

Scottish Government Consultation on the 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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CHAPTER 1

Introduction

1.1 On 28 May 2015, Angela Constance MSP, Cabinet Secretary for Education and Lifelong Learning addressed the Parliament on the National Inquiry into Historical Child Abuse¹. This was the culmination of a lengthy process of collaborative working between the Scottish Government, the Scottish Human Rights Commission (“the SHRC”) and other key stakeholders. A timeline of that work is set out at **Annex A**.

1.2 In that announcement, the Cabinet Secretary set out the package of measures to support survivors of historical abuse. These included:

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

The Cabinet Secretary also advised of the action that the Scottish Government is taking in response to the SHRC recommendation on time-bar. 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 the 26th of September 1964.

1.3 Ministers are of the view that the 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. The circumstances of survivors of historic 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. For these reasons the Scottish Government intends to remove the application of the 3 year limitation period (time-bar) from personal injury actions raised by victims of child abuse.

1.4 This consultation seeks views on a number of matters around the removal of the 3 year limitation period for survivors of historical abuse. Responses to the consultation will inform the development of legislative proposals to remove the 3 year limitation period. Scottish Ministers aim to ensure that any resulting legislation is fit for purpose, with no unintended consequences and that it takes account of all relevant perspectives, including equalities considerations and any potential financial and regulatory implications.

1.5 As a further demonstration of our clear intent and commitment to this issue we will also publish a draft Bill, informed by the responses to this consultation, before the end of the 2015/16 Parliamentary Session.

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

1.6 As the Cabinet Secretary set out to Parliament, on Thursday 28th May, the Scottish Government has given serious consideration to a legislative solution to the application of the law of prescription on cases of abuse which occurred before the 26th of September 1964. For the reasons detailed in Chapter 3 of this consultation, the legal issues relating to the removal of the law of prescription for these cases has proved too difficult to overcome. This consultation, therefore, seeks views on the removal of the 3 year limitation period only. As part of our wider engagement with survivors, we will continue to listen to the views of survivors of historical abuse who suffered abuse prior to the 26th of September 1964 as to how their needs and concerns may be addressed.

CHAPTER 2

Background

The current law

2.1 In order to be able to raise an action for damages in the civil courts in Scotland for any form of personal injury, it must be raised within the timeframe set out in the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”).

Why do we have a time-bar?

2.2 An essential aim of time-barring actions is to strike an appropriate balance between, on the one hand, the rights of individuals who may wish to make a claim for personal injury and who should have a reasonable opportunity to do so and on the other, the protection of all individuals and organisations against open-ended civil liability.

2.3 A time-bar period for personal injury claims exists in nearly all similar developed systems in the world. The detailed rules are different but the underlying principle remains the same. Its aim is to avoid the potential for evidence to be lost with the passage of time, or for the quality of the evidence to be adversely affected; reduce the potential difficulties in securing a fair determination of a case long after the circumstances at issue; and to ensure the public interest in encouraging disputes to be resolved speedily thus promoting finality and certainty.

Prescription and Limitation

2.4 Prescription and limitation are different in form and concept but both have the effect of ‘time-barring’ a claim for damages.

- Limitation – this is essentially a procedural rule rather than a rule of substantive law because its effect is to prevent an action proceeding in court after the lapse of a period of time rather than to remove the right to raise the action itself.
- Prescription – in contrast with limitation, this 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

2.5 In relation to limitation, the law recognises that there will always be cases where it will be appropriate to allow a claim which is why currently a court may “if it seems equitable to do so” allow an action for damages to proceed even though it is otherwise time-barred. To enable this discretion to be exercised the courts will require evidence of why the claim was not raised earlier and will require to be satisfied that the passage of time will not cause undue prejudice to the defendant’s ability to defend the proceedings.

2.6 The court’s discretion has to accommodate a wide range of personal injuries, whether they are immediately apparent (e.g. as with a broken leg arising from a road traffic accident) or whether they are effectively latent for many years (e.g. as with

mesothelioma arising from exposure to asbestos some decades before). It must also be able to accommodate not only physical injuries, but injuries of a psychiatric nature as well. Moreover, it must recognise and take account of the fact that the circumstances and capabilities of injured people can vary greatly.

2.7 In relation to prescription, the law generally provides no discretion as the length of time that has passed means that the claims are regarded as so stale that they prescribe absolutely. In law any right or duty no longer exists.

2.8 Further details on the application of these rules are detailed below.

Limitation

2.9 In relation to personal injury actions there is a 3 year limitation period. This means that an individual has to begin any personal injury action within 3 years of the injury being sustained or within 3 years of the individual knowing that the injury has been sustained. The court has some discretion to allow an action to be commenced after the 3 year limitation period has lapsed if on the evidence presented to them they consider that it would be equitable for them to do so.

2.10 Time-bar does not run whilst the injured person is under the age of 16 or for any time they are 'unsound of mind'. The three-year period begins to run from whichever of the following dates is latest.

- the date on which the injuries were sustained, or
- the date on which the act or omission ceased (where the act or omission to which the injuries were attributable was a continuing one), or
- the date on which the injured person became aware (or the date on which, in the opinion of the court, it would have been reasonably practicable for him to become aware) of all the following facts:
 - (i) that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;
 - (ii) that the injuries were attributable in whole or in part to an act or omission; and
 - (iii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.

Prescription

2.11 Until 1984, in relation to personal injury claims, the prescriptive period was 20 years. In 1984 the law was amended² so that, in future, no prescriptive period would apply to claims for personal injury. However, no change was made in respect of

² Prescription and Limitation (Scotland) Act 1984.

claims which had already by that date prescribed – that is, claims in relation to events occurring before 26 September 1964. These were not revived.

2.12 Notwithstanding the change in the law in 1984, for injuries occurring before 26 September 1964 the law before and after that date has been that any right of action arising out of those events was extinguished after 20 years. Put simply if an individual suffered a personal injury prior to 26 September 1964 and did not raise a claim before 25th September 1984, the law of prescription applies and they have no right to bring a claim unless the claim was made or acknowledged before 26th September 1984. If however the personal injury occurred after 26 September 1964, the law of prescription does not apply and the individual is able to bring a claim - although limitation would apply.

2.13 Claims in respect of pre-1964 injury – that is, claims in respect of injuries occurring more than 50 years before the present date - have been legally extinct for more than 30 years and in some cases for very much longer than that.

CHAPTER 3

Prescription

3.1 Chapter 2 of this paper described the law on prescription.

3.2 The Scottish Law Commission considered whether there was a case for retrospectively undoing the effects of prescription³, despite the passage of several decades, to allow claims in respect of the extinguished rights/obligations which had initially arisen prior to September 1964 to be taken forward.

3.3 In a carefully argued assessment, which considered the case in relation to the retrospective revival of right/obligations for personal injuries generally and personal injuries arising from institutional childhood abuse specifically, and which took particular account of developments elsewhere, the Commission concluded that there were compelling reasons why this could not and should not be attempted.

3.4 As the Scottish Law Commission pointed out in their paper⁴: -

"Any reversal of ...negative prescription... would present grave difficulties for the courts and practitioners attempting to set aside current standards and attitudes and to apply the standards and attitudes of the past.... Documentary records would probably have been lost... it might be impossible to establish whether any form of liability insurance was in place at the time."

3.5 In general, retrospective application raises difficulties because: -

- Individuals take actions based on the law which exists at the time and retrospective application may interfere unfairly.
- It may cause incidents which occurred in the past to be judged against current standards.
- Witnesses may have died; individuals may have difficulty recalling what happened a long time ago; and evidence may no longer be available.

3.6 As regards whether the effects of prescription could be retrospectively undone, particular attention requires to be paid to the European Convention on Human Rights, bearing in mind that the Scottish Parliament has no power to pass legislation which conflicts with the rights guaranteed by that Convention. The Commission noted that:

"In light of the case law on the Convention, there is a real possibility that the retrospective imposition of liability on a person upon whom no liability currently existed for events which occurred in the past would contravene Article 1 of the First Protocol to the Convention, in that it involves an interference with the peaceful enjoyment of his "possessions" (or property); the imposition of such liability could require the payment of compensation out of his assets and thus the depletion of his "possessions". This result is not

³ Report on Personal Injury Actions: Limitation and Prescribed Claims (Scot Law Com No 207) Scottish Law Commission, December 2007. <http://www.scotlawcom.gov.uk/publications/reports/2000-2009/>

⁴ *ibid*, paragraph 5.11, page 53

certain; not every case of retrospective or retroactive legislation affecting property rights will necessarily contravene Article 1 of the First Protocol. ... Nevertheless, we consider that any retrospective or retroactive legislation in this area would undoubtedly raise serious human rights issues and might well be held to be incompatible with the European Convention on Human Rights."

3.7 The Scottish Government accepted the recommendations of the Commission in 2013⁵ and agreed that prescribed claims should not be revived. Given the continuing concerns about these cases, the Scottish Government has considered the position again very carefully and remains of the view that it would not be compatible with Article 1 of the First Protocol (A1P1) to the ECHR to reverse the law that was put in place in 1984. Reviving very old cases would be difficult in respect of retrospection and A1P1 because of the importance of certainty and finality. Any claims are at least 50 years old and have been legally extinct for at least 30 years. These are very long periods during which (in terms of finality and certainty) the law has been completely beyond doubt.

3.8 Consideration also needs to be given to the fundamental value of legality - that persons should be able to regulate their actions by reference to the law, which in turn must meet acceptable standards of clarity and foreseeability, and not be judged by the standards of a later era.

3.9 In this paper where we subsequently refer to 'time-bar' we are therefore referring to the 3 year limitation period. The proposal to remove the limitation period will mean 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 prescription will continue to apply and there will be no right to raise a civil action for damages for personal injury.

⁵ This position was publicly reaffirmed by the Scottish Government in December 2013. Civil Law of Damages: Issues in Personal Injury - Scottish Government Response to the Consultation December 2013 at p.12.

CHAPTER 4

Limitation - Scottish Government Action to Date

Scottish Law Commission Report

4.1 There have been concerns that the current law in relation to limitation - may not always succeed in striking an appropriate balance and does not adequately reflect that it is the nature of the abuse that is a barrier to raising a claim within the required period.

4.2 Consequently, the Scottish Ministers invited the Scottish Law Commission ("the SLC") to review the law and make appropriate recommendations for reform. The Commission's Report on *Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com No 207) was published in December 2007 and contained a series of recommendations.

4.3 The SLC considered the issue of limitation in their report No.207. On the issue of limitation in personal injuries actions, including in cases of child abuse, they did not recommend any reforms to section 19A other than inserting a non-exhaustive listing of relevant factors which a court ought to take into account when applying that section. They did recommend that the limitation period should be extended from 3 to 5 years; that there should be a subjective element to the date of knowledge test; and that the definition of 'unsoundness of mind' should be updated.

Damages for personal injury consultation

4.4 The Scottish Government subsequently consulted⁶ on issues surrounding damages for personal injury generally. The consultation paper was informed by the SLC's report and recommendations on Limitation and Prescribed Cases and sought views on a number of issues.

4.5 That consultation did not specifically ask whether time-bar should be removed for any particular category of pursuer. It did ask whether respondents agreed that it is appropriate to have a single, standard limitation period for all types of personal injury claim, instead of different periods for different types of injury. Just over three-quarters of those providing a view agreed that it is appropriate to have a single, standard limitation period for all types of personal injury claim. The most common argument in favour of a single, standard limitation period was that this creates a simple rule, which is easy for the public to understand⁷. There was however a minority view that there should be different limitation periods or no limitation period for cases relating to historical child abuse as well as for some occupational disease claims.

⁶ Civil Law of Damages: Issues in Personal Injury – A Consultation Paper, Scottish Government , 19 December 2012 <http://www.gov.scot/Publications/2012/12/5980>

⁷Civil Law of Damages: Issues in Personal Injury - Analysis of Written Consultation Responses; August 2013 <http://www.gov.scot/Publications/2013/08/6983/0>

4.6 In the Scottish Government response to the consultation⁸, we set out our intention to, amongst other things:-

- extend the limitation period for personal injury actions from 3 to 5 years;
- set out a non-exhaustive list of factors for the court to consider when asked to exercise its discretion to allow a case to proceed, where that case is time-barred;
- introduce a subjective element to the date of knowledge test to allow the personal circumstances of a pursuer to be taken into account;
- update the definition of when a pursuer lacks capacity.

4.7 The combination of these measures was intended to address some of the practical difficulties in pursuing claims for personal injuries. It was thought that in particular, the provision of a detailed list of factors which may be taken into account when judges exercise their discretion would assist the courts and practitioners to address the issues around difficult cases such as actions by survivors of historical child abuse.

4.8 It was proposed that these measures would be taken forward in a Damages (Scotland) Bill (“the Bill”). Some of the policy issues around the Bill are still under consideration as a result of issues raised in the course of the consultation, including the way in which time-bar operates in relation to survivors of historic child abuse.

4.9 We have given careful consideration to the question of whether the changes to the general limitation regime, which were proposed as part of the Bill, would assist with these difficult cases. On reflection and, for the reasons detailed below, although the proposed changes to the application of judicial discretion in the Bill ‘may go some way to delivering justice to such victims’⁹, the Scottish Government are of the view that the unique position of survivors of historic child abuse merits a different approach to application of the limitation regime.

4.10 It is for these reasons that we propose to take steps to disapply the 3 year limitation period to cases of historical child abuse.

SHRC Interaction Action Plan

4.11 As outlined in earlier and in **Annex A**, the SHRC Action Plan recommended a review of the way in which time-bar operates. The Scottish Government issued a response to the recommendations in the Action Plan, in October 2014¹⁰ and in that response, committed to working with survivors and other key stakeholders across the legal sector to understand what the difficulties were and how they could be overcome. Views were gathered at a series of stakeholder events.¹¹

⁸ Civil Law of Damages: Issues in Personal Injury – Scottish Government Response to the Consultation; December 2013 <http://www.gov.scot/Publications/2013/12/7197/downloads>

⁹ Historic Abuse: the hard reality for victims, Eleanor J Russell, April 2015, Page 35

¹⁰ <http://www.survivorscotland.org.uk/news-and-resource-library/item/scottish-human-rights-interaction-7/>

¹¹ A series of regional engagement events facilitated by CELCIS on the National Inquiry and related issues which took place in March 2015.

4.12 Attendees at the events were invited to share their experiences of the operation of time-bar to help inform the Scottish Government's policy thinking on this matter. The consultation paper¹² noted the following:-

“Survivors were asked about their experiences in respect of raising an action in the civil courts to obtain compensation for their injuries to help inform the Scottish Government's policy thinking on this matter. Those participants that had attempted to bring claims invariably reported negative experiences linked to the existence of the time bar (as detailed by the Prescription and Limitation (Scotland) Act 1973) and a consequent inability to obtain legal aid.

Discussions and feedback explored the nature of child abuse and the numerous reasons why individuals might not come forward immediately or within a prescribed time limit, to report their experiences. A range of examples were given to explain this, including the residual trauma precipitated by abuse; feelings of embarrassment and shame; a fear of authority and retribution; a lack of knowledge and education pertaining to their rights; not realising that what happened to them was wrong; the fear of not being believed; not being believed when they spoke out and wanting to leave their experiences in the past and move on with their lives.

As a result, participants overwhelmingly felt that the existence of the time-bar is unfair and a fundamental barrier to survivors gaining access to civil justice. A majority of participants felt that the time bar should be removed automatically in cases of historic child abuse.”

4.13 Representatives of provider organisations advised of the perceived unfairness of time bar which, in their view, acted as a real barrier to survivors of historical child abuse accessing justice. They commented that a great deal of child abuse is by its very nature complex and there are many reasons why individuals may not be able to come forward; and that victims of abuse experience conflicted feelings, they may have been pressurised to keep silent and they have a suspicion of authority and legal processes.

¹² Consultation on the Public Inquiry into Historical Child Abuse in Scotland and other Scottish Government Commitments to Survivors of Historical Child Abuse, Andrew Kendrick & Julie Shaw, CELCIS University of Strathclyde March 2015.

CHAPTER 5

Proposal to Remove the Application of the Limitation Period to Survivors of Historical Child Abuse Who Wish to Raise Personal Injury Actions

5.1 The Scottish Government has undertaken discussion with the legal profession to try to establish if the anecdotal evidence provided by survivors on the application of time-bar within the Scottish Courts can be evidenced. The limitation period, in and of itself, does not prevent a victim of historic child abuse raising an action but it provides a hurdle which must be overcome by the victim before their case can be heard.

5.2 The current law proceeds on the basis that ordinarily personal injury proceedings should be raised within 3 years of the date of the injury. However, it is not an absolute rule. The starting point can be set at a later date if there were continuing acts or omissions; if a pursuer did not have the requisite knowledge about the seriousness of their injuries; or if the pursuer was legally disabled by reason of age or unsoundness of mind. Judges can also use their discretion to allow a case to proceed notwithstanding the expiry of the limitation period. In the above exceptions, the onus lies on the pursuer to demonstrate some cogent reason why the normal effect of the expiry of the limitation period should not apply.

5.3 The difficulty in a number of the reported cases is that pursuers have been unable to provide a cogent justification for failing to raise proceedings within the required timescale and, frequently for a significant period thereafter. A number of reasons have been provided by pursuers for not doing so, such as ignorance of their legal rights¹³ or as a consequence of the “silencing effect” but these have invariably been unsuccessful in arguing that section 19A of the 1973 Act¹⁴ should be applied, overriding time bar.

5.4 By contrast, it is often not difficult for defenders to demonstrate that the passage of time of historical abuse is likely to cause difficulty in the investigation and presentation of a defence. This is frequently the case where the abuser has either died or lacks the resources to meet a claim for damages and the defender is therefore the abuser's employer who may have been unaware of the abuse.

5.5 Although there are many different reasons for cases not proceeding, in the most recent case of *EA v GN*¹⁵ the Inner House of the Court of Session upheld Lord Kinclaven's decision to exercise his discretion and waive time-bar in a case of historic child abuse which was raised in 2003 having been time-barred in 1986. Of particular note in this case was that the pursuer had been aware of the abuse but the court accepted that the defenders conduct in making the pursuer sexualised, habituated to the abuser's conduct and emotionally dependent on him explained the delay in raising proceedings. Furthermore, that this produced in her as an adult a state akin to dependence. Even after the exploitation stopped in 1997, the fact that

¹³ CW v Trustees of the Roman Catholic Archdiocese of St. Andrews and Edinburgh [2013] COSH 185

¹⁴ Section 19A(1) “Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision.”

¹⁵ EA v GN [2015] CSIH 26

the pursuer had been emotionally dependent was a relevant factor to explain the delay.

Policy Position

5.7 The circumstances of historical child abuse are sufficiently unique from other cases involving personal injury that a different approach appears to be warranted in relation to time-bar. In particular that the law should recognise that it is the abuse which is the reason why people do not come forward until many years after the event even where there was knowledge of what had happened. The Government considers that whatever factors might govern the exercise of the court's discretion, the nature of a limitation period creates an inbuilt resistance to allowing stale claims which is not appropriate in the context of child abuse. This was acknowledged by Lady Hale in the House of Lords opinion in *A v Hoare and others*:

*"Until the 1970s people were reluctant to believe that child sexual abuse took place at all. Now we know only too well that it does. But it remains hard to protect children from it. This is because the perpetrators are so often people in authority over the victims, sometimes people whom the victims love and trust. These perpetrators have many ways, some subtle and some not so subtle, of making their victims keep quiet about what they have suffered. The abuse itself is the reason why so many victims do not come forward until years after the event. This presents a challenge to a legal system which resists stale claims."*¹⁶

5.8 Survivors of historic abuse were not only vulnerable children when the harm took place but many came from difficult home circumstances and as a result were especially vulnerable when they were supposed to be in a safe and a caring environment. In some cases they may have been too young to recall the detail of what happened to them because the abuse occurred while the survivor was an infant or toddler. Some survivors, therefore, do not know or understand that they were in fact subject to abuse until many years later. Although survivors may be able to pursue actions, they would require to demonstrate that they did not have knowledge of the harm until a later date ("date of knowledge test") to prevent the clock starting on time bar. As noted above, this is relatively strict test and the onus of proof is on the pursuer.

5.9 The harm that occurred was not accidental; it was deliberate and constituted a crime – in many cases a very serious crime. Frequently the institutions caring for survivors exercised such a degree of control over them it left them unable to deploy even the most basic life skills. These children usually left care traumatised and not equipped to understand their rights or instruct a lawyer.

5.10 The particular way in which the harm manifests itself can make it almost impossible to raise an action within the limitation period. It is quite common for sufferers of child abuse to suppress the knowledge of abuse through shame, guilt, fear and the stigma associated with their abuse, this is often referred to as the

¹⁶ *A v Hoare and others*, House of Lords [2008] UKHL 6 Paragraph 54.

“silencing effect”. Moreover, one of the outcomes of effectively ‘grooming’ a child is to encourage their complicity and silence about the abuse.

5.11 This silencing effect was also highlighted in the Shaw Report:¹⁷

“A major theme among former resident’s experiences, as told to the review, is that they didn’t talk about their abuse as children, or, if they did, they weren’t believed or they were punished. As children they learnt to be silent about they had experienced as grave injustices.”

5.12 Evidence¹⁸ also suggests that most reported cases of child abuse often only emerge or are divulged under conditions of stress, a catastrophic life event, serious illness or in later life when an adult survivor establishes a loving, trusting relationship or in the process of addressing the underlying causes of addiction or substance misuse.

5.13 It is clear that child abuse creates in people feelings of insecurity, a persecution complex, a belief that everyone is hostile towards them and a deep resentment of authority. The feeling of being disbelieved and difficulties with people in a position of authority means that survivors can find it very difficult to engage in the justice system.

5.14 When all of these factors are considered in the round, it is apparent that the position of survivors of historical child abuse stands apart from other cases of personal injury. That is not in any way to undermine the seriousness of other personal injury cases but rather to recognise that the combination of age, vulnerability, the nature of the injuries and the accepted impact of these types of injury along with the fact that the children were in a care setting makes the characteristics of these cases distinctive.

What would removing time-bar from child abuse cases mean?

5.15 Currently, where a case is beyond the 3 year limitation period, a defender may rely on the defence of time-bar. It is for the defender to decide whether or not to lodge such a defence. Although there is evidence that defenders may choose not to invoke the time bar defence¹⁹, in most cases a prudent defender will do so. The onus is then on the pursuer to persuade the court that they were not aware of all of the statutory facts (as set out at paragraph 2.8 above) until a period less than 3 years before raising their action or failing that then ask the court to exercise their discretion.

5.16 The court may choose to decide these issues in a preliminary hearing before they hear the full case or they may decide that they need to hear the evidence before they reach a decision on time bar. At the point the court reaches a decision on the issue of time bar and if their decision is not to exercise their discretion to allow the case to be heard the case will be dismissed.

¹⁷ Historical Abuse Systemic Review: Residential Schools and Children’s Homes in Scotland 1950 to 1995. An independent review led by Tom Shaw <http://www.gov.scot/Publications/2007/11/20104729/27>

¹⁸ Time to be Heard Pilot Forum

¹⁹ JM v Fife Council. [2007] CSOH 07

5.17 There is a right of appeal as demonstrated by the cases of *AS v Poor Sisters of Nazareth*²⁰ which was time barred and *EA v GN*, where discretion was exercised and time-bar was waived. The appeal courts are unlikely to interfere with the exercise of the discretion by the lower court.

“[T]his House would not overrule the discretion of a lower court merely because we might think that we would have exercised it differently..... We might do so if some irrelevant factor had been taken into account, or some important relevant factor left out of account, or if the decision was unreasonable, and we would not doubt do so if the decision could be said to be unjustified.” (Thomson v Glasgow Corporation 1962 SC (HL) 36 Lord Reid, page 66”.

5.18 A decision not to exercise discretion to allow a case to proceed is therefore seen by many survivors as ‘denying them their day in court’. Often the court will not get to the point of hearing any evidence or any merits of the case. This can be difficult for many to accept.

5.19 The proposal to remove the application of the limitation regime from this category of pursuers would mean that a survivor of historic abuse would be able to raise an action if the abuse took place after 26 September 1964. Such a change would not of itself guarantee success but would remove the prerequisite to overcome the time-bar hurdle.

Other Issues

5.20 The effect of our proposal to modify the law on limitation will not necessarily enable all cases raised by pursuers in child abuse cases to proceed. Modifying the law will remove the barrier of time-bar but this does not resolve the underlying issue that in many cases the availability or quality of the evidence may be insufficient to enable them to prove their case. Therefore legal aid funding may still be refused on the grounds that there are limited prospects of success due to a lack of evidence or witnesses.

5.21 One of the main reasons for the law on time-bar, and which is why we wish to maintain that law for other categories of personal injury actions, is that there is a general public interest in actions being settled as quickly as possible. Good quality, fresh, reliable and complete evidence which has not been adversely affected by the passage of time contributes to the efficient administration of justice and ensures that the legal consequences of an event are judged by the standards which apply when it occurred.

5.22 Removing time-bar will also not avoid the court process. In order to determine the outcome of an action, the court will need to hear the evidence and hear from witnesses which will likely to include the pursuer. A defender may still want to defend a claim and the experience is still likely to be an adversarial one,

²⁰ *AS v Poor Sisters of Nazareth: sub nom B v Murray* [2008] UKHL 32: 2008 SC (HL) 146: 2008 SLT 561

which is may prove challenging, emotional and difficult for anyone who raises an action.

5.23 The proposed removal of time-bar from child abuse cases will not guarantee a successful outcome but it is hoped it will enable pursuers who have legitimate cases the opportunity to raise their action without having to overcome the burden on proof to except their case from the limitation regime.

5.24 The Scottish Government are considering whether and how the proposed change in the law may apply to cases which have been raised unsuccessfully on the basis of the limitation period.

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

Yes

No

Don't know

Please set out your reasons

Q.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?

Please set out your reasons for your answer

CHAPTER 6

Application of the Proposed Change in Law

6.1 We propose that there is a change in the law to remove the application of the limitation regime from survivors of historic child abuse. To facilitate this, we would welcome your views on the following questions: -

What do we mean by the term 'child'?

6.2 There are a number of different definitions of child in Scotland for different purposes. Under the Children (Scotland) Act 1995²¹ a child is generally defined as a person under the age of eighteen years. Moreover, section 13 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 defines "adult" means a person aged 18 or over, "child" means a person under the age of 18...'. Similarly, the United Nations²² define a child as anyone under the age of 18. Article 1 does however state that this is the case unless majority is attained earlier under the law applicable to the child.

6.3 Under the Age of Legal Capacity (Scotland) Act 1991²³ a person has legal capacity at age 16 or over. This is the age of nonage in terms of the law on time-bar, which means that time-bar does not start to run until a child has reached age 16, regardless of the age they were when the harm took place.

6.4 The scope of the Public Inquiry into Historical Child Abuse which was announced by the Cabinet Secretary for Education and Lifelong Learning on 28 April 2015, defines a child as someone under the age of 18. In addition, under the new Children and Young People (Scotland) Act 2014, a child is defined as under the age of 18.

6.5 On balance we consider that for the purposes of time-bar legislation a child should be defined as someone who has not attained the age of 18.

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

Yes

No

If no, please explain your reasons

Don't Know

²¹ Children (Scotland) Act 1995 c.36 section 15

²² United Nations Convention on the Rights of Children Article 1

²³ Age of Legal Capacity (Scotland) Act 1991, c.50 section 1

What type of abuse should be covered?

6.6 In the Report of the Child Protection Audit and Review²⁴ it was noted that “There is no single agreed definition of what child abuse and neglect is and definitions have changed over time. Abuse can be physical, sexual or emotional. It may be acute or involve a long-term pattern of physical neglect. Often children are abused in more than one way.”

6.7 More recently, the National Guidance for Child Protection in Scotland which was published in 2010 and refreshed in 2014, set out the view that child abuse and child neglect are “forms of maltreatment of a child. Somebody may abuse or neglect a child by inflicting, or by failing to act to prevent, significant harm to the child”²⁵. 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.

6.8 In the course of engagement with survivors, 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.

Q.4 Do you agree that any definition of ‘child abuse’ should cover physical, sexual, emotional, psychological, unacceptable practices and neglect?

Yes

No

If not, why not

Don’t Know

²⁴ “It’s everyone’s job to make sure I’m alright” – Report of the Child Protection Audit and Review, Scottish Government, November 2002

²⁵ National Guidance for Child Protection in Scotland 2010 as in 2014. The Scottish Government. Paragraph 32

What settings should be covered by the carve out?

6.9 The work of the SHRC in the context of the InterAction related to victims of historical abuse of children in care²⁶. It is proposed that any change in the law should cover abuse that occurred “in care” settings.

6.10 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.’

6.11 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.

Q.5 Do you agree that types of care outlined above should be covered?

Yes

No

If not, why not

Don’t know

Q.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”?

Yes

No

If not, why not

Don’t know

²⁶ Action Plan on Justice for Victims of Historic Abuse of Children in Care Action Plan
<http://www.shrcinteraction.org/Portals/23/Action-Plan-on-Historic-Abuse-of-Children-in-Care-Nov-2013.pdf>

What will be the financial and resource impact of this change?

6.12 The purpose of the proposal is to remove the barrier of time-bar for a defined category of pursuer – survivors of historical child abuse. If pursued the result would be that more cases would attract legal aid funding and therefore would be heard in court. There will therefore be a cost implication for both the legal aid fund and the administration of the Scottish Court Service.

6.13 It is not possible, at this stage, to provide any precise costings for the proposed change in the law. There is insufficient experience of such cases progressing through the court system to provide any volume base data. The impact will also ultimately depend upon the extent of the definition of historic child abuse.

6.14 We would welcome your views on the following:-

Q.7 What do you think the impact of implementing these proposals would be in relation to the issues below, where possible please illustrate your answer with figures:-

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

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

Is it likely that more or fewer cases will be settled out of court?

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

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

Can you quantify the benefits for pursuers?

Can you quantify the benefits for defenders?

Can you quantify the drawbacks for pursuers?

Can you quantify the drawbacks for defenders?

ANNEX A

Scottish Human Rights Commission InterAction Process

Background

1. In 2009, the Scottish Government commissioned the Scottish Human Rights Commission (SHRC) to produce a Human Rights Framework to inform the design and delivery of an acknowledgement and accountability forum.
2. The Framework was published in February 2010 and outlined what the SHRC regards as a “comprehensive approach to ensuring effective access to justice, remedies and reparation for childhood abuse”. This was based on an analysis of international human rights law, research on the views of survivors and others, and experience in other countries. The Framework made a series of recommendations for the Scottish Government.

The InterAction Process

3. In December 2011 Scottish Ministers engaged with an InterAction process (a facilitated negotiation within a human rights framework) to develop an Action Plan to implement the recommendations in the SHRC Framework. The Action Plan was published in 2013 and contained number of recommendations for the Scottish Government on justice for survivors of historical childhood abuse in care. 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.”*
4. The Scottish Government issued a response to the recommendations in the Action Plan, in October 2014²⁷ and in that response, committed to working with survivors and other key stakeholders across the legal sector to understand what the difficulties were and how they could be overcome.
5. The Cabinet Secretary for Education and Lifelong Learning, Angela Constance, on behalf of the Scottish Government made a Parliamentary statement on 17 December 2014 announcing the Governments’ intention to hold a National Inquiry into Historical Child Abuse. This also set out a commitment to engage with Survivors and relevant organisations to seek views on the Terms of Reference of the Inquiry, as well as the attributes of the Chair and Panel. A series of regional engagement events on the Inquiry were held and were attended by a range of survivors and service providers. These events provided an opportunity to allow contributions about the Public Inquiry and related issues.

²⁷ <http://www.survivorscotland.org.uk/news-and-resource-library/item/scottish-human-rights-interaction-7/>

6. During December 2014 a number of Scottish ministers interacted with survivors. In February, views were also sought from the Lord President, the Faculty of Advocates, the Law Society of Scotland and the Scottish Legal Aid Board on any difficulties around the operation of judicial discretion for survivors of historical child abuse and the process for obtaining legal aid funding. In April the Minister for Community Safety and Legal Affairs met representatives of survivors to specifically discuss the issue of time-bar and to hear at first hand their experience of how time-bar operated for them.

ANNEX B

I. THE SCOTTISH GOVERNMENT CONSULTATION PROCESS

A.01 Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

A.02 The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

A.03 Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government Library at Victoria Quay, Edinburgh (Area GD-Bridge, Victoria Quay, Edinburgh, EH6 6QQ, telephone 0131 244 4560).

A.04 All Scottish Government consultation papers and related publications (e.g., analysis of response reports) can be accessed at: Scottish Government consultations (<http://www.scotland.gov.uk/consultations>).

A.05 The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

A.06 Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

A.07 While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

II. How to Respond to this Consultation Paper

A.08 We are inviting written responses to this consultation paper by Friday 18 September 2015. Please send your response with the completed Respondent Information Form (see "Handling your response" below), to:

damages@scotland.gsi.gov.uk

or

Scottish Government, Civil Law Reform Unit, Room GW.15, St Andrew's House, Regent Road, Edinburgh, EH1 3DG.

If you have any queries, please contact the team as above, or on 0131 244 2442 or 0131 244 6931.

A.09 We would be grateful if you would use the consultation questionnaire provided or, where this is not possible, would clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

A.10 This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at www.scotland.gov.uk/consultations.

A.11 The Scottish Government has an email alert system for consultations (SEconsult: www.scotland.gov.uk/consultations/seconsult.aspx). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

A.12 We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** below as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

A.13 All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

RESPONDENT INFORMATION FORM: CONSULTATION PAPER ON REMOVAL OF THE 3-YEAR LIMITATION PERIOD FROM CIVIL ACTIONS FOR DAMAGES FOR PERSONAL INJURY FOR IN CARE SURVIVORS OF HISTORICAL CHILD ABUSE

Please Note That This Form **Must** Be Returned With Your Response To Ensure That We Handle Your Response Appropriately

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

Forename

2. Postal Address

Postcode

Phone

Email

3. Permissions

I am responding as...

Individual

/ Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

CONSULTATION QUESTIONS

B.01 This Annex summarises all the questions that appear in this consultation paper. Respondents should not feel obliged to answer all of them. However, the Scottish Government would appreciate all responses, whether from individuals or from organisations, with views on any or all of these matters.

B.02 Please explain and, where possible, provide evidence for each answer that you give.

Chapter 5: Proposal to Remove the Application of the Limitation Period to Survivors of Historical Child Abuse Who Wish to Raise Personal Injury Actions

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

Yes

No

Don't know

Please set out your reasons:

Q.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?

Please set out your reasons for your answer:

Chapter 6: Application of the Proposed Change in law

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

Yes

No

If no, please explain your reasons:

Q.4 Do you agree that any definition of 'child abuse' should cover physical, sexual, emotional, psychological, unacceptable practices and neglect?

Yes

No

If not, why not:

Q.5 Do you agree that types of care (outlined in Para's 6.9 to 6.11) should be covered?

Yes

No

If not, why not:

Q.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"?

Yes

No

If not, why not:

Q.7 What do you think the impact of implementing these proposals would be in relation to the issues below, where possible please illustrate your answer with figures:-

Q.7(a) Is it likely that more or fewer actions will be raised?

Q.7(b) Is it likely that more or fewer cases come to court?

Q.7(c) Is it likely that more or fewer cases will be settled out of court?

Q.7(d) Is it likely that cases will require more or less preparation time?

Q.7(e) Is it likely that cases will require more or less court time?

Q.7(f) Can you quantify the benefits for pursuers?

Q.7(g) Can you quantify the benefits for defenders?

Q.7(h) Can you quantify the drawbacks for pursuers?

Q.7(i) Can you quantify the drawbacks for defenders?



The Scottish Government
Riaghaltas na h-Alba

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