zealand, New South Wales, Victoria, and as proposed in Scotland.

4.72 *The Commission recommends that the proposed legislation governing limitations of actions should include a provision for a narrow statutory discretion to either extend or dis-apply the ultimate limitation period.*

(7) Limited nature of Statutory Discretion

4.73 The exercise of a narrow statutory discretion would essentially allow a limitation period to be extended beyond its expiry. It would be applicable in circumstances where a plaintiff has run out of time, and a defendant seeks to rely on a defence of the matter being statute-barred.

4.74 The Commission is of the view that his statutory discretion to extend an ultimate limitation period should be available in all types of actions covered in the scope of the proposed reforms. However, a list of statutory guidelines to assist the judiciary in applying this discretion will serve to ensure that this discretion is narrowly applied.

⁸⁸ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 6.114.

4.75 The Commission's recommendation of a 2 year basic limitation period commencing at the date of knowledge of the plaintiff reflects the current law of limitations in relation to personal injuries actions.⁸⁹ A substantial body of case law has developed around the interpretation and application of this limitation period, particularly as regards what is meant by knowledge and constructive knowledge. The Commission does not consider that there is any substantive need to modify the application of this basic limitation period, other than to broaden its scope of application to contract and tort actions generally. As a result, the Commission is not of the view that the proposed statutory discretion should be applied to the basic limitation period.

4.76 The Commission envisages that this statutory discretion would arise in the event of the plaintiff, with a claim, seeking to initiate proceedings after the expiry of the ultimate limitation period of 15 years, in circumstances where the defendant has raised the defence of the matter being statute-barred. It would seem probable that this statutory discretion would most commonly arise in cases involving an element of latent injury which resulted in the plaintiff not discovering their injury before the expiry of the 15 year ultimate limitation period, and where the defendant then pleads that the matter is statute-barred.

4.77 The Commission considers that the framework of these statutory guidelines should be constructed in such a way as to emphasise the overall guiding principles and objectives of the proposed new legislation. As clear from Chapter 1, the objectives of the proposed reforms are primarily twofold; firstly, to simplify and clarify existing limitations law, and secondly, to more effectively balance the interests and rights of the both the plaintiff and defendant as a result. The guiding principles underlying the proposed reforms relate to the balancing of competing rights and interests; those of the plaintiff, the defendant and the public interest. The plaintiff has the right of access to justice, and therefore the courts, while the defendant has the right to a speedy trial and fair procedures. It is also in the public interest that stale or delayed claims are avoided.⁹⁰

4.78 The Commission is aware that the inclusion of such discretion creates the risk of leading to a system of limitations whereby the 'exception' to the rule overwhelms the rule itself. The Commission is of the opinion that the application of carefully drafted statutory guidelines eliminates this risk by narrowly confining when this discretion should be considered by the courts. The statutory guidelines will also clearly emphasise that the question of the lapse of time, and its effect upon the claim, must always be of the utmost importance in considering the guidelines.

4.79 The Commission considers that this approach reflects the current judicial approach to discretion in relation to limitation of actions and the court's inherent jurisdiction to regulate its own proceedings, while still fitting in with the other proposed reforms in this Report.

4.80 However, the Commission is of the view that in exercising this statutory based judicial discretion to extend a limitation period, the court should have statutory guidance. This would provide that the discretion is to be exercised in exceptional circumstances only, and would include a non-exhaustive statutory list of factors which the court may consider in deciding whether it should exercise this discretion in favour of the plaintiff.

4.81 *The Commission recommends that the narrow statutory discretion be restricted in its application to exceptional circumstances and that, to assist the courts in exercising this discretion, a non-exhaustive list of factors to which the court must have regard before exercising this discretion should be included.*

⁸⁹ Section 3(1) *Statute of Limitations (Amendment Act) 1991* as amended by section 7 *Civil Liability and Courts Act 2004*.

⁹⁰ *Tuohy v Courtney* [1994] 3 IR 1, 47, in which the Supreme Court held that limitation periods involve a balancing of rights including "the interest of the public constituting an interest or requirement of the common good which is involved in the avoidance of stale or delayed claims."

(8) Specific Guidance for the Statutory Discretion

4.82 The Commission considers that this list of factors should be modelled on the statutory guidance provided for in England and Wales, New South Wales, Victoria, New Zealand, and as recommended in Scotland. In England and Wales, New South Wales, Victoria, and Scotland, this judicial discretion is limited to personal injuries actions, including personal injuries actions which have resulted in death. In New Zealand this discretion is limited to two specific instances of personal injuries claims, child abuse claims and claims involving latent injuries caused by gradual process, disease or infection.

(a) England and Wales Law Commission Recommendations

4.83 The Commission considers that the recommendations made by the Law Commission of England and Wales in relation to the statutory list of factors to be considered in exercising statutory judicial discretion are extremely clear and comprehensive. The list of factors recommended essentially consists of a re-enactment of the existing legislation, section 33 of the *Limitation Act 1980*, with one or two small changes. In England and Wales, there is no ultimate limitation period applicable to personal injuries actions, and thus this judicial discretion to dis-apply a limitation period refers merely to the basic limitation period running from the date of discoverability.

4.84 Firstly, the Law Commission recommended that as follows:

“... the court may direct that the limitation period which would otherwise bar the claimant’s claim shall be disapplied if, but only if, it is satisfied that it would be unjust not to give such a direction having regard to

(a) any hardship which would be caused to the defendant if the direction were given; and

(b) any hardship which would be caused to the claimant if the direction were not given.”⁹¹

4.85 In exercising the discretion to dis-apply, or extend the limitation period, the Law Commission recommended that the court should take account of the following factors. Those listed at (g) and (h) are the two additional factors recommended for insertion, the rest of the factors are similar to those already contained in section 33(3) of the *Limitation Act 1980*:

“The court shall take into account the following factors in the exercise of its discretion:

(a) The length of, and reasons for, the delay on the part of the plaintiff;

(b) The effect of the passage of time on the ability of the defendant to defend the claim;

(c) The effect of the passage of time on the cogency of any evidence which might be called by the claimant or the defendant;

(d) The conduct of the defendant after the cause of action arose, including the extent (if any) to which he or she responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant to the claim;

(e) The extent to which the claimant acted promptly and reasonably once he or she knew that the facts gave rise to a claim;

(f) The steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice he or she may have received;

(g) Any alternative remedy or compensation available to the claimant; and

(h) The strength of the claimant’s case.

⁹¹ Law Commission of England and Wales *Limitation of Actions* (Law Com. Report No. 270) at paragraph 3.169. This is similar in effect to section 33(1) of the *Limitation Act 1980* but a different formulation is used.

Section 33(1) states: “If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which (a) the provisions of section 11 (personal injuries) ... or 12 (fatal injuries) of this Act prejudice the plaintiff or any person whom he represents; and (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents; the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.”

In addition the court shall be empowered to consider any other relevant circumstances.”⁹²

4.86 It is worth noting that section 33(3)(d) of the *Limitation Act 1980* contains an additional factor: “the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action”. This was not included in the recommended list of guidelines by the Law Commission of England and Wales. The Commission’s approach in relation to postponement provisions, including adult and minor disability, is discussed in further detail in Part D, below.

(b) Scottish Law Commission recommendations

4.87 On the subject of whether or not a judicial discretion to allow a time-barred personal injuries action to proceed should be reformed, the Scottish Law Commission recommended that such a judicial discretion be retained in the current legislation.⁹³ However, it also recommended that the relevant legislative section be amended to include a list of factors to be considered by the court in applying its judicial discretion. The list of factors was largely identical to the list recommended by the Law Commission of England and Wales, which in turn was closely modelled on the current legislation in force in England and Wales in section 33(3) of the *Limitation Act 1980*.

4.88 The Scottish Commission also noted that it should be clearly stated in the list of factors that there should be no hierarchy between the listed factors.⁹⁴

4.89 The Commission is in agreement with the Scottish Commission as regards the purpose of a such a list of factors for consideration by the court:

“The purpose of a list of factors in a provision such as section 19A (the provision providing for the court to use its discretion to dis-apply a limitation period) is to provide clear and simple guidelines to aid practitioners in focusing their pleadings, evidence and arguments; that should assist the courts in performing their task of assessing whether the case before them warrants the exercise of the discretion. Our strong preference is for the listed guidelines to be as straightforward as possible.”⁹⁵

(c) New South Wales and Victoria

4.90 Limitation statutes in New South Wales and Victoria also contain guidelines similar to those contained in section 33(3) of the English *Limitation Act 1980*.⁹⁶ However, there are one or two additional factors included in the approaches of New South Wales (*Limitation Act 1969*) and Victoria (*Limitation of Actions Act 1958*).

4.91 In New South Wales, the list of relevant factors in section 62B to which the court can have consideration is as follows:

⁹² Law Commission of England and Wales *Limitation of Actions* (Law Com. Report No. 270, July 2001) at paragraph 3.169. Section 33(3) *Limitation Act 1980* is largely similar, with the only two new additional factors recommended by the Commission, the alternative remedy available to the claimant and the strength of the claimant’s case.

⁹³ Scottish Law Commission *Report on Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com No. 207, December 2007) at paragraph 3.24.

The legislative section in question is section 19A *Prescription and Limitation (Scotland) Act 1973*. It states that: “where a person would be entitled, but for any of the provisions of section 17 (actions in respect of personal injuries not resulting in death), 18 (actions where death has resulted from personal injuries) ... to bring an action, the court may, if it seems equitable to do so, allow him to bring the action notwithstanding that provision.”

⁹⁴ Scottish Law Commission *Report on Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com No. 207, December 2007) at paragraph 3.33.

⁹⁵ *Ibid* at 3.35.

⁹⁶ Section 62B *Limitation Act 1969* (No. 31) (New South Wales), section 27L *Limitation of Actions Act 1958* (No. 6295) (Victoria).

“(1) In exercising the powers conferred on it by section 62A, a court is to have regard to all the circumstances of the case, and (without affecting the generality of the foregoing), the court is, to the extent that they are relevant to the circumstances of the case, to have regard to the following:

- (a) the length of and reasons for the delay,
- (b) 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,
- (c) the nature and extent of the plaintiff’s injury or loss,
- (d) any conduct of the defendant that induced the plaintiff to delay bringing the action,
- (e) 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,
- (f) the time when the cause of action was discoverable (within the meaning of Division 6 of Part 2) by the plaintiff.”⁹⁷

4.92 One of the obvious differences between the approach of New South Wales and that of England is that New South Wales places emphasis upon the actual nature of the plaintiff’s injury or loss, and the extent of the injuries. This obviously allows for explicit consideration to be given to what are often termed ‘hard’ or ‘special’ cases, cases involving elements of latent injury or loss.

4.93 The time when the action was discoverable is also taken into consideration. It could be argued that this could guideline is already adequately covered by the common consideration of the length and reasons for delay, however; it would also cater for plaintiffs suffering with latent physical or psychological injuries who may have been very much unaware of their injuries until after the expiry of the ultimate limitation period, and who simply may not have been in a position to realise they were injured until the 12 year limitation period in question.

4.94 The conduct of the defendant in contributing to the plaintiff delaying the commencement of proceedings is also an unusual factor.

4.95 Amongst the list of factors set out in the legislation for Victoria, there are the standard factors regarding reasons for delay, the likelihood of prejudice to the defendant, the conduct of the plaintiff and so forth. However, there are also one or two additional factors, along with a further sub-section which highlights what the guidelines are to focus on. These are as follows:

- “(d) the duration of any disability or legal incapacity of the plaintiff arising on or after the date of discoverability;
- (e) the time within which the cause of action was discoverable...
- (2) To avoid doubt, the circumstances referred to in subsection (1) include the following-
 - (a) whether the passage of time has prejudiced a fair trial of the claim; and
 - (b) the nature and extent of the plaintiff’s loss; and
 - (c) the nature of the defendant’s conduct.”⁹⁸

4.96 The nature of the plaintiff’s loss, and its extent, is explicitly set out as a factor for consideration in these guidelines.

(d) Conclusion

4.97 Having considered the approach adopted in other jurisdictions, the Commission considers that a list of statutory guidelines should be included in the proposed limitations legislation, which would

⁹⁷ Section 62B *Limitation Act 1969* (No. 31) (New South Wales)

⁹⁸ Sections 27L(1) & (2) *Limitation of Actions Act 1958* (No. 6295) (Victoria)

provide guidance for the judiciary in deciding whether it is reasonable to extend the proposed ultimate limitation period of 15 years.

4.98 The Commission considers that the guidelines to be taken into account when exercising this discretion can be largely modelled on the recommendation proposed by the Law Commission of England and Wales, as discussed above. However, given that the England and Wales recommended guidelines contain a comprehensive list of factors dealing with any difficult cases that may arise, the Commission does not see the need to include a more general catch-all discretion which would allow the court “to consider any other relevant circumstances”.⁹⁹

4.99 Furthermore, the Commission considers that four additional features should be included, based on the variation in guidelines adopted in other jurisdictions.

4.100 Firstly, the Commission considers that in the application of this statutory discretion, the emphasis should be placed firmly upon the issue of time, and its effect upon the rights of the plaintiff and the defendant, and the court’s ability to oversee the administration of justice.

4.101 Therefore, the Commission is of the view that the court should be explicitly required to consider the overall lapse of time which has passed in the case since the date of the act or omission giving rise to the cause of the action and the initiation of proceedings. This requirement can be set out in a preliminary section preceding the guidelines. Reflecting the recommendation of the Law Commission of England and Wales, the preliminary section states that in exercising judicial discretion to extend or dis-apply an ultimate limitation period, the court must consider any hardship which could be caused to the plaintiff or defendant in extending or dis-applying the ultimate limitation period; additionally, the Commission considers that the court should also consider the lapse of time in the case and its impact upon the parties involved.

4.102 Secondly, the Commission considers that an additional factor should be included in the guidelines in relation to the nature and extent of the injury suffered. This is the approach adopted both by New South Wales and Victoria, as discussed above.

4.103 Thirdly, the Commission is of the view that explicit reference should be made to any possible incapacity issues which the plaintiff may have, that is, the duration of any incapacity of the plaintiff arising on or after the date of the act or omission giving rise to the cause of action due to either mental incapacity, or legal incapacity due to the plaintiff being under the age of 18. This is one of the factors specifically set out in the Victoria legislation¹⁰⁰, and also in the current English legislation¹⁰¹. In the respective legislation, it is formulated as the incapacity or disability of the plaintiff arising from two different dates, from the date of discoverability under the Victoria statute, and from the date of the accrual of the action under the English Act. This is due to the restriction of the scope of the judicial discretion under the respective legislation to specific categories of actions. As the Commission proposes to have the discretion apply to the expiry of the ultimate limitation period generally, the appropriate date from which to consider the plaintiff’s incapacity would be the commencement date of the ultimate limitation period, that is, the date of the act or omission in question giving rise to the cause of action.

4.104 Finally, it should be made clear in the guidelines, as recommended by the Scottish Commission, that there should be no hierarchy between the listed factors in the statutory guidelines.¹⁰²

4.105 *The Commission recommends that the statutory list of factors to which the court must have regard should be drafted as follows:*

⁹⁹ See paragraph 4.99 above. See further Law Commission of England and Wales *Limitation of Actions* (Law Com. Report No. 270, July 2001) at paragraph 3.169.

¹⁰⁰ Section 27L(1)(d) *Limitation of Actions Act 1958* (No. 6295) (Victoria)

¹⁰¹ Section 33(3)(d) *Limitation Act 1980*

¹⁰² Scottish Law Commission *Report on Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com No. 207, December 2007) at paragraph 3.33.

“The court may direct that the ultimate limitation period which would otherwise bar the plaintiff’s claim shall be dis-applied if, but only if, the court is satisfied that because of exceptional circumstances it would be unjust not to give such a direction having regard to

(a) any hardship which would be caused to the defendant if the direction were given;

(b) any hardship which would be caused to the plaintiff if the direction were not given;
and

(c) the overall lapse of time between the date of the act or omission giving rise to the cause of action, and initiation of proceedings, and the impact which this lapse of time may have upon the rights of both the plaintiff and the defendant.

In considering whether or not to exercise its discretion in such circumstances, the court must have regard to all of the circumstances of the case and in particular any of the following (where relevant):

(a) The length of, and reasons for, the delay on the part of the plaintiff;

(b) The effect of the passage of time on the ability of the defendant to defend the claim;

(c) The effect of the passage of time on the cogency of any evidence which might be called by the plaintiff or the defendant;

(d) The conduct of the defendant after the cause of action arose, including the extent (if any) to which he or she responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the claim;

(e) The extent to which the plaintiff acted promptly and reasonably once he or she knew that the facts gave rise to a claim;

(f) The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he or she may have received;

(g) Any alternative remedy or compensation available to the plaintiff;

(h) The strength of the plaintiff’s case;

(i) The absence of any legal capacity or mental capacity on the part of the plaintiff arising on or after the date of the act or omission giving rise to the cause of action;

(j) Any conduct of the defendant that induced the plaintiff to delay bringing the action;

(k) The nature and extent of the plaintiff’s injury (including whether it was latent).”

D Retention of the Postponement Provisions in the 1957 Statute

4.106 In this Part, the Commission considers whether the existing postponement provisions in Part III of the *Statute of Limitations 1957* need to be retained, particularly in the light of the statutory discretion recommended in Part C, above. Part III of the *Statute of Limitations 1957* currently regulates exceptions to the running of a limitation period, which suspend, postpone, or extend the limitation period. Thus, in circumstances where the statutory limitation period has expired under the general rules of limitation, the plaintiff could still be entitled to commence an action by proving that the cause of action has been kept alive by falling into one of the exceptions:

- (i) The plaintiff has a disability which prevented them from taking the action within the limitation period;
- (ii) There was acknowledgement or part-payment by the defendant;
- (iii) There was fraud or concealment on the part of the defendant; or,
- (iv) The plaintiff missed the expiry of a limitation period due to the consequences of a mistake.

(1) The plaintiff’s ‘disability’

4.107 It is generally accepted that the limitation period will not run if the plaintiff is not in a position to make a reasonable judgement with respect to his or her position during the limitation period in question. This is because limitations law intends to operate only when a person has the capacity to determine

whether to commence proceedings during the relevant period. In such cases, the general principle has been that the 'date of accrual' test is side-stepped.

4.108 Under section 48(1) of the *Statute of Limitations 1957*, as amended, there are two categories¹⁰³ of persons described as being under a disability:

- (a) an infant, that is, a person under 18; and
- (b) a person "of unsound mind" (this term relates to the current wardship system regulated under the *Lunacy Regulation (Ireland) Act 1871*, and does not take account of proposals to reform the law on mental capacity and adult guardianship, discussed below).

4.109 As a preliminary point,¹⁰⁴ the Commission reiterates its previous recommendation that the term "disability" is no longer an appropriate term to use in modern limitations legislation and should be replaced by the term "person whose legal capacity may be limited or absent."¹⁰⁵ This which should refer to specific instances, in particular that an individual is under the age of 18 (a minor) or that the mental capacity of a person over 18 may be limited or absent. In the context of limitations legislation, the issue of mental capacity may be relevant, for example, in connection with whether the decision-making capacity of a person over 18 may have been affected by sexual or physical abuse when the person was a child. In the context of a corporate entity, "legal capacity" refers to whether the corporate entity has the ability to enter in certain transactions, such an initiating litigation, and whether certain individuals (such as a director) are authorised to initiate proceedings on its behalf.

4.110 *The Commission recommends that the term "disability" should not form part of a modern limitations regime and should be replaced by the term "person whose legal capacity may be limited or absent," which should refer to specific instances, including that an individual is under the age of 18 (a minor) or that the mental capacity of a person over 18 may be limited or absent.*

(a) "Disability": The General Rule

4.111 Currently, the general rule is that where a plaintiff is under a legal 'disability' or incapacity on the date of accrual or the date of knowledge of the cause of action, the running of the limitation period is postponed and commences only when the plaintiff ceases to be under a disability or dies. In this respect, it is misleading to use the expression 'postponement', as the plaintiff in fact has 6 years from the date he or she ceases to be under a disability in which to commence his action.¹⁰⁶ For example, where the plaintiff is an "infant", that is, a person under the age of 18, on the date of accrual, the limitation period is suspended until their 18th birthday, and will run from that date for 6 years. They will therefore have until their 24th birthday to commence proceedings.

4.112 This 6 year post-disability limitation period does not apply in a number of situations¹⁰⁷ while other types of actions also use different post-disability limitation periods. For example, a two year post-

¹⁰³ As enacted, section 48(1)(c) contained a third category of persons under a disability, "convicts." This referred to convicted persons who were sentenced to penal servitude and who, under the *Forfeiture Act 1870*, forfeited or had restrictions placed on certain civil freedoms (such as the freedom to institute proceedings). The 1870 Act was repealed by the *Criminal Law Act 1997* (which also abolished the distinction between felonies and misdemeanours) and, as a consequence, section 48(1)(c) was also repealed by the 1997 Act.

¹⁰⁴ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 8.15.

¹⁰⁵ In 2001, the Commission recommended that the term be replaced with a wider concept incorporating "adult incapacity" and infancy. See Law Reform Commission *Report on the Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001) at paragraph 7.07.

¹⁰⁶ Section 49(1)(a) *Statute of Limitations 1957*.

¹⁰⁷ For example, under section 9 of the *Civil Liability Act 1961*, actions against the estate of a deceased are subject to a fixed limitation period of two years from date of death, and under section 49(1)(d) of the *Statute of Limitations 1957* certain land-related actions are subject to an ultimate limitation period of 30 years from the date of accrual. See Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraphs 8.18-8.22.

disability limitation period for personal injuries and wrongful death actions¹⁰⁸, and a three year post-disability limitation period for malicious injuries claims.¹⁰⁹

4.113 There are numerous exceptions to the general exception of the “disability” rule. The Commission remains of the view that this creates confusion in an already complex area of limitation.

(b) Persons who are incapable of managing their affairs

4.114 Section 48(1)(b) of the *Statute of Limitations 1957* provides for an ‘extension’ of the limitation period in circumstances where the plaintiff is incapable of managing their own affairs due to their state “of unsound mind”.

4.115 Section 48(2) gave an unhelpful example of what kind of person could fall into this category of ‘unsound mind’ by stating, without prejudice to the general meaning of the phrase, that:

“a person shall be conclusively presumed to be of unsound mind while he is detained in pursuance of any enactment authorising the detention of persons of unsound mind or criminal lunatics.”¹¹⁰

4.116 The Commission previously¹¹¹ expressed its dissatisfaction with this concept of ‘unsoundness of mind’ on the basis that it is antiquated in nature. Thus, the Commission previously recommended the widening of the concept to persons who are incapable of managing their affairs by reason of limited capacity.¹¹²

4.117 The Commission is greatly concerned that the effect of the current postponement rules is that where the plaintiff is incapacitated, the defendant is open to claims for an indefinite period, with all of the associated costs and risks that this entails. Difficulties created by such an indefinite postponement include a heightened risk that the evidence will have deteriorated with the consequent danger of an unfair trial, and increased insurance costs.¹¹³

4.118 The Commission questions the need for retaining the approach of applying postponement provisions to those incapable of managing their affairs, in light of the proposed new limitations regime incorporating a basic and an ultimate limitation period. This proposed regime would aim to provide a greater balance between the plaintiff’s and defendant’s interests.

4.119 To ensure maximum fairness and certainty within the proposed regime, the Commission is keen to ensure that there are as few exceptions as possible to the three main pillars of reform (a two year basic limitation period, a 15 year ultimate limitation period and a narrow statutory discretion to extend the ultimate limitation period), and therefore separate categories of plaintiffs requiring different treatment for limitation purposes should not be retained, for example, a category for those who are incapable of managing their own affairs.

(c) Effect of proposed mental capacity legislation

4.120 The use of the term “person of unsound mind” relates to the current wardship system regulated under the *Lunacy Regulation (Ireland) Act 1871*, and does not take account of proposals to reform the law

¹⁰⁸ Section 5(1) *Statute of Limitations (Amendment) Act 1991* as amended by section 7(c) *Civil Liability and Courts Act 2004*.

¹⁰⁹ Section 23(3) *Malicious Injuries Act 1981*.

¹¹⁰ Section 48(2) *Statute of Limitations 1957*. This is expressed to be without prejudice to the generality of the phrase.

¹¹¹ See generally Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) and *Report on Vulnerable Adults and the Law* (LRC 83-2006).

¹¹² Law Reform Commission *Report on the Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001) at paragraphs 7.08 - 7.13.

¹¹³ Law Reform Commission *Report on the Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001) at paragraph 7.21.

on mental capacity and adult guardianship. In its 2006 *Report on Vulnerable Adults and the Law*,¹¹⁴ the Commission recommended the replacement of the wardship system with modern mental capacity and adult guardianship legislation that would be consistent with the 2006 UN Convention on the Rights of Persons with Disabilities. In this respect, the Commission welcomes the commitment of the Government to publish a *Mental Capacity Bill* in 2012.¹¹⁵

4.121 In the light of these developments, the Commission had provisionally recommended in the Consultation Paper that the proposed limitations regime should not allow for any exception to the running of either the basic or the ultimate limitation period in the event that the plaintiff is an adult whose mental capacity is limited or who lacks mental capacity.¹¹⁶ This was because the proposed mental capacity legislation had the potential to afford a suitable level of protection to those with limited mental capacity, and that there was no consequent need to carry over the current rules governing postponement into the new proposed regime.

4.122 The Commission generally remains of this view that, in light of the proposed mental capacity legislation there will no longer be a need for the current ‘postponement’ provisions to be carried over. Nonetheless, the Commission is conscious that the proposed mental capacity legislation may not be enacted for some time. In addition, in the specific context of limitations legislation, the issue of mental capacity may be relevant, for example, in connection with whether the decision-making capacity of a person over 18 was affected by sexual or physical abuse when the person was a child, including the dominating influence of the perpetrator of such abuse (sometimes referred to as the issue of “dominion” in the case law on child sexual abuse). This was, indeed, the basis for the enactment of the *Statute of Limitations (Amendment) Act 2000*, and the Commission considers that this specific aspect of mental capacity should be taken into account in the proposed core limitations regime. In that respect, the Commission has concluded, and so recommends, that the proposed narrow statutory discretion providing for the extension of the ultimate limitation period in exceptional circumstances should include a specific reference to a person whose mental capacity may be limited, including by reference to child sexual or physical abuse.

4.123 *The Commission recommends that the proposed narrow statutory discretion providing for the extension of the ultimate limitation period in exceptional circumstances should include a specific reference to a person whose mental capacity may be limited, including by reference to child sexual or physical abuse.*

(d) Persons who are under 18 years of age

4.124 As for persons under the age of 18 years, generally they have 6 years in which to commence proceedings running from the person’s 18th birthday.¹¹⁷ The Commission accepts that, in general, the interests of children and young persons under 18 are for the most part dealt with by their parents or guardians. In this respect, the Commission considers that the current disability provisions for those under 18 may provide too much protection for the plaintiff, potentially at the expense of the defendant.¹¹⁸

4.125 In the Consultation Paper, the Commission provisionally recommended that “the proposed limitations regime should not allow for any exception to the running of either the basic or the ultimate limitation period in the event that the plaintiff is under the age of 18 and is in the custody of a competent

¹¹⁴ *Report on Vulnerable Adults and the Law* (LRC 83-2006).

¹¹⁵ The *Programme for Government 2011-2016* (March 2011), p.38, available at www.taoiseach.ie, contains a commitment to “introduce a Mental Capacity Bill that is in line with the UN Convention on the Rights of Persons with Disabilities.” The Government Legislation Programme, Autumn Session 2011 (September 2011), available at www.taoiseach.ie, states that the Mental Capacity Bill is scheduled for publication in 2012.

¹¹⁶ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 8.46.

¹¹⁷ Section 49(1)(a) *Statute of Limitations 1957*

¹¹⁸ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 8.51.

parent or guardian who is conscious of his or her responsibilities and is capable of commencing proceedings on behalf of the plaintiff.”¹¹⁹

4.126 The Commission acknowledged that this had the potential to create unfairness in a small number of cases involving those under 18. The Commission also stated that it did not wish to recommend reform which would have the effect of penalising those who are most vulnerable in society. With this concern in mind, the Commission provisionally recommended “the introduction of a residual discretion on the part of the courts, exercisable in exceptional cases and subject to the interests of justice, to allow proceedings to be commenced by a plaintiff who had not reached the age of 18 before the expiry of the ultimate limitation period.”¹²⁰ The Commission has therefore concluded that in light of the statutory discretion to extend or dis-apply the 15 year ultimate limitation period in exceptional circumstances, the proposed limitation regime need not provide for a specific exception to the running of either the basic or ultimate limitation period in the event that the plaintiff is under the age of 18. This is on the basis, however, that the person under 18 was in a family setting where a competent parent or guardian was conscious of his or her responsibilities and was capable of commencing proceedings on behalf of the person under 18.

4.127 The Commission therefore recommends that the legislation should provide that, in respect of a person who was under the age of 18, and who was in the custody of a parent or guardian, the parent or guardian should be presumed competent and presumed to be conscious of his or her responsibilities and therefore capable of commencing proceedings on behalf of such a potential plaintiff.

4.128 *The Commission recommends that the legislation should provide that, in respect of a person who was under the age of 18, and who was in the custody of a parent or guardian, the parent or guardian should be presumed competent and presumed to be conscious of his or her responsibilities and therefore capable of commencing proceedings on behalf of such a potential plaintiff.*

(2) Acknowledgement and Part-Payment

4.129 Sections 50 to 60 of the *Statute of Limitations 1957* govern the impact of acknowledgements on the running of limitation periods, while sections 61 to 70 govern part-payments. The current rule is that even if a cause of action has already accrued, it will be deemed to have accrued afresh on the date of acknowledgement or part payment by the defendant, but only in respect of specified actions according to the rules set out.¹²¹

4.130 Under the *Statute of Limitations 1957*, the acknowledgement by the defendant of a debt owed to the plaintiff may re-start the running of the limitation period. Acknowledgement is not defined but certain formal requirements are set out in order for an acknowledgement to restart the limitation period, namely it must be made in writing and signed by the acknowledgeor. A part-payment is a form of acknowledgement where the right of action is in respect of a debt and the acknowledgement takes the form of conduct rather than words.

4.131 The current rules applicable to acknowledgements apply only to certain actions: actions to recover land (section 51 of the *Statute*); actions by mortgagees to recover land (section 52); actions by mortgagees claiming sale of land (section 53); actions by mortgagors to redeem land (section 54); actions in respect of private rights in or over land (section 55); actions to recover debt (section 56); actions to recover mortgage debt (section 56(2)); and actions claiming a share or interest in the personal estate of a deceased person (section 57).¹²²

4.132 The current rules applicable to part payments apply also to certain actions only: actions by mortgagees to recover land (section 62); actions by mortgagees claiming sale of land (section 63);

¹¹⁹ *Ibid* at paragraph 8.53.

¹²⁰ *Ibid* at paragraph 8.66.

¹²¹ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 8.69.

¹²² Part 10 (Sections 89-114) of the *Land and Conveyancing Law Reform Act 2009* has introduced substantial simplification and modernisation of the law concerning mortgages, notably that a mortgage no longer forms part of the title to land but is a registrable debt.

actions by mortgagors to redeem land (section 64)¹²³; actions to recover debt (section 65); and actions claiming a share or interest in the personal estate of a deceased person (section 66).

4.133 The rationale for the rules on acknowledgement and part payment recognise that, without these rules, a debtor could lead a creditor to believe that the debt would be paid in full, while making part payments or acknowledging the debt, while all the while, the debtor is simply waiting for the limitation period to expire.¹²⁴

4.134 In the Consultation Paper, the Commission considered that the introduction of a general discoverability (date of knowledge) test for the commencement of a basic limitation period would render it unnecessary for limitations law to provide additional protection to the plaintiff in the event of an acknowledgment or part payment by the defendant. The date of knowledge test is based on the plaintiff having all the knowledge required on a particular date to bring proceedings, and that as a result the plaintiff should be required to bring proceedings within a set period after this date. It would, therefore, be illogical to suggest that the date of knowledge of the plaintiff would somehow re-occur at a date after the fulfilment of these conditions by reason of the defendant's acknowledgment or part payment.¹²⁵

4.135 As to acknowledgements, or part payments, the Commission provisionally recommended that "an acknowledgement or part payment should have no impact on the running of either the basic or ultimate limitation period."¹²⁶ The Commission remains of this view.

4.136 *The Commission recommends that an acknowledgement or part-payment should not trigger the running of either the basic or ultimate limitation period.*

(3) Fraud

4.137 Section 71(1)(b) of the *Statute of Limitations 1957* provides that a limitation period does not run if the action is based on the fraud of the defendant, or the right of action is concealed by the fraud of the defendant. The limitation period only begins to run when the plaintiff has discovered the fraud or could with reasonable diligence have discovered it.

4.138 In its 2001 *Report on the Statutes of Limitation: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)*,¹²⁷ the Commission recommended that the principle in section 71(1)(b) be retained alongside the proposed reform to introduce a discoverability rule in latent damage actions (excluding personal injuries). The Commission had concerns that the date of discoverability of an action, which has been fraudulently concealed, might not always coincide with the date of discoverability of the resulting loss.¹²⁸

4.139 In the *Consultation Paper on Limitation of Actions*,¹²⁹ the Commission considered that if the date of knowledge/discoverability test is carefully formulated, the plaintiff will be required to bring proceedings only where they are deemed to have requisite knowledge to do so. Thus it would be immaterial that the defendant sought by fraud to conceal the cause of action in terms of the commencement of proceedings as only the plaintiff's state of knowledge is relevant. However, any attempt to fraudulently conceal a cause of action would be taken into consideration by the court.

4.140 The Commission provisionally recommended that "the concept of postponement in circumstances where the action is based on the fraud of the defendant or the defendant has fraudulently

¹²³ Section 58(1) *Statute of Limitations 1957*.

¹²⁴ Canny, *Limitation of Actions* (Round Hall, 2010) at paragraph 11.02.

¹²⁵ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 8.77.

¹²⁶ *Ibid* at paragraph 8.79.

¹²⁷ Law Reform Commission *Report on the Statutes of Limitation: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 64-2001) at paragraph 7.50.

¹²⁸ *Ibid* at paragraph 7.42.

¹²⁹ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 8.87.

concealed the cause of action from the plaintiff should not be incorporated into a new limitations regime which includes a discoverability test of general application".¹³⁰ The Commission remains of this view.

4.141 There is also an added protection in light of the final recommendation in this Report that the courts retain a narrow statutory discretion to extend or dis-apply the 15 year ultimate limitation period in exceptional circumstances.

4.142 *The Commission recommends that, having regard to the inclusion of a discoverability test of general application and of the limited discretion to dis-apply the ultimate limitation period, there is no need to include a provision for postponement of the limitation period where the action is based on the fraud of the defendant or the defendant has fraudulently concealed the cause of action from the plaintiff.*

(4) Mistake

4.143 Section 72 of the *Statute of Limitations 1957* provides a limited defence of mistake which suspends the running of the limitation period until the plaintiff has discovered the mistake, or could, with reasonable diligence, have discovered it. The defence is limited in nature as the mistake must be part of the cause of action, for example, in an action for rectification of a deed, or an action to recover money paid under mistake of fact.

4.144 In the Consultation Paper, the Commission provisionally recommended that "the defence of mistake should not be incorporated into a core limitations regime which includes a discoverability test of general application."¹³¹ The Commission considered that there was no longer a need for a limitation defence of mistake.

4.145 The Commission remains of the view that a basic limitation period utilising a general date of knowledge test for commencement would mean that the protection provided by section 72 of the 1957 Statute is rendered obsolete. The protection afforded to plaintiffs under section 72 is automatically incorporated into the proposed reformed limitations regime by virtue of the application of the date of knowledge test.

4.146 *The Commission recommends that, having regard to the inclusion of a discoverability test of general application, there is no need to include a provision for the postponement of the limitation period arising from the mistake of the plaintiff.*

¹³⁰ *Ibid* at paragraph 8.89.

¹³¹ Law Reform Commission *Consultation Paper on Limitation of Actions* (LRC CP 54-2009) at paragraph 8.92.

CHAPTER 5 SUMMARY OF RECOMMENDATIONS

The recommendations made by the Commission in this Report are as follows.

5.01 The Commission recommends that since the principal legislation governing limitation of actions, the *Statute of Limitations 1957* (as amended), is unnecessarily complex, it is in need of fundamental reform and simplification. [paragraph 1.21]

5.02 The Commission recommends that the scope of the proposed reforms to limitations legislation in this Report should deal with the most commonly litigated civil claims, often referred to as the “common law” actions, namely, claims concerning: (a) contracts (including debt-related claims), (b) quasi-contract (sometimes referred to as claims for restitution); (c) torts (that is, non-contractual obligations, but not defamation claims, for which the Oireachtas has enacted a specific limitation rule in the *Defamation Act 2009*); (d) personal injuries actions claiming damages for negligence, nuisance or breach of duty; and (e) wrongful detention or conversion of an item or chattel. [paragraph 1.31]

5.03 The Commission recommends that the law governing limitation of actions must ensure that a balance is struck between the competing rights of the plaintiff and the defendant, as well having regard to the public interest; in particular the right of the plaintiff of access to the courts and the right to litigate, the right of the defendant to a speedy trial and to fair procedures, as well as the public interest in the avoidance of delayed claims and the timely administration of justice. [paragraph 1.85]

5.04 The Commission recommends the introduction of a limitations law based on the model of a “core limitation regime”, comprising: a uniform basic limitation period, a uniform commencement date; and a uniform ultimate limitation period, and which would apply to the types of claims discussed in this Report. [paragraph 1.131]

5.05 The Commission recommends the introduction of a uniform basic limitation period, which would apply to the common law actions as defined in this Report. [paragraph 2.10]

5.06 The Commission recommends the introduction of a 2 year basic limitation period, which would apply to the common law actions as defined in this Report. [paragraph 2.18]

5.07 The Commission recommends that the basic limitation period should run from the date of knowledge of the plaintiff, and that the date of knowledge should be calculated by reference to the date on which the plaintiff first knew, or ought reasonably to have known, the following:

- (a) that the injury, loss, or damage had occurred;
- (b) that the injury, loss, or damage is attributable to the conduct of the defendant;
- (c) that the injury, loss, or damage warrants bringing proceedings, assuming liability on the part of the defendant;
- (d) the identity of the defendant; and
- (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant. [paragraph 2.67]

5.08 The Commission recommends that determining a person’s knowledge under the ‘date of knowledge test’ for the commencement of the basic limitation period should include both actual and constructive knowledge. [paragraph 2.68]

5.09 The Commission recommends that constructive knowledge should be knowledge that a person might reasonably have been expected to acquire from facts observable or ascertainable by him or her, or from facts ascertainable by him or her with the help of professional expert advice. [paragraph 2.69]

5.10 The Commission recommends that the plaintiff should be considered to have constructive knowledge of the relevant facts when he or she, in his or her circumstances, ought reasonably to have known of the relevant facts. [paragraph 2.70]

5.11 The Commission recommends that the test for determining the date of discoverability should be based on the test in *section 2(1) of the Statute of Limitations (Amendment) Act 1991*. The Commission therefore recommends that the start date for the commencement of the 2 year basic limitation period applicable to the common law actions as already defined in this Report should include actual and constructive knowledge and be stated in the following manner:

“The commencement date of the basic limitation period consists of the date of knowledge of the person (whether he or she is the person injured or a personal representative or dependant of the person injured), and meaning the date on which the person first knew, or ought reasonably to have known in the circumstances, of the following facts:

- (a) That the injury, loss or damage had occurred;
- (b) That the injury, loss or damage in question warrants the bringing of proceedings against the defendant;
- (c) That the injury, loss or damage, was attributable in whole or in part to the act or omission of the defendant which is alleged to constitute negligence, nuisance, or breach of duty or otherwise give rise to a claim;
- (d) the identity of the defendant, and
- (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant,

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.” [paragraph 2.71]

5.12 The Commission also recommends that the definition of constructive knowledge in sections 2(2) and 2(3) of the *Statute of Limitations (Amendment) Act 1991* should be applied, using the following formula:

“Constructive knowledge is knowledge that a person might reasonably have been expected to acquire either:

- (a) from facts observable or ascertainable by him or her; or
- (b) from facts ascertainable by him or her with the help of medical or other appropriate expert advice which it is reasonable for him or her to seek.

Notwithstanding this:

- (a) a person will not be fixed with knowledge of a fact ascertainable only with the help of expert advice so long as he or she has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice; and
- (b) a person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he or she has failed to acquire as a result of that injury.” [paragraph 2.72]

5.13 The Commission recommends the introduction of a uniform ultimate limitation period, which would apply to the common law actions as defined in this Report. [paragraph 3.18]

5.14 The Commission recommends the introduction an ultimate limitation period of 15 years duration. [paragraph 3.31]

5.15 The Commission recommends that the ultimate limitation period should run from the date of the act or omission giving rise to the cause of action. [paragraph 3.63]

5.16 The Commission recommends that the ultimate limitation period should apply to personal injuries actions. [paragraph 3.86]

5.17 The Commission recommends that the proposed limitations legislation recommended in this Report should include an express statement that it is without prejudice to any power of a court to dismiss an action on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal, or for inordinate, inexcusable and prejudicial delay, or for abuse of process or the vexatious nature of the claim. [paragraph 4.40]

5.18 The Commission recommends that the proposed legislation governing limitations of actions should include a provision for a narrow statutory discretion to either extend or dis-apply the ultimate limitation period. [paragraph 4.72]

5.19 The Commission recommends that the narrow statutory discretion be restricted in its application to exceptional circumstances and that, to assist the courts in exercising this discretion, a non-exhaustive list of factors to which the court must have regard before exercising this discretion should be included. [paragraph 4.81]

5.20 The Commission recommends that the statutory list of factors to which the court must have regard should be drafted as follows:

“The court may direct that the ultimate limitation period which would otherwise bar the plaintiff’s claim shall be dis-applied if, but only if, the court is satisfied that it would be unjust not to give such a direction having regard to

- (a) any hardship which would be caused to the defendant if the direction were given;
- (b) any hardship which would be caused to the plaintiff if the direction were not given; and
- (c) the overall lapse of time between the date of the act or omission giving rise to the cause of action, and initiation of proceedings, and the impact which this lapse of time may have upon the rights of both the plaintiff and the defendant.

In considering whether or not to exercise its discretion in such circumstances, the court must have regard to all of the circumstances of the case and in particular any of the following (where relevant):

- (a) The length of, and reasons for, the delay on the part of the plaintiff;
- (b) The effect of the passage of time on the ability of the defendant to defend the claim;
- (c) The effect of the passage of time on the cogency of any evidence which might be called by the plaintiff or the defendant;
- (d) The conduct of the defendant after the cause of action arose, including the extent (if any) to which he or she responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the claim;
- (e) The extent to which the plaintiff acted promptly and reasonably once he or she knew that the facts gave rise to a claim;
- (f) The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he or she may have received;
- (g) Any alternative remedy or compensation available to the plaintiff;
- (h) The strength of the plaintiff’s case;
- (i) The absence of any legal capacity or mental capacity on the part of the plaintiff arising on or after the date of the act or omission giving rise to the cause of action;
- (j) Any conduct of the defendant that induced the plaintiff to delay bringing the action;
- (k) The nature and extent of the plaintiff’s injury (including whether it was latent).”
[paragraph 4.105]

5.21 The Commission recommends that the term “disability” should not form part of a modern limitations regime and should be replaced by the term “person whose legal capacity may be limited or absent,” which should refer to specific instances, including that an individual is under the age of 18 (a minor) or that the mental capacity of a person over 18 may be limited or absent. [paragraph 4.110]

5.22 The Commission recommends that the proposed narrow statutory discretion providing for the extension of the ultimate limitation period in exceptional circumstances should include a specific reference to a person whose mental capacity may be limited, including by reference to child sexual or physical abuse. [paragraph 4.123]

5.23 The Commission recommends that the legislation should provide that, in respect of a person who was under the age of 18, and who was in the custody of a parent or guardian, the parent or guardian should be presumed competent and presumed to be conscious of his or her responsibilities and therefore capable of commencing proceedings on behalf of such a potential plaintiff. [paragraph 4.128]

5.24 The Commission recommends that an acknowledgement or part-payment should not trigger the running of either the basic or ultimate limitation period. [paragraph 4.136]

5.25 The Commission recommends that, having regard to the inclusion of a discoverability test of general application and of the limited discretion to dis-apply the ultimate limitation period, there is no need to include a provision for postponement of the limitation period where the action is based on the fraud of the defendant or the defendant has fraudulently concealed the cause of action from the plaintiff. [paragraph 4.142]

5.26 The Commission recommends that, having regard to the inclusion of a discoverability test of general application, there is no need to include a provision for the postponement of the limitation period arising from the mistake of the plaintiff. [paragraph 4.146]

DRAFT LIMITATIONS BILL 2011

ARRANGEMENT OF SECTIONS

Section

1. Short title and commencement
2. Interpretation
3. Guiding rights and interests
4. Basic limitation period
5. Ultimate limitation period
6. Discretion to extend or disapply ultimate limitation period in exceptional circumstances
7. Jurisdiction of court to dismiss claim
8. No effect on other civil claims

ACTS REFERRED TO

Defamation Act 2009

2009, No.31

Statutes of Limitations

DRAFT LIMITATIONS BILL 2011

BILL

entitled

AN ACT TO PROVIDE FOR A DEFENCE TO CERTAIN CIVIL CLAIMS THAT HAVE BEEN INITIATED BEYOND SPECIFIED LIMITATION PERIODS; TO REFORM THE LAW CONCERNING LIMITATION PERIODS; AND TO PROVIDE FOR RELATED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Short title and commencement

1.—(1) This Act may be cited as the Limitations Act 2011.

(2) This Act comes into operation on such day or days as the Minister for Justice and Equality may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

Explanatory Note

This is a standard section setting out the Short Title and commencement arrangements.

Interpretation

2.— In this Act, unless the context otherwise requires—

“civil claim” means a claim—

(a) founded on simple contract, or

(b) founded on quasi-contract, or

(c) founded on tort (other than a defamation action under the Defamation Act 2009), or

(d) claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision), or

(e) arising from the wrongful detention or conversion of an item or chattel;

“the Minister” means the Minister for Justice and Equality;

“the person who initiates the claim” includes the person who has suffered the injury, loss or damage at issue in the claim or, where relevant, a personal representative or dependant of that person.

Explanatory Note

The definition of civil claim implements the recommendation in paragraph 1.31 of the Report that the core limitation regime should apply to the most commonly litigated civil claims, often referred to as the “common law” actions, namely, claims concerning: (a) contracts (including debt-related claims), (b) quasi-contract (sometimes referred to as claims for restitution); (c) torts (that is, non-contractual obligations, but not defamation claims, for which the Oireachtas has recently enacted a specific limitation rule in the *Defamation Act 2009*); (d) personal injuries actions claiming damages for negligence, nuisance or breach of duty; and (e) wrongful detention or conversion of an item.

Guiding rights and interests

3.—Every person concerned in the application of this Act shall have regard to the following guiding rights and interests—

- (a) the right of a person initiating a civil claim to litigate and of access to the courts,
- (b) the right of the person against whom a claim is initiated to have the claim heard within a reasonable period and to fair procedures, and
- (c) the public interest in the avoidance of delayed claims and the timely administration of justice.

Explanatory Note

This section implements the recommendation in paragraph 1.85 on the guiding rights and interests to be applied in the legislation on limitation periods.

Basic limitation period

4.—(1) A civil claim to which this Act applies shall not be brought after the expiration of the basic limitation period, that is, 2 years from the date of knowledge of the person who initiates the claim.

(2) The basic limitation period begins on the date of knowledge of the person who initiates the claim.

(3) The date of knowledge is the date on which the person first knew, or ought reasonably to have known in the circumstances, of the following facts—

- (a) that the injury, loss or damage had occurred;
- (b) that the injury, loss or damage in question warrants the bringing of proceedings against the defendant, assuming liability on the part of the defendant;
- (c) that the injury, loss or damage, is attributable in whole or in part to the conduct of the defendant;
- (d) the identity of the defendant; and
- (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant,

and knowledge that any acts or omissions did or did not, as a matter of law, involve a breach of contract, a tort, negligence, nuisance or breach of duty is irrelevant.

(4) The date of knowledge shall be determined by reference to actual and constructive knowledge.

(5) Constructive knowledge is knowledge that a person might reasonably have been expected to acquire either—

(a) from facts observable or ascertainable by him or her or

(b) from facts ascertainable by him or her with the assistance of medical or other appropriate professional expert advice.

(6) Notwithstanding *subsection (5)* —

(a) a person will not be fixed with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice; and

(b) a person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he has failed to acquire as a result of that injury.

Explanatory Note

Subsection (1) implements the recommendations in paragraphs 2.10 and 2.18 on the introduction of a 2 year uniform basic limitation period of general application, which would apply to the claims common law actions defined in the Report. *Subsections (2) and (3)* implement the recommendations in paragraphs 2.67 and 2.71 that the basic limitation period should run from the date of knowledge of the plaintiff; and that this should be calculated based on the date on which the plaintiff first knew, or ought reasonably to have known, the following: (a) that the injury, loss, or damage had occurred; (b) that the injury, loss or damage warrants bringing proceedings, assuming liability on the part of the defendant; (c) that the injury, loss, or damage is attributable to the conduct of the defendant; (d) the identity of the defendant; and (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant. *Subsections (4), (5) and (6)* implement the recommendations in paragraphs 2.69, 2.70 and 2.72 concerning constructive knowledge. The text of this section is based primarily on the text in the *Statute of Limitations (Amendment) Act 1991*.

Ultimate limitation period

5.—The right to initiate a civil claim under this Act shall be extinguished on the expiration of the ultimate limitation period, that is, 15 years from the date of the act or omission giving rise to the cause of action.

Explanatory Note

This section implements the recommendations in paragraphs 3.31 and 3.63 on the introduction of a 15 year ultimate limitation period, also known as a “long-stop”. This means that, even where the 2 year discoverability rule would allow a claim to be made 16 years after the act or omission that caused the injury, loss or damage, the right to bring the claim will, usually, be barred after 15 years. This 15 year “long stop” is subject to the narrow discretion to extend provided for in *section 6* of the Bill, below.

Discretion to extend or disapply ultimate limitation period in exceptional circumstances

6.—(1) The Court may extend or disapply the ultimate limitation period, which would otherwise bar a claim, if, but only if, the court is satisfied that because of exceptional circumstances it would be unjust not to give such a direction having regard to—

- (a) any hardship which would be caused to the defendant if the direction were given,
- (b) any hardship which would be caused to the plaintiff if the direction were not given, and
- (c) the overall lapse of time between the date of the act or omission giving rise to the cause of action, and initiation of proceedings, and the impact which this lapse of time may have upon the rights of both the plaintiff and the defendant.

(2) In considering whether or not to exercise its discretion under *subsection (1)*, the court shall have regard to all of the circumstances of the case and in particular to the following (each of which is to be treated as of equal significance)—

- (a) the length of, and reasons for, the delay on the part of the plaintiff,
- (b) the effect of the passage of time on the ability of the defendant to defend the claim,
- (c) the effect of the passage of time on the cogency of any evidence which might be called by the claimant or the defendant,
- (d) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he or she responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the claim,
- (e) the extent to which the plaintiff acted promptly and reasonably once he or she knew that the facts gave rise to a claim,
- (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he or she may have received,
- (g) any alternative remedy or compensation available to the plaintiff,
- (h) the strength of the plaintiff's case,
- (i) the absence of any legal capacity or mental capacity on the part of the plaintiff arising on or after the date of the act or omission giving rise to the cause of action,
- (j) any conduct of the defendant that induced the plaintiff to delay bringing the action,
- (k) the nature and extent of the plaintiff's injury (including whether it was latent).

(3) In respect of a person who was under the age of 18 years on the date of the act or omission giving rise to the cause of action, and who was in the custody of a parent or guardian, the parent or guardian shall be presumed competent and presumed to be conscious of his or her responsibilities and therefore capable of commencing proceedings on behalf of the persons.

Explanatory Note

Subsection (1) implements the recommendations in paragraphs 4.72 and 4.81 on the introduction of a narrow judicial discretion to extend or otherwise disapply the ultimate limitation period (the long stop) in exceptional circumstances. *Subsection (2)* implements the recommendations in paragraph 4.105 and 4.123 on the factors to be taken into account in exercising the narrow judicial discretion. *Subsection (3)*

implements the recommendations in paragraph 4.128. The 15 year long stop in *section 5* of the Bill will deal with most unusual cases, such as latent personal injury or latent property damage or other loss. The limited judicial discretion in *section 6* is intended to deal with other highly exceptional cases where, for example, although most hidden property defects will become apparent in under 15 years this may not always be the case and the limited discretion allows for an extension if the criteria in *section 6* are met. Section 6 is also intended to allow for an extension where the legal capacity of the person initiating the claim was absent (because the person was under 18) or was limited (because of an intellectual disability, or because their mental capacity may have been affected in some way, for example, arising from child sexual or physical abuse). It could also be applicable in a case where an injury may lie dormant or hidden for longer than 15 years; this could include a case of mesothelioma arising from exposure to asbestos, which can remain undetectable and symptomless for up to 40 years. Section 6 could also apply to claims in which the defendant was engaged in fraud.

Jurisdiction of court to dismiss claim

7.— (1) Nothing in this Act shall be construed as affecting any power of a court to dismiss a claim on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal.

(2) Nothing in this Act shall be construed as affecting any power of a court to dismiss a claim where this arises from—

(a) such inordinate, inexcusable and prejudicial delay that a hearing of the claim would not be consistent with the administration of justice or fair procedures, or

(b) abuse of process or the frivolous or vexatious nature of the claim.

Explanatory Note

This section implements the recommendations in paragraph 4.40 that the law on limitation periods is without prejudice to the existing jurisdiction of the courts to dismiss a claim. This includes cases that are dismissed on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal. It also includes cases that are dismissed because of such inordinate, inexcusable and prejudicial delay that a hearing of the claim would not be consistent with the administration of justice or fair procedures. It also includes dismissing a claim for abuse of process or the frivolous or vexatious nature of the claim (such as where a litigant repeatedly returns to court with the same claim).

No effect on other civil claims

8.— (1) This Act applies only to the civil claims defined in *section 2* and does not apply to any or affect any other civil claim, including any other civil claim or cause of action to which the *Statutes of Limitations* apply.

(2) This Act applies to civil claims that arise arising after it comes into force.

Explanatory Note

Subsection (1) clarifies that the draft Bill is limited to the civil claims defined in *section 2* and therefore does not affect the limitation periods concerning other causes of actions. These continue to be regulated by the *Statute of Limitations 1957*, as amended (the draft Bill uses the collective citation in the *Statute of Limitations (Amendment) Act 2000*). *Subsection (2)* is a standard provision that provides that the draft Bill would, if enacted, apply to claims arising after the coming into force of the draft Bill.