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By email

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Thank you for your letter of the 3 February 2017 in which you request further information about the reasoning behind the decision not to reform the law on prescription within the Limitation (Childhood Abuse) (Scotland) Bill ('the Bill'). The Committee may recall this issue was discussed in Parliament during the statement by the then Cabinet Secretary for Education and Lifelong Learning, Angela Constance MSP, on the 28<sup>th</sup> of May 2015. In her statement and in the discussion that followed, Ms Constance set out the Scottish Government's commitment to supporting survivors of childhood abuse and, as much as possible, removing barriers to justice. She also set out the challenges involved in this area.

These challenges – the nature of prescription and its impact on the rights of survivors who were abused before the 26<sup>th</sup> of September 1964 - have been difficult for me and my ministerial colleagues. The nature of the law on prescription (set out below) and the constraints that it imposes have been hard to reconcile with the aim of removing barriers. We have carefully considered these issues and have had to conclude that it is impossible to revive the rights extinguished by the law of prescription without breaching the European Convention on Human Rights (ECHR).

Our intention has been to improve access to justice for as wide as possible a group of survivors. As the Committee will have seen in the Bill and its accompanying documents, this involves applying the removal of the limitation period retrospectively and the highly unusual step of allowing previously raised cases to be re-raised if the reason for their previous disposal was the limitation period. While we recognise that these steps depart from general legal principles, we are of the view that there is a very special justification for doing so for these cases. However, we have had to recognise that there are limits to how far we can go in pursuing our aim of removing barriers and the law of prescription embodies such a limit.



We have been able to go as far as the Bill does in terms of amending the law of limitation but do not consider that we can amend the law of prescription because of the different nature of the two laws and the very considerable amount of time which has now elapsed since prescription applied to the relevant rights of action.

Limitation is a procedural law, a set of rules that govern proceedings. For personal injury actions, an individual currently has to begin any personal injury action within three years of a given date. That date is generally the date on which the injury was sustained, but can be later depending on the circumstances of the case. The expiry of the limitation period does not extinguish any rights – the right of action remains and, despite the existence of the three year rule, the court has discretion to allow a case to proceed after the limitation period has passed. Rights of action are therefore not lost, rather there is simply a procedural rule which requires the pursuer to ask the court to use its discretion for the case to proceed<sup>1</sup>.

The law on prescription is substantive law, defining the rights and duties of people. This makes it different from limitation as it entirely extinguishes an individual's right after a prescribed period of time. The defender's liability to pay damages is removed. The court has no discretion to allow the case to proceed after the prescription period has passed. In law any right or duty no longer exists.

It is important to keep in mind that the law on prescription has already been reformed in that it no longer applies to personal injury cases. In relation to personal injury claims, the prescriptive period used to be 20 years. In addition to the limitation period, this meant that an individual had to begin any personal injury action within 20 years of the date when their right to claim damages became (or was deemed to become) enforceable. In 1984 the law was changed so that, in future, no prescriptive period would apply to claims for personal injury. Accordingly, rights to claim damages arising on or after 26 September 1964 would be unaffected by prescription. However, claims which had already prescribed by that date, were not revived by this change. The reform in 1984 did therefore not change the position of survivors whose rights had already been extinguished. Any individual who sustained injuries prior to the 26th of September 1964 and did not raise an action before their claim prescribed, would not be able to raise proceedings, despite the change in the law.

We have therefore given serious consideration to whether anything can be done to revive these extinguished rights, in particular whether it would be compatible with the ECHR. As the Committee will be aware, the Scottish Government requires to ensure that any legislation that is put before the Scottish Parliament is compatible with the ECHR. Article 1 of the First Protocol to the ECHR (A1P1), which gives a right to the peaceful enjoyment of possessions, is most relevant for these considerations. The Scottish Law Commission<sup>2</sup> considered whether it would be possible to allow claims which were extinguished by prescription prior to 26 September 1984 to be revived and concluded that it might well be incompatible with A1P1. In 2013 the Scottish Government<sup>3</sup> accepted the Scottish Law Commission's recommendation that such claims should not be revived. Given the continuing concerns about these cases, we carefully considered the position again before reaching our view that it would not be compatible with the ECHR to retrospectively revive rights extinguished by prescription.

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<sup>1</sup> The Policy Memorandum sets out why we are of the view that this requirement does not strike the right balance for survivors which why this Bill is necessary.

<sup>2</sup> Scottish Law Commission, Report on Personal Injury Actions: Limitation and Prescribed Claims, No 207, 2007 <http://www.scotlawcom.gov.uk/files/3412/7989/7451/rep207.pdf>

<sup>3</sup> <http://www.gov.scot/Resource/0044/00440957.pdf>

It is clear that ECHR issues could also arise in relation to the removal of the limitation period and this is why the Bill includes a mechanism for the court to consider this, on a case by case basis (see section 17D of the 1973 Act as inserted by the Bill). However, reviving rights of action in relation to personal injuries where those rights have been extinguished through prescription would be different. Unlike the removal of a limitation defence (which, as noted above, is qualified by the possibility of the court exercising its discretion to allow an action to be raised after the expiry of the limitation period) reversing the effect of the pre-1984 law of prescription would have the effect of imposing legal liability anew where, for a period of at least 33 years, there had been no such liability at all (not even one which depended upon a court exercising a discretion). This would be the position for every case in respect of which prescription had previously operated. Those cases would, for the reasons noted above, necessarily relate to events which would have taken place at least 53 year earlier. We are therefore of the view that it would not be a proportionate interference with A1P1 rights to re-impose liabilities previously extinguished by prescription. (For discussion on interference with A1P1, see for example *AXA General Insurance Limited and Others v The Lord Advocate and others* [2011] UKSC 46; *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, Reference by the Counsel General for Wales* [2015] UKSC 3, *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35).

I appreciate that this is not the outcome those affected would have hoped for. I also recognise that the Bill will not be the solution for all survivors. In addition to those abused before 26 September 1964, some may decide against civil action due to the personal challenges involved, some may lack sufficient evidence to prove the validity of their claim, or in some cases the perpetrator may lack the ability to pay damages. It is therefore important to note that the Bill is only one of a range of measures that the Scottish Government is putting forward for survivors, in line with the recommendations set out in the Scottish Human Rights Commission Interaction Plan on Historical Abuse in Care.

In 2015, the Scottish Government established the Scottish Child Abuse Inquiry which is one of the widest ranging public inquiries that Scotland has ever seen. The independent statutory Inquiry is chaired by Lady Anne Smith and is looking into abuse of children in care. It is expected to report within four years of starting work on 1 October 2015. On 31 January 2017 the Inquiry hosted a preliminary hearing in Edinburgh which provided an update on its work including details of the investigations currently underway. These investigations include institutions run by faith based organisations, other major care providers, boarding schools and local authorities. Public hearings will proceed in phases, with the first commencing on 31 May 2017.

On 28th May 2015, Cabinet Secretary for Education and Lifelong Learning, Angela Constance announced investment of £13.5 million over 5 years to deliver a dedicated in care survivor support fund. The Support Fund worked closely with the InterAction Action Plan Review Group to identify and involve survivors in the refinement of the operational systems and procedures prior to the Fund becoming fully operational in September 2016. To date over 150 survivors have registered with the Support Fund. The majority of survivors are currently living in Scotland, however a small number of registered survivors live outside Scotland.

We have also committed to a formal process of consultation and engagement, led by CELCIS (Centre for Excellence for Looked After Children in Scotland) with survivors and other relevant parties on the question of financial redress. This process will fully explore the issues and gather a wider range of views.

I would like to assure the Committee of our continued commitment to improving the position of survivors where we can and we will continue to have a dialogue with everyone involved.

**ANNABELLE EWING**