

Removal of the 3 Year Limitation Period from Civil Actions for Damages for Personal Injury for In Care Survivors of Historical Child Abuse

Analysis of Written Consultation Responses

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**REMOVAL OF THE 3 YEAR LIMITATION PERIOD
FROM CIVIL ACTIONS FOR DAMAGES FOR
PERSONAL INJURY FOR IN CARE SURVIVORS OF
HISTORICAL CHILD ABUSE**

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CONTENTS

| CHAPTER | PAGE NO. |
|---|-----------------|
| 1. EXECUTIVE SUMMARY | 1 |
| 2. INTRODUCTION | 5 |
| 3. PROPOSAL TO REMOVE THE APPLICATION OF THE LIMITATION PERIOD TO SURVIVORS OF HISTORICAL CHILD ABUSE | 8 |
| 4. APPLICATION OF THE PROPOSED CHANGE IN LAW | 15 |
| 5. ASSESSMENT OF IMPACT OF THE PROPOSALS | 21 |
| | |
| Annex : List of respondents | 26 |

1. EXECUTIVE SUMMARY

1.1 The Prescription and Limitation (Scotland) Act 1973 sets out a 3 year limitation period during which personal injury actions must be raised. The Scottish Government intends to lift the 3 year time-bar on civil actions in cases of historical child abuse that took place in care settings after 26 September 1964.

1.2 On 25 July 2015 the Scottish Government published a written consultation paper to seek views on matters associated with the removal of the time-bar, with responses invited by 18 September 2015. A participative workshop was also held with survivors of historical child abuse to discuss the issues and hear views.

1.3 35 written responses to the consultation were received. A summary of views from the written responses and from the participative workshop follows. The views are those of the respondents to this consultation and do not necessarily represent the views of a wider population.

Views on removing cases relating to historical child abuse from the limitation regime

1.4 58% of those providing a view in written responses agreed that the Scottish Government should remove cases relating to historical child abuse from the limitation regime. A significant minority of 42% respondents disagreed. Participants at the workshop supported the proposal.

1.5 The most common rationale provided in support of the proposal was that there are genuine reasons as to why survivors of historical child abuse may not raise actions within the current limitation period. Some felt that the current time-bar constitutes a barrier to achieving justice for survivors; a few considered that judicial discretion to allow an action outwith the limitation period does not work effectively.

1.6 Four main criticisms against the proposal were: deterioration of quality of evidence over time; judicial discretion over limitation already exists; potential negative impact on current employers, including charities; and inconsistencies in relation to child abuse taking place outwith in care settings.

1.7 Those attending the workshop considered that in addition to the removal of the time-bar, there should be a scheme for financial support for survivors which includes interim payments, to enable survivors to access care required.

Views on how the proposed change in law may apply to cases previously raised unsuccessfully on the basis of the current law of limitation

1.8 There was some support for allowing previously unsuccessful cases to be raised again under the new regime. It was felt that it would be unfair to deny this

possibility and would place new claimants in a more favourable position than their counterparts who had raised claims earlier, particularly when the law is now under question. Participants at the workshop agreed with this view.

1.9 In contrast however, some respondents (largely insurance bodies) considered that this proposal could lead to legal challenges from defenders who may consider their human rights to be breached under Articles 1 and 6 of the European Convention of Human Rights. Another prominent view was that defenders and insurers should have a legitimate expectation that previous cases have been finalised and will not be open to re-examination.

Views on how “child” should be defined under the proposed change in law

1.10 The majority view amongst respondents to the written consultation (66% of those who provided a clear view) and amongst participants at the workshop, was for “child” to be defined as someone who has not yet attained the age of 18. A recurring theme was that the legislation should allow for exceptions, particular in relation to vulnerable adults and pursuers, the abuse of whom began before they were 18 and continued after this.

Views on what type of abuse should be covered

1.11 70% of written respondents who addressed the issue supported the definition of child abuse as covering physical, sexual, emotional, psychological, unacceptable practices and neglect.

1.12 The most prominent objection to the proposed definition was that the terminology is too broad and could risk unintended consequences, confusion and legal challenge.

1.13 Workshop participants were largely in support of the proposed definition, but recommended that spiritual, ritual and human rights abuse be added.

Views on which settings should be covered by the carve out

1.14 86% of written respondents who addressed the issue agreed that “in care” settings should include residential care; children’s homes; secure care (list D schools), borstals and young offenders’ institutions; foster care; “boarded out” children; child migrants; independent boarding schools; and healthcare establishments providing long stay care.

1.15 Additions to the list of settings were made by some respondents and by participants at the workshop and included: children placed in kinship care; children with disabilities in respite care; former looked-after children aged 16 – 18 years in care leavers’ accommodation; church settings; sports clubs; armed forces/M.O.D; scouts and guides; and youth and community groups.

1.16 A few respondents raised concern that the proposal could create anomalies in relation to survivors being treated differently depending on the way they were cared for within the same setting (e.g. pupils at a school where some board and others do not).

Views on whether the proposal should be extended to cover all children and not just those abused “in care”

1.17 Of those respondents to the written consultation who provided a view, 62% agreed that the proposed exemption should be extended to cover all children. Supporters considered that any other regime would be hard to justify and illogical. Some concern was expressed, however, that the extension may impact significantly on bodies such as charities, the Scout Association, church, youth organisations, and parents.

Views on the financial and resource impact of the exemption

1.18 The majority view amongst those responding to the written consultation was that, as a result of the exemption, more actions will be raised (at least in the short-term), more cases will come to court and more settled out of court. Most envisaged cases requiring more preparation time due to the work involved in tracking down witnesses and other evidence relating to older cases.

1.19 Views were more diverse on whether cases will require more or less court time, with some arguing that this would depend on the details of individual cases.

Benefits identified for pursuers

1.20 The three most frequently identified benefits for pursuers were: opportunity to access justice; opportunity to have voices heard; and opportunity to obtain reparation.

1.21 A few respondents considered that compensation to pursuers would provide a means by which survivors can access specialist support, thus alleviating pressure on the welfare system and society in general.

1.22 Workshop participants identified key benefits to pursuers as including the opportunity to find answers and to demonstrate to perpetrators that they will not be allowed to escape the consequences of their actions.

Benefits identified for defenders

1.23 Amongst the benefits identified for defenders were: greater certainty with the removal of judicial discretion regarding limitation; opportunity to have voice heard and defend accusations in a court of law; opportunity to learn lessons regarding good practice in safeguarding children.

1.24 Eight respondents stated that they could not envisage any benefits for defenders.

Drawbacks identified for pursuers

1.25 Concerns were expressed that raising actions will require survivors to re-live past experiences which may be physically and mentally stressful. Another key drawback envisaged was that outcomes are not certain and expectations of pursuers may be raised which are not then met, leading to feelings of resentment that alleged abusers have escaped justice.

Drawbacks identified for defenders

1.26 The prevailing view amongst those who provided a response was that organisations could be held financially responsible for events occurring prior to the employment of any current employees. Some respondents cautioned that insurance may not be traceable or valid for the period relating to the action, with expenses not likely to be recoverable even where an organisation has successfully defended the action.

1.27 Other drawbacks identified included: fair trials being compromised due to lack of robust evidence; the risk of adverse media and loss of reputation; stress and anxiety associated with the court proceedings; creation of open-ended liability which will curtail business planning for organisations; and the potential rise in spurious and fraudulent claims.

2. INTRODUCTION

2.1 On 28 May 2015 the Cabinet Secretary for Education and Lifelong Learning addressed the Parliament on the National Inquiry into Historical Child Abuse¹. In her announcement, the Cabinet Secretary set out a package of measures to support survivors of historical abuse including:

- The Terms of Reference of the Inquiry;
- The Chair of the Inquiry; and
- An update on a survivor support fund.

2.2 The Cabinet Secretary also advised of the action that the Scottish Government is taking in response to the Scottish Human Rights Commission (SHRC) recommendation on the time-bar, presented within the Action Plan developed to implement the recommendations in the SHRC Human Rights Framework. On the civil justice system, the SHRC recommended that, “The civil justice system should be increasingly accessible, adapted and appropriate for survivors of historic abuse of children in care, including through the review of the way in which “time-bar” operates”.

2.3 Acknowledging that delivering the right to reparation called for by survivors through the SHRC interaction process would involve removing the time-bar, which requires a civil case for damages to be brought to court within the 3 year limitation period, the Cabinet Secretary announced that the Scottish Government intends to lift the 3 year time-bar on civil actions in cases of historical childhood abuse that took place after 26 September 1964.

2.4 Ministers hold the view that victims of child abuse should not have to demonstrate to the court that they have a right to raise litigation before the case can proceed. They consider that the circumstances of survivors of historical abuse, in particular, the class of pursuer, the type of injury and the impact on the victim are such that they should be treated differently. Whilst Ministers acknowledge that removing the law on time-bar for survivors of historical child abuse will not address all of the challenges of bringing a case to court or guaranteeing a successful outcome, it is anticipated that this proposal will at least provide pursuers with better opportunity to raise their action without having first to hurdle the burden of proof stage to exempt their case from the limitation rules.

2.5 On 25 June 2015 the Scottish Government published a written consultation paper to seek views on matters associated with the removal of the time-bar for survivors of historical abuse with responses invited by 18 September 2015². The responses to the consultation will inform the development of legislative proposals to remove the 3 year limitation period.

2.6 This report presents the analysis of views contained in the responses to the consultation. These responses have been made publicly available on the Scottish Government website unless the respondent has specifically requested otherwise.

¹ <http://scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9973&i=91608#ScotParlOR>

² <http://www.gov.scot/publications/2015/06/5970>

The views are those of the respondents to this consultation and do not necessarily represent the views of a wider population.

2.7 In addition to the written consultation, a participative workshop was organised by the Scottish Government and took place in Glasgow on 19 – 20 August with survivors of historical child abuse. The workshop was mediated by independent, external facilitators with the first day devoted to considering the issues raised by the consultation. Participants provided their views in large and small group discussions, summaries of which were documented by facilitators and the content agreed with group members. This report outlines the views of the workshop participants at appropriate points throughout the analysis, alongside the views provided by respondents to the written consultation.

Consultation responses

2.8 The Scottish Government received 35 written responses to the consultation. Table 2.1 shows the distribution of responses by category of respondent. A full list of respondents is in the Annex. The respondent category applied to each response was agreed with the Scottish Government policy team. Where respondents did not fit clearly into any of the sectors, a decision was made on the closest match and a consistent policy followed.

Table 2.1: Distribution of responses by category of respondent

| Category | No. | % |
|------------------------------|------------|------------|
| Insurance Body | 6 | 17 |
| Legal Representative Body | 6 | 17 |
| Care Provider | 4 | 11 |
| Local Government | 4 | 11 |
| Solicitor Firm | 4 | 11 |
| Academic | 3 | 9 |
| Individual | 3 | 9 |
| Voluntary Organisation | 2 | 6 |
| Survivor Representative Body | 1 | 3 |
| Other | 2 | 6 |
| Total | 35 | 100 |

2.9 The largest categories of respondent were insurance bodies and legal representative bodies, each comprising 17% of all respondents. Four care providers and one survivor representative body were amongst the respondents.

2.10 Content from the responses was entered onto a bespoke electronic database to enable comparison of views and analysis.

Analysis of responses

2.11 The analysis of responses is presented in the following three chapters which follow the order of the topics raised in the consultation paper. The consultation contained seven questions in a mix of closed and open format.

2.12 Throughout the report quotes taken directly from responses have been used to

illustrate specific points. These were selected on the basis that they enhanced the analysis by emphasising specific points succinctly. Quotes from a range of sectors were chosen, where the respondents had given permission for their respective response to be made public.

2.13 All numbers and percentages used in the analysis are based on the respondent population to this consultation. They are not necessarily representative of the wider population and cannot be extrapolated further.

2.14 Respondent categories have been abbreviated in the report as follows:

| | |
|------------------------------|------|
| Insurance Body | Ins |
| Care Provider | CP |
| Legal Representative Body | Leg |
| Local Government | LG |
| Solicitor Firm | Sol |
| Academic | Acad |
| Individual | Ind |
| Voluntary Organisation | Vol |
| Survivor Representative Body | Surv |
| Other | Oth |

3. PROPOSAL TO REMOVE THE APPLICATION OF THE LIMITATION PERIOD TO SURVIVORS OF HISTORICAL CHILD ABUSE

Background

Scottish legislation in relation to raising action for damages in civil courts for any form of personal injury aims to balance the rights of claimants to have reasonable opportunity to raise their action, with the protection of individuals and organisations from open-ended civil liability. The Prescription and Limitation (Scotland) Act 1973, (“the 1973 Act”), sets out a timeframe within which such actions must be raised. In relation to personal injury actions the 1973 Act established a three year limitation period. This means that an individual has to begin any personal injury action within three years of the injury being sustained or within three years of the individual knowing that the injury has been sustained.

Limitation is a procedural rule rather than a rule of substantive law and the court has some discretion to allow an action to be commenced after the three year limitation period has lapsed if on the evidence presented to them they consider that it would be equitable for them to do so.

The Scottish Government proposes to remove the three year limitation period (referred to as the “time-bar”) in relation to historical cases of child abuse, so that anyone whose abuse occurred between 26 September 1964 and the present day and who wishes to raise a civil action for damages for personal injury will not be time-barred from doing so. For those whose abuse occurred before 26 September 1964 the law of prescription³ will continue to apply and there will be no right to raise a civil action for damages for personal injury.

Question 1: Do you agree with our proposal to remove cases relating to historical child abuse from the limitation regime?

3.1 This question attracted the highest volume of response of all questions in the consultation. 34 respondents addressed the question with 33 stating clearly whether they agreed or disagreed with the proposal. Of these, the majority (58%) agreed that the Scottish Government should remove cases relating to historical child abuse from the limitation regime. A significant minority of 42% of respondents disagreed. Table 3.1 overleaf presents views by category of respondent.

3.2 Participants at the Glasgow workshop were unanimous in their support for this proposal.

³ Prescription is a rule of substantive law. Its effect is that after the requisite period of time the obligation (in this case the liability to pay damages) is extinguished.

Table 3.1: Views on whether the Scottish Government should remove cases relating to historical child abuse from the limitation regime (Question 1)

| Respondent category | Agree | Disagree | Total |
|------------------------------|--------------|-----------------|--------------|
| Insurance Body | | 6 | 6 |
| Care Provider | 1 | 3 | 4 |
| Legal Representative Body | 3 | 2 | 5 |
| Local Government | 3 | 1 | 4 |
| Solicitor Firm | 2 | 2 | 4 |
| Academic | 3 | | 3 |
| Individual | 3 | | 3 |
| Voluntary Organisation | 2 | | 2 |
| Survivor Representative Body | 1 | | 1 |
| Other | 1 | | 1 |
| Total | 19 | 14 | 33 |

3.3 All insurance bodies disagreed with the proposal. Other categories of respondent were divided in view, or all respondents in the category supported the proposal.

Summary of views in favour of the proposal to remove cases relating to historical child abuse from the limitation regime

3.4 The most common rationale provided in support of the proposal was that there are **genuine reasons as to why survivors of historical child abuse may not raise actions within the limitation period**. Respondents across seven different categories identified issues such as trauma, shame and mistrust of authorities as contributing to survivors delaying or not taking any action against their alleged abusers. A typical comment was:

“Some survivors of abuse may only come to understand their victimhood much later in life, while many may have stayed silent for fear that they might not be believed. Some survivors may have been impeded from seeking justice due to them struggling with consequences of the abuse. Furthermore, in cases where abuse is suffered in early years, it may take some time for the victim to attain the social and communication skills to articulate what has happened to you until much later” (Aberlour-Scotland’s Children’s Charity).

3.5 Another recurring view emerging from respondents across several different categories was that the current time-bar acts as a **hurdle or barrier to achieving justice** for survivors. One respondent remarked:

“We know from research that many children who have been abused do not go onto report this until adulthood....removing the limitation is one less hurdle for them in what is a significant event moving forward” (East Lothian & Midlothian Public Protection Committee).

3.6 Five respondents who favoured removing the time-bar argued that in their view the court’s **current discretion** to allow an action to be commenced after the three year limitation period has lapsed **has not been working effectively**. In particular they felt that defenders can all too easily cite difficulties in collating robust evidence

due to the passage of time as impeding the fair consideration of the case.

Comments included:

“ Currently the defender can easily prove that the passage of time since the alleged abuse will cause difficulty in the investigation and presentation of the defence” (Association of Personal Injury Lawyers).

“...the law in Scotland currently allows Judges to deploy equitable discretion to permit a case to proceed after the expiry of the limitation period. In reality this discretion has invariably been deployed in a manner which has prevented the vast majority of cases from proceeding” (Slater & Gordon Lawyers (UK)).

3.7 Two other substantive reasons provided in support of the proposal were documented. One academic argued that criminal law proceedings are not affected by limitation law and to suggest that the passage of time may affect civil law proceedings but not those in criminal law appears to be incongruous. One legal representative body provided their view that historical child abuse cases should be treated differently to others as they have distinctive differences relating to type of pursuer, type of injury and the nature of the impact on victims.

Summary of views against the proposal to remove cases relating to historical child abuse from the limitation regime

3.8 Four main criticisms dominated responses. The most frequent to emerge (from 11 respondents including all insurance bodies) was that the passage of time between the alleged abuse and raising the action could result in **poor quality and/or missing evidence** which could lead to an unfair trial and injustice being done. One insurance body argued:

“Claims that are not raised within a reasonable period carry a very serious risk that witness evidence and documentation will be lost, or key witnesses will not be able to be traced due to the passage of time or in some cases, will have passed away in the intervening period. All of these factors can undermine the principle of a fair trial and at the very least, leave the court with an unsatisfactory quality of evidence upon which to try to reach a decision” (Aviva Insurance Ltd).

3.9 A contrasting view from an academic was that the passage of time need not necessarily cause quality of justice to deteriorate as can be seen from criminal law cases (which are not affected by limitation law).

3.10 Another recurring view in opposition to the proposal was that the **current law already allows for judicial discretion** regarding allowing cases to proceed outwith the limitation period. Ten respondents across four categories (including all insurance bodies) considered that the status quo presented a well-balanced system in the wider public interest, and removing historical child abuse cases from the limitation regime would change the balance. One respondent remarked:

“This is a very complex area where there is potential for unintended consequences (if the time-bar is removed) which would affect wider public interests in relation to limitation periods and existing judicial discretion” (Forum of Scottish Claims Managers).

3.11 Ten respondents including four insurance bodies and three care providers expressed concern that the proposal could **significantly affect employers, including charities, who would not have been held liable had the claims been brought in good time**, as until 2001 employers were not vicariously liable for the criminal actions of individual employees abusing children within their care where they had taken all practicable safeguarding measures. Some raised the possibility of claims from across the UK being brought to Scottish courts if the proposal goes ahead; another concern was that care providers may not be able to obtain indemnity against claims on account of being unable to trace a previous insurer, or an insurer refusing to cover them under their policy.

3.12 Eight respondents across five categories argued that exempting historical child abuse cases from the limitation regime would **create inconsistency and anomalies**, for example, when compared with cases of alleged child abuse outwith in care settings. Some felt that the proposed exemption would invite challenges from other types of claim. One solicitor firm stated:

“Exempting certain delicts from the operation of limitation is invidious and not sustainable. It is inevitable that there would be calls to expand the scope of any exemption. Indeed to refuse such calls would be to exercise a moral judgment over the relative worth of such claims. Why should time run against those abused in a family setting but not those abused in care? Why should time run against an adult victim, also traumatised by the experience?” (Simpson & Marwick).

3.13 Other substantive views in opposition to the proposal were:

- likely to be in breach of Article 1 Protocol 1 of the European Convention on Human Rights namely that “every natural or legal person is entitled to the peaceful enjoyment of his possessions” (6 mentions);
- proposal is disproportionate and amounts to a blanket lifting of limitation without considering the merits of individual cases (4 mentions);
- potential ambiguity over terminology (such as “unacceptable practices” and “neglect”) could result in the unintended inclusion of practices within the ambit of the new regime (2 mentions);
- previous events cannot be judged within the context of today’s attitudes and standards (1 mention);
- the proposal will prevent some survivors putting the events of the past behind them as they will know they could always raise a claim and that they could be called upon to give evidence in relation to others’ claims (1 mention).

Alternative approaches and compromises

3.14 A few respondents outlined other potential ways to address the issues raised. These are summarised below:

- Presumption that cases will not be time-barred unless the defender can show that the passage of time has been grossly prejudicial to his/its ability to defend the action. This was envisaged as changing the balance in favour of making it easier for survivors to bring cases, whilst at the same time enabling defenders, who would be genuinely grossly prejudiced by reason of the loss of relevant evidence, trying to defend actions (Oth).

- Further guidance could be provided relating to judicial discretion in permitting cases out of time-bar, if this is indeed not operating effectively at present (LG).
- s19A of the 1973 Act could be amended to require explicitly judges to take into account the emotional and psychological issues which may prevent claimants from raising actions within the period of limitation (Legal).
- Extend the period of limitation to six years from the applicant's 18th birthday (CP).
- Learn lessons from other jurisdictions, such as the state of Victoria in Australia, where limitation in abuse claims was abolished in February this year but a caveat remained giving judges the power to summarily dismiss or permanently stay claims where the delay impacts on the defendant to such a degree that a fair trial is no longer possible (Sol).

3.15 Participants at the Glasgow workshop expressed the view that the removal of the time-bar is not enough, with some survivors arguing for a scheme for financial support which includes interim payments to provide care that is needed for survivors, in order to restore lost dignity. Some felt that this scheme should operate outwith an adversarial court system in order to avoid additional stress being placed on already vulnerable people. Another respondent to the written consultation (Sol) described consultation in Victoria, Australia, on the introduction of a state scheme to provide compensation to abuse victims where it is considered too difficult to bring proceedings and demeaning to have to seek compensation from the organisation responsible for the abuse.

Question 2: What are your views on how the proposed change in the law may apply to cases which have been raised unsuccessfully on the basis of the current law on limitation?

3.16 33 respondents addressed this question, but it appeared from several responses that a number of respondents were referring to cases which had received a final judgement and decree of absolvitor rather than cases previously time-barred according to limitation law (which are the focus of the question). The following summary of views (paragraphs 3.17 – 3.22) refers to the handling of cases previously raised unsuccessfully on the basis of the current law on limitation. Paragraphs 3.23 – 3.24 summarise the views emerging in relation to previous cases of decree of absolvitor.

Views in favour of allowing previously unsuccessful claims to be raised again

3.17 Ten respondents across a wide range of categories expressed clearly their view that such cases should be allowed to be raised again under the proposed new limitation regime, with a few others open to considering this possibility. Not to permit this was perceived by some to be grossly unfair, placing new claimants in a more favourable position than survivors who raised claims earlier. A few legal representative bodies argued that the law under which previous cases were rejected is now under question, and as such, previous unsuccessful claimants should be permitted to claim again. Comments included:

“It would be manifestly unfair to prevent those pursuers, whose cases have failed at a preliminary stage due to time-bar, from re-raising a fresh

action of pursuing their claim under the new law. This would, in effect, penalise those that have tried to access justice but failed due to rules that are now under scrutiny” (Digby Brown LLP).

“It is our view that it would be unfair to allow some victims the opportunity to pursue a personal injury claim against their abuser whilst denying others the same opportunity. It would be inherently unjust for those who were previously denied justice through the current limitation law to be further prevented from accessing justice - VSS believes that all victims should receive equal treatment and fairness within the civil justice system regardless of whether they have already attempted to pursue a personal injury claim” (Victim Support Scotland).

3.18 Participants at the event considered that there should be no discrimination (as they perceived it) against older cases and that should such cases be permitted to be raised under the proposals, then a clear public statement should be made to this effect.

3.19 To enable the efficient processing of such cases which were previously time-barred, one solicitor firm recommended that there would need to be a “judicial filtering mechanism” (Slater & Gordon Lawyers (UK)) to ensure that only those cases which are “meritorious”, but previously failed due to existing limitation law, should proceed. Another suggestion was for a 24 month “window” of opportunity for previous cases to be re-raised, supported by publicity, following which they could no longer be resurrected.

Views against allowing previously unsuccessful claims to be raised again

3.20 Two main rationales emerged in opposition to permitting previously time-barred claims to be raised again. A recurring view amongst opponents (largely insurance bodies) was that this proposal could lead to legal challenges from defenders who may consider their human rights to be breached under Article 1 (peaceful enjoyment of possessions) and Article 6 (right to a fair trial) of the ECHR. Another prominent argument was that defenders (and insurers) should have a legitimate expectation that previous cases have been finalised and will not be open to re-examination. A contrasting argument from an academic was that:

“Although on the face of it this may appear harsh to defenders who have previously escaped civil law responsibility for their actions it should be recognised that behaviour that could be described as ‘abusive’ of a child more often than not is the result of a deliberate act, and it is arguable that for that reason defenders (whose wrongdoing comes to be established in relevant legal proceedings) are undeserving of the ‘protection’ that might have been afforded by civil limitation laws” (Individual academic).

3.21 Two respondents (LG, CP) considered that resurrecting old cases would have cost and manpower implications, diverting much needed funds and resources away from current needs. Others (Acad, Leg) highlighted the importance of looking at the reasons why judges had previously disallowed such claims and not used the discretion available to them. One (Acad) remarked that raising previous claims could have considerable psychological impact on survivors in addition to being costly.

3.22 Two respondents (Sol, Leg) suggested that if the law does not allow claims time-barred under the previous limitation law to be raised again, then some form of reparation or compensation scheme should be considered for these cases to address issues of fairness and justice.

Views on cases of previous decree of absolvitor⁴

3.23 Five respondents representing four different categories referred explicitly to previous cases in which decree of absolvitor was pronounced and argued that in such cases defenders should have a legitimate expectation that this position is final and the case should not be re-opened on the basis of a change in limitation rules. One commented:

“Several cases were raised.....ten years ago. The pursuers abandoned those cases and we were granted decree of absolvitor. We incurred substantial legal costs, as well as putting a great deal of time into responding to the allegations. We are concerned that if a change in the law were to impact upon cases which were raised unsuccessfully, we would in effect be deprived of the outcomes in those cases...” (Sailors’ Society).

3.24 A further seven respondents across five respondent categories did not mention cases of decree of absolvitor specifically, but the text of their response in which they refer, for example, to previous claims abandoned and a decision pronounced in favour of the defender, suggests that they were referring to such cases. All were of the view that in such cases, there should be a legitimate expectation that the previous decision is final and the case should not be capable of being re-raised.

⁴ Where a court assolzies the defender (grants a decree of absolvitor) this is a final judgement effectively extinguishing the pursuer’s right of action.

4. APPLICATION OF THE PROPOSED CHANGE IN LAW

4.1 The Scottish Government proposes that there is a change in the law to remove the application of the limitation regime from survivors of historical child abuse. In order to apply the proposed change in law there are a number of issues to be decided.

What do we mean by the term “child”?

Background

There are a number of different definitions of child in Scotland for different purposes. Having considered these the Scottish Government proposes that for the purposes of the time-bar legislation, a child should be defined as someone who has not attained the age of 18 years old.

Question 3: Do you agree that child should be defined as someone who has not yet attained the age of 18?

4.2 29 respondents provided a clear indication of whether they agreed with the proposal, with the majority (66%) supporting this definition of “child” and 34% of those who responded opposing it. All four of the insurance bodies who provided a view disagreed with the proposal. Table 4.1 presents views by category of respondent.

Table 4.1: Views on whether “child” should be defined as someone who has not yet attained the age of 18 (Question 3)

| Respondent category | Agree | Disagree | Total |
|------------------------------|-----------|-----------|-----------|
| Insurance Body | | 4 | 4 |
| Care Provider | 1 | 2 | 3 |
| Legal Representative Body | 3 | 1 | 4 |
| Local Government | 5 | | 5 |
| Solicitor Firm | 1 | 2 | 3 |
| Academic | 3 | | 3 |
| Individual | 3 | | 3 |
| Voluntary Organisation | 2 | | 2 |
| Survivor Representative Body | | 1 | 1 |
| Other | 1 | | 1 |
| Total | 19 | 10 | 29 |

4.3 Very few substantive comments were documented in support of the proposal. Two respondents (Sol, Leg) acknowledged the different definitions of “child” in different contexts but recommended accepting the older age limit of under-18 to ensure that no unnecessary barriers are created for pursuers. One care provider remarked that defining a “child” as someone who has not yet reached 18 is commensurate with current child and adult protection legislation.

4.4 The key reasons to oppose the proposal were that the age of majority under the Age of Legal Capacity (Scotland) Act 1991 is 16 years (7 mentions); and that under

the 1973 Act, 16 is the age from which time runs under s17 and there is no reason to change this in updated legislation (7 mentions).

4.5 A recurring theme in several responses was that the legislation should allow for exceptions to be made, with vulnerable adults and pursuers whose abuse began prior to age 18 and continued after this, the most frequently cited. One respondent argued thus:

“Clearly, vulnerable adults who lack mental capacity are exempt from the time bar under existing provisions. However, it is important that legislation provides for the position of vulnerable adults who did not technically lack mental capacity but were sufficiently vulnerable to be at risk of abuse and too fearful to disclose. We have in mind, for example, cases involving sexual assaults by therapists on their patients - such persons are often in a very vulnerable position so delays in disclosure should be sympathetically considered even if technically the pursuer has legal capacity” (Slater & Gordon Lawyers (UK)).

4.6 Participants at the workshop agreed broadly with the definition, although a request was made for the age to be raised to 21. They supported the view that people with learning difficulties or other issues which impeded development and maturity should be considered as exceptions. They also recommended that practice in other jurisdictions should be examined to identify lessons of relevance.

What type of abuse should be covered?

Background

The National Guidance for Child Protection in Scotland, published in 2010 and refreshed in 2014, set out the view that child abuse and child neglect are “forms of maltreatment of a child. Someone may abuse or neglect a child by inflicting, or by failing to act to prevent, significant harm to the child”⁵. The guidance goes on to provide a description of the sorts of actions which would fall under the headings: physical abuse, sexual abuse, emotional abuse and neglect.

In engagement events with survivors and the Scottish Government representatives, similar suggestions were made in the context of what the Public Inquiry into Historical Child Abuse should cover. The terms of reference which have been agreed for the National Inquiry on Historical Child Abuse defines abuse as physical abuse (including medical experimentation); sexual abuse; emotional abuse; psychological abuse; unacceptable practices; and neglect.

Question 4: Do you agree that any definition of “child abuse” should cover physical, sexual, emotional, psychological, unacceptable practices and neglect?

4.7 30 respondents provided a clear indication of whether they agreed with the proposal, with the majority (70%) supporting this definition of “child abuse” and 30% of those who responded opposing it. All four of the insurance bodies who provided a

⁵ National Guidance for Child Protection in Scotland 2010 and in 2014. The Scottish Government. Paragraph 32

view disagreed with the proposal; care providers were evenly divided in view; other categories were wholly or largely in favour. Table 4.2 overleaf presents views by category of respondent.

Table 4.2: Views on whether “child abuse” should cover physical, sexual, emotional, psychological, unacceptable practices and neglect (Question 4)

| Respondent category | Agree | Disagree | Total |
|------------------------------|--------------|-----------------|--------------|
| Insurance Body | | 4 | 4 |
| Care Provider | 2 | 2 | 4 |
| Legal Representative Body | 3 | 1 | 4 |
| Local Government | 3 | 1 | 4 |
| Solicitor Firm | 2 | 1 | 3 |
| Academic | 3 | | 3 |
| Individual | 3 | | 3 |
| Voluntary Organisation | 2 | | 2 |
| Survivor Representative Body | 1 | | 1 |
| Other | 2 | | 2 |
| Total | 21 | 9 | 30 |

4.8 Very few substantive comments were documented in support of the proposal. Two respondents (Leg, Ind) welcomed what they perceived to be the broad, inclusive nature of the definition, which they envisaged would encourage pursuers to come forward to raise claims. One respondent (Leg) commented that logically the definition should align with that used for the public inquiry. Another (Oth) considered the inclusion of psychological abuse and unacceptable practices as particularly useful in this context.

4.9 The most prominent objection to the proposed definition, which emerged across all categories of those in opposition, was that the terminology was so broad as to risk unintended consequences, confusion and legal challenge. Some respondents emphasised the importance of ensuring the definition is very clear, on account of the serious issues at stake. Indeed three (Ins, CP, Sol) called for comprehensive explanations to accompany each element of the definition.

4.10 Respondents appeared to be content with the inclusion of the “physical” and “sexual” aspects of the proposed definition, but several questioned how the “unacceptable practices”, “emotional” and “psychological” elements could be clearly understood. Comments included:

“While “unacceptable practices” may be a useful umbrella term for the public inquiry, it has no meaning in delict. This will only increase the scope for litigation over what falls within the ambit of acts or omissions for which time does not run” (Simpson & Marwick).

4.11 Three respondents (Sol, Ins, CP) argued that the definition should be limited to acts or omissions which amount to a delict.

4.12 A few respondents expressed concern that previous practices, which at the time were acceptable in the eyes of the law, may come within the definition of “child abuse” under the proposed contemporary definition. Comments included:

“Some historical practices were not contemporaneously regarded as unacceptable but now are in the light of modern child care practice. For example, corporal punishment in school settings (including residential schools) would have been acceptable in the eyes of the law in previous decades” (Glasgow City Council Social Work Services).

“The Consultation does not elaborate on whether "unacceptable practices" ought to be determined according to the standards of the time of the alleged abuse, or the present day” (Faculty of Advocates).

4.13 Two respondents proposed additional aspects to the definition: human rights abuses (Surv); and spiritual abuse/ritual abuse; inappropriate physical restraint (Acad).

4.14 Views from the workshop were in general support of the proposed definition, with the possible addition of spiritual, ritual and human rights abuse also included. A suggestion was made that reference is made to the World Health Organisation definition of abuse which is seen as a benchmark international standard.

What settings should be covered by the carve out?

Background

It is proposed that any change in the law should cover abuse that occurred “in care” settings. The National Inquiry into Historical Child Abuse has defined “in care” as meaning “for the purposes of his or her residence a child is in the care of a person or organisation other than the child’s natural or adoptive parent or other family member”.

This definition is intended to include residential care; children’s homes; secure care (list D schools), borstals and young offenders’ institutions; foster care; “boarded out” children; child migrants; independent boarding schools; and healthcare establishments providing long stay care.

Question 5: Do you agree that the types of care outlined above should be covered?

4.15 28 respondents provided a clear indication of whether they agreed with the proposal, with the majority (86%) agreeing that the types of care outlined should be covered, and 14% of those who responded disagreeing. Of the legal representative bodies who responded, all supported the types of care outlined. Insurance bodies, care providers and local government respondents were divided in opinion; all other categories of respondent supported the proposal. Table 4.3 overleaf presents views by category of respondent.

Table 4.3: Views on whether the types of care outlined should be covered (Question 5)

| Respondent category | Agree | Disagree | Total |
|------------------------------|--------------|-----------------|--------------|
| Insurance Body | 2 | 2 | 4 |
| Care Provider | 3 | 1 | 4 |
| Legal Representative Body | 4 | | 4 |
| Local Government | 2 | 1 | 3 |
| Solicitor Firm | 3 | | 3 |
| Academic | 3 | | 3 |
| Individual | 2 | | 2 |
| Voluntary Organisation | 2 | | 2 |
| Survivor Representative Body | 1 | | 1 |
| Other | 2 | | 2 |
| Total | 24 | 4 | 28 |

4.16 Very few comments were documented in support of the proposal other than to condone the inclusion of “foster care” as it was considered that the position regarding this form of care is unclear in England and Wales (Leg, Sol).

4.17 The key concern relating to the proposal (from some supporters in addition to those disagreeing with the proposal) was that it could create anomalies in relation to survivors being treated differently depending on the way they were cared for (even within the same setting). Examples were provided such as a school with some pupils boarding. Boarders’ claims raised under the proposals would never time bar whereas day pupils’ claims would be subject to time-bar. A few respondents highlighted another potential anomaly between children abused whilst in hospital care but some in long stay and others abused – perhaps repeatedly – whilst as outpatients.

4.18 Some respondents made suggestions for additions to the proposed definition. Two (CP, LG) recommended that children placed in kinship care should be included. One (Oth) argued that children with disabilities in respite care and former looked-after children, aged 16 – 18 years, in care leavers’ accommodation such as homeless units, hostels and bed and breakfast settings, should come under the legislation. An individual respondent called for more settings to be added including care homes, own home, schools, scouts and football teams.

4.19 Participants at the event also felt that the definition could be broader and suggested additional types of care settings including church institutions, Armed Forces/M.O.D., scouts and guides, all schools (public and private), sports clubs, hospitals and public healthcare settings, youth and community groups, re-located children and any groups involving children and/or vulnerable adults.

Question 6: Do you think that the proposed exemption from the limitation regime should be extended to cover all children, not just those abused “in care”?

4.20 32 respondents provided a clear indication of whether they agreed with the proposal, with the majority (62%) agreeing that the types of care outlined should be

covered, and 38% of those who responded disagreeing. Table 4.4 presents views by category of respondent.

Table 4.4: Views on whether the proposed exemption should be extended to apply to all children, not just those abused “in care” (Question 6)

| Respondent category | Agree | Disagree | Total |
|------------------------------|--------------|-----------------|--------------|
| Insurance Body | | 4 | 4 |
| Care Provider | 1 | 3 | 4 |
| Legal Representative Body | 4 | 1 | 5 |
| Local Government | 4 | | 4 |
| Solicitor Firm | 2 | 2 | 4 |
| Academic | 3 | | 3 |
| Individual | 2 | 1 | 3 |
| Voluntary Organisation | 2 | | 2 |
| Survivor Representative Body | | 1 | 1 |
| Other | 2 | | 2 |
| Total | 20 | 12 | 32 |

4.21 The main reason provided in support of the proposed exemption being extended to apply to all children and not just those abused “in care” was that any other regime would be hard to justify and illogical. A few respondents (CP, Ins) envisaged complications emerging if the extension was not made, for example, if a foster parent abused their own child and a foster child; or a child was abused by a family member and also by someone in care, and the court would need to apportion losses across each setting.

4.22 Several of those stating that they disagreed with the proposal did so on the grounds that they disagreed with the overall proposal to remove cases relating to historical child abuse from the limitation regime. A few (Leg, CP), however, cautioned that the proposal to extend the exemption amounted to removing any such cases occurring in childhood which, they predicted, could impact significantly on bodies such as charities, Scout Association, church, youth organisations and parents. They expressed concern that such bodies would be unlikely to be able to produce relevant historical documentation and witnesses to defend cases raised against them.

4.23 One respondent (Ind) argued that as the Inquiry was established for “institutional abuse” then the exemption should be restricted to those “in care”.

5. ASSESSMENT OF IMPACT OF THE PROPOSALS

5.1 The Scottish Government considers that removing the barrier of time-bar for survivors of historical child abuse will result in more cases attracting legal aid funding and being heard in court.

Question 7: What do you think the impact of implementing these proposals would be in relation to the issues below?

Is it likely that more or fewer actions will be raised?

5.2 31 respondents across nine categories all agreed that more actions will be raised although a few felt that the spike in the number of actions may only be temporary, as a result of publicity and non-recent cases being dealt with.

5.3 Insurance bodies in particular envisaged proceedings overall slowing down due to increased pressure from historical child abuse actions, with possible additional actions relating to “satellite litigation” over definitions and boundaries and actions originating from other UK jurisdictions. One local government respondent predicted speculative “no-win-no-fee” claims from lawyers and claim companies. Two respondents (Leg, Sol) suggested that there may be scope for the use of “class action” amongst actions raised.

5.4 Despite the opening of opportunity to bring historical child abuse actions, a few respondents (Ind, Vol) considered that some survivors may find it difficult to come forward unless given support.

5.5 Participants at the workshop also predicted an increase in actions due to raised awareness that the limitation period has been removed. Although they considered that the adversarial nature of the legal system may cause emotional distress, they also felt that many survivors had an increased motivation to find answers and to ensure perpetrators do not escape the consequences of their actions. They suggested that lifting the time-bar will enable victims to feel validated which will help accelerate their healing process. They cautioned, however, that much will depend on the financial support provided for survivors to initiate legal action.

Is it likely that more or fewer cases will come to court?

5.6 31 respondents address this question, with 28 agreeing that more cases will come to court, two (Leg, Ind) predicting fewer cases and one (Ind) unsure.

5.7 A recurring view was that as more actions will be raised, it follows that more cases will come to court. A few insurance bodies suggested that those coming to court could be complex and lengthy.

5.8 Despite envisaging more cases in court, some respondents qualified their view stating that this depended on the quality of evidence and survivors’ awareness of their rights.

5.9 One legal representative argued that as often the primary reason for a case reaching court is to test the admissibility of an action under s19A of the 1973 Act, without a limitation period there will be no need for this, which may lower the number of court cases overall.

It is likely that more or fewer cases will be settled out of court?

5.10 24 respondents addressed this question with 14 considering that more cases will be settled out of court, one predicting fewer out of court settlements and nine unsure.

5.11 A few respondents argued that with no contentious limitation issues to deal with, more cases would be settled out of court; others commented that more cases will run to Proof as concerns over historic evidence and causation are tested. Several respondents, however, considered that predictions are difficult to make due to the likely complexity of the cases and the individual circumstances of pursuers who may vary considerably in whether or not they wish to have their day in court.

5.12 Participants at the workshop envisaged that there may be an increase in out of court settlement offers by institutions wishing to mitigate against reputational and public image damage.

Is it likely that cases will require more or less preparation time?

5.13 27 respondents addressed this issue with 16 considering that cases would require more preparation time, seven predicting less preparation time, and four unsure.

5.14 The prevailing view was that investigations of older cases will require more preparation time on account of the work involved in tracing evidence, tracking down witnesses, identifying expert evidence for breach of duty and causation issues and preparation on quantum.

5.15 Those holding the view that cases would require less preparation time considered that the removal of the need to evidence why the time-bar should not apply would reduce the amount of preparation time involved overall.

Is it likely that cases will require more or less court time?

5.16 24 respondents addressed this question. 11 considered that cases will require more court time; six envisaged less court time being required; six felt that the amount of court time required depended on the detail of the individual case; and one predicted no difference in the amount of court time required.

5.17 Amongst the seven responses from legal representatives and solicitor firms, five expected that less court time would be required, largely due to judges no longer needing to make decisions on exercising discretion over the time-bar.

5.18 The dominant argument amongst those envisaging more court time was that cases based on evidence following passage of time could be complex and will require judgements over validity of evidence. One respondent remarked:

“It is likely that there will be a marked increase in court time required to examine such historic evidence to determine whether breach of duty and causation have been established. The judiciary is likely to be placed in the unenviable position of having to determine the veracity of the pursuers’ claims in the absence of any cogent evidence to support their allegations” (Zurich Insurance plc).

Can you quantify the benefits for pursuers?

5.19 21 respondents outlined benefits for pursuers, with all categories of respondent represented except insurance bodies. A few respondents emphasised that benefits for pursuers were difficult to quantify as they related largely to psychological impacts.

5.20 The three benefits cited most frequently were:

- opportunity to access justice
- opportunity to have their voice heard
- opportunity to obtain reparation.

5.21 Comments included:

“...for survivors civil action may be the only route to having their voices heard, which is often a very important step in recovery from the impact of abuse. A finding against a defender allows many survivors to feel they have been believed” (Care Inspectorate).

“The principle benefit to pursuers will be access to justice together with an official recognition of victimhood” (Aberlour - Scotland’s Children’s Charity).

“...many victims pursue civil action for acknowledgement of their abuse, to have their abuser held to account, and for the psychological benefits associated with accessing justice. Similar to criminal injuries compensation, those claiming often tell us that the amount of financial award given is of lesser importance than the acknowledgement of the crime and its impact on them” (Victim Support Scotland).

5.22 Amongst those who highlighted reparation as a potential benefit for pursuers, a few commented that compensation will provide a means by which survivors can access specialist support, thus alleviating pressure on the welfare system and society in general.

5.23 Two respondents (Leg, Ind) envisaged that a benefit of removing the time-bar would be allowing survivors the chance to raise actions, then ultimately move on having finally obtained closure. One view (Leg) was that the change enabled survivors to decide for themselves when they are ready to raise an action, with this door always open.

5.24 Participants at the workshop shared the view that that benefits to pursuers included the opportunity to find answers and to demonstrate to perpetrators that they will not be allowed to escape the consequences of their actions. Other advantages cited by participants were that survivors would feel validated which would enable the healing process to speed up. They argued, however, that much will depend on the financial support awarded to survivors to initiate legal action.

Can you quantify the benefits for defenders?

5.25 12 respondents across six categories identified benefits for defenders; eight respondents (across four categories and including four insurance bodies) stated that they could not envisage any benefits for defenders.

5.26 Key amongst the benefits identified was that defenders would have more certainty, in that judicial discretion regarding limitation will be removed.

5.27 Three respondents identified a benefit to defenders as their opportunity to have their voice heard, to defend accusations in a court of law.

5.28 Three respondents considered that defenders could benefit by learning from the lessons which will emerge on safeguarding practices. One remarked:

“Requiring defenders to meet claims for abuse creates a powerful incentive to prevent abuse in the future, which promotes better safeguarding practices now. This is in the interests of those institutions as well as the children in them, and wider society” (Slater & Gordon Lawyers (UK)).

Can you quantify the drawbacks for pursuers?

5.29 21 respondents across all categories identified drawbacks for pursuers with a further four (from four different categories) providing their view that there will be no drawbacks.

5.30 Recurring themes were that raising actions will require survivors to re-live their past experiences, which may prove to be physically and mentally stressful. Many respondents emphasised that outcomes were not certain, particularly in view of evidence weakening over time. Concerns were voiced that raised hopes and expectations may not be fulfilled with possible feelings of resentment that alleged abusers have escaped justice.

5.31 Three respondents (Sol, Vol, Leg) shared the view that pursuers may face challenges in pursuing civil action if the perpetrator is a “man of straw” and there are no other parties able to meet the claim. In such circumstances they highlighted the Criminal Injuries Compensation Scheme as being of potential significance.

Can you quantify the drawbacks for defenders?

5.32 26 respondents across all categories identified drawbacks for defenders. The prevailing view was that organisations, possibly with current good practice relating to safeguards, could be held financially responsible for events occurring a long time

ago, before current employees were in post. Where insurance is not traced or in place then significant costs could be placed on voluntary and local government bodies, diverting monies from current needs. Some envisaged that even where a case is successfully defended, it will be unlikely that expenses will be recovered; the cost of insurance in future was predicted as rising.

5.33 Another dominant view, particularly amongst insurance bodies, was that due to the passage of time it would be impossible to conduct a fair trial, as evidence could be lost, key witnesses dead or untraceable, medical records unavailable, memories faded and cross-examination impossible.

5.34 Several respondents considered that for defenders, a key drawback is that they will need to defend actions which previously may have been time-barred, and could now risk adverse media and reputational loss. As for pursuers, it was felt that involvement in court proceedings could create stress and anxiety.

5.35 Four respondents (two legal representatives and two insurance bodies) argued that the change resulted in open-ended liability, whereby certain organisations would not be able to plan financially or operate as businesses due to the historical allegations against them remaining a possibility.

5.36 One respondent (Acad) identified the potential for a rise in spurious and fraudulent claims as a drawback for defenders.

ANNEX: LIST OF RESPONDENTS

Academic

Centre for Excellence for Looked After Children in Scotland
Child Law & Policy Unit, Edinburgh Napier University
Dr Hamish Ross

Care Provider

Aberlour – Scotland's Children's Charity
Barnardo's
Quarriers
Sailors' Society

Insurance Body

Allianz Insurance plc
Aviva Insurance Ltd
Forum of Scottish Claims Managers
RSA Group
The Association of British Insurers
Zurich Insurance plc

Legal Representative Body

Association of Personal Injury Lawyers
Faculty of Advocates
Forum of Insurance Lawyers
Law Society
Scottish Legal Action Group
Sheriffs' Association

Local Government

East Ayrshire Council
East Lothian and Midlothian Public Protection Committee
Shared Social Service, Stirling & Clackmannanshire Council
Social Work Services, Glasgow City Council

Other

Care Inspectorate
Scottish Labour

Solicitor Firm

Digby Brown LLP
DWF LLP
Simpson & Marwick
Slater & Gordon, Lawyers

Survivor Representative Body

Former Boys and Girls Abused in Quarriers Homes

Voluntary Organisation

Rape Crisis Scotland

Victim Support Scotland

Three individuals responded to the consultation.

A participative workshop, organised by the Scottish Government, and facilitated independently, was held in Glasgow on 19 – 20 August 2015 with survivors of historical child abuse, with their views incorporated into the analysis as appropriate.



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