

## **Justice Committee**

### **Limitation (Childhood Abuse) (Scotland) Bill**

#### **Written submission from the Scottish Human Rights Commission**

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006. The Commission is the national human rights institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and protect human rights for everyone in Scotland.

#### **Introduction**

Everyone has the right to live and be treated with dignity. Sexual abuse and serious physical or emotional abuse or neglect are breaches of the human right to be free from torture or other cruel, inhuman or degrading treatment. Anyone who has been subjected to such abuse has a human right to access justice and to an effective remedy. The Commission strongly supports this bill.

The Commission has been working since 2009 to promote effective access to justice and remedies for survivors of historic child abuse. Ensuring the full and effective participation of survivors in all decisions on the means of realising the rights of effective access to justice and effective remedies has been crucial to the Commission's work in this area. A recurring view from survivors of historic child abuse is that the current limitation regime is a barrier to access civil justice.

Survivors have expressed the view that the limitation regime also contributes to their sense of self-blame, feeling that they are being further victimised for their failure to take action within the limitation period, which for many survivors was their 19th birthday. Furthermore, some survivors considered that that current judicial discretion to allow an action outwith the limitation period does not work effectively. Limitation has also a broader effect, which impacts on the ability to obtain legal aid and therefore the viability of a case being taken forward which can render this aspect of the remedy inadequate and inaccessible.

The 2013, Action Plan on Justice and Remedies, which was the result of an "InterAction" process that brought together survivors of abuse, religious leaders and representatives from Scottish Government sets out two outcomes: 1) the acknowledgement of historic abuse of children in care and effective apologies are achieved and 2) the accountability of historic abuse of children in care will be upheld, including access to justice, effective remedies and reparation.<sup>1</sup>

This legislative proposal should be set within the wider context of this Action Plan and all of the requisite elements and commitments to the strengthening and implementation of acknowledgement and accountability it outlines, such as an apology law, national inquiry and a survivor support fund.

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<sup>1</sup> <http://www.shrcinteraction.org/Portals/23/Action-Plan-on-Historic-Abuse-of-Children-in-Care-Nov-2013.pdf>.

We have annexed to this response the 2010 SHRC Acknowledgement and Accountability Framework and review paper of international human rights law relevant to historic child abuse for the Committee's further information.

This response paper focuses on the relevant human rights standards for adult survivors of childhood abuse in relation to the proposed legislation and answers the six questions asked by the Committee in the consultation document.

## **1. Do you agree with the proposal in the Bill to remove cases relating to historical childhood abuse from the limitation regime set**

The Commission agrees strongly with the proposal to remove cases relating to historical childhood abuse from the limitation regime. Judicial and other remedies for human rights breaches must be practical and effective<sup>2</sup> and equally accessible in practice as well as in law.<sup>3</sup> This requires that they "*should be appropriately adapted so as to take account of the special vulnerability of certain categories of person*".<sup>4</sup>

The State must take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or physiological abuse, negligent treatment and exploitation while in care. This positive duty to protect children extends to cases where the State is not the primary violator of rights.<sup>5</sup> In *A v. the UK* (1998), the European Court of Human Rights (ECtHR) held that the State has an affirmative duty under Article 3 to protect its inhabitants (particularly those who are young and vulnerable) from physical harm. This covers not only the actual abuse, but the failure to take adequate measures to deter and prevent further abuse.<sup>6</sup>

Where breaches of rights occur the right to an effective remedy becomes paramount. The right to remedy is included in both the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). The ECHR requires national authorities to establish an effective remedy 'where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention'.<sup>7</sup> The ECHR is incorporated into UK and Scots law via the Human

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<sup>2</sup> See *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32.

<sup>3</sup> See *E and others v UK; İlhan v Turkey*, Application no. 22277/93, ECHR 2000-VII, judgment of 27 June 2000.

<sup>4</sup> UN Human Rights Committee, *General Comment no. 31*, para. 15.

<sup>5</sup> *Kontrová v. Slovakia*, no. 7510/04, 31 May 2007, *Siliadin v. France*, no. 73316/01, 26 July 2005, *Mubilanzila Mayeka v. Belgium*, no. 13178/03, 12 October 2006, *Kutzner v. Germany*, no. 46544/99, 26 February 2002.

<sup>6</sup> *O'Keeffe v. Ireland* (2014) ECtHR.

<sup>7</sup> The Parliamentary Assembly of the Council of Europe ("PACE") first made recommendations concerning child protection in 1969 with its Recommendation 561 entitled "Protection of Minors against ill-treatment". Although primarily concerned with the beating of children in the home, it recommended that States be invited to "take all necessary measures to ensure that the competent ministries and departments are aware of the gravity and extent of the problem of children subject to physical or mental cruelty" and, further, to "request the official services responsible for the care of maltreated children to coordinate their action as far as possible with the work undertaken by private organisations". Recommendation No. R (79) 17 of the Committee of Ministers on the protection of children against ill-treatment builds on this PACE Recommendation: governments were to take all necessary measures to ensure the safety of abused children "where the abuse is caused by acts or

Rights Act and the Scotland Act 1998. The remedy must be *effective* in practice as well as in law, having regard to the principles of adequacy, accessibility and promptness. Legal limitation on claims may render the remedy ineffective.

There has been a series of cases which have found violations of the right to an effective remedy for cases involving historic child abuse originating from Scotland and England. Remedies for historic child abuse in Scotland have been found to be inadequate by the ECtHR in the case of *E and others v UK*.<sup>8</sup> The case was brought in the 1990s and determined in 2002. It involved a failure of the State to protect children from serious abuse in the 1960s and 1970s. Judged by the standards of social work at the time, it was found that the State ought to have known of the real and immediate risk of serious ill-treatment and had failed to take reasonably available measures to address that risk.

In assessing remedies available, the ECtHR pointed out inadequacies, notably the restriction of the Criminal Injuries Compensation Authority to crimes (which would not necessarily cover serious neglect, amounting to ill-treatment) committed after 1964 (thus excluding older survivors), and the impact of judgments of higher domestic courts appearing to effectively block access to civil remedies.<sup>9</sup>

In an equivalent case which originated in England, the ECtHR found a violation of Article 13 (the right to an effective remedy) as the applicants:

*“did not have available to them an appropriate means of obtaining a determination of their allegations that the local authority failed to protect them from inhuman and degrading treatment and the possibility of obtaining an enforceable award of compensation for the damage suffered thereby.”*<sup>10</sup>

The ECtHR stopped short of declaring that access to a court would always be a required element of the right to a remedy where alleged violations of Article 3 were concerned. However it did argue in favour of access to court in such cases.

*“The Court does not consider it appropriate in this case to make any findings as to whether only court proceedings could have furnished effective redress, though judicial remedies indeed furnish strong guarantees of independence, access for the victim and family, and enforceability of awards in compliance with the requirements of Article 13.”*<sup>11</sup>

Noting that cases which involve serious ill-treatment of children invoke the absolute right to freedom from torture, inhuman or degrading treatment or punishment, the ECtHR considered these:

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omissions on the part of persons responsible for the child’s care or others having temporary or permanent control over him”. The European Social Charter 1961 provides in Article 7 that children and young persons have the right to special protection against physical and moral hazards to which they are exposed.

<sup>8</sup> *E and others v United Kingdom*, 2002, Application No. 33218/96.

<sup>9</sup> *E and others v UK* pointed to gaps in the current framework for remedies of historic abuse in Scotland (and the equivalent English case of *Z and others v UK* did the same in respect of England). See Legal paper, pp 64-67.

<sup>10</sup> *Z and others v UK*, (2001), at para 111.

<sup>11</sup> *Z and others v UK*, (2001) at para 110.

*“rank as the most fundamental provisions of the Convention, [and in consequence] compensation for the non-pecuniary damage flowing from the breach should in principle be part of the range of available remedies.”*<sup>12</sup>

In terms of civil liability, statutes of limitation should not be “unduly restrictive” to the exercise of the right to a remedy.<sup>13</sup> Crucially in *E and others v UK (2002)*, The ECtHR pointed to gaps in the current framework for remedies of historic abuse in Scotland, including the practical application of a “time-bar” to civil remedies.

That time-bar can amount to an unduly restrictive has been commented on. In *A v N* [2008] CSOH 165, Lord McEwan stated that:

*“I have an uneasy feeling that the legislation and the strict way the courts have interpreted it, has failed a generation of children who’ve been abused and whose attempts to seek a fair remedy have become mired in the legal system.”*

UK jurisprudence also confirms this view. In *A v Hoare*, [2008] the House of Lords held that the limitation period for actions founded on intentional torts may be dis-applied where it is inequitable to enforce it.<sup>14</sup>

The proposed change offers an important opportunity to address the barriers which continue to be faced by survivors of historic child abuse in securing effective access to remedies. It is of course axiomatic that any response must take into account the rights of everyone involved, potential defendants as well as potential pursuers.<sup>15</sup>

However in drawing the balance between the rights of each it is important to recognise the serious nature of the rights violations at stake in cases of historic child abuse. Many survivors will be victims of serious ill-treatment in the meaning of Article 3 of the Convention, when judged by the standards of the time.<sup>16</sup> Others will be victims of other human rights abuses such as of Article 8. The Commission considers that there remains both a legal and a moral duty on the State to remove barriers to access to justice for survivors of historic child abuse.

It is the Commission’s view that given the nature of historic abuse and the significant barriers to seeking redress experienced by survivors, the 3 year limitation period for personal injury actions resulting from child abuse should be removed.

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<sup>12</sup> *E and others v UK*, 2002, para 110; *Z and others v UK*, Judgement of 10 May 2001, para 109.

<sup>13</sup> *James v United Kingdom* [1986] ECHR.

<sup>14</sup> This case centred on the wording of the Limitation Act 1980, which created an exception to the three year (extendable) limitation period for personal injury and six years (non-extendable) for intentional assaults.

<sup>15</sup> For a useful overview of the Convention rights of potential defendants, see Irish Reform Commission, *Limitation of Actions*, LRC 104-2011, Dublin, December 2011, pp23-26.

<sup>16</sup> For an overview of the evolving standards which will be of relevance to assessing conduct from pre-1953 to the present day see the Commission’s Legal Paper, pp9-17.

## **2. What will the impact of the new exemption on:**

### **i) victims of historical childhood abuse who could bring claims**

The legislation should bring about a potentially positive impact on those seeking redress for historical child abuse. The Commission considers that the current limitation is unduly restrictive, particularly given the limited circumstances in which the limitation is set aside by the courts under section 19A of the Prescription and Limitation (Scotland) Act 1973. While there is a power to allow an action which would usually be limited where it is equitable to do so, the courts have typically not accepted explanations where the pursuer has been aware of the abuse. Explanations for the delay which have referred to such matters as shame, fear and psychological difficulties as a result of childhood abuse have been unsuccessful.<sup>17</sup> This issue was addressed by the European Commission on Human Rights in a case from the UK in 1996. Although it was considered then that such limits were not in breach of the ECHR, it was noted that there could be a need to revisit the proportionality of the limitation on the right to access a remedy as the understanding of the enduring impacts of child abuse on victims' mental integrity develops.<sup>18</sup>

As set out above, survivors have identified limitation as a barrier to access to justice. The exclusion from the limitation period is an important aspect of ensuring an effective remedy, and the ability to seek compensation as a part of wider reparation.

The exemption is likely to lead to an increase in the number of cases settled out of court, as well as increasing the ability to get legal representation and legal aid. However, there is still a necessary but significant evidential burden on survivors in proving their cases, or identifying a relevant defender. It is important that advice is available to survivors in relation to the challenges of bringing claims of this sort, and that further work is done to ensure that survivors are made aware of the other elements of the Action Plan and ways to access other elements of the overall remedy package available to victims and survivors.

Drawing on the Action Plan and on lessons from recent experiences of designing national reparations programmes around the world, these should also operate in coordination with other justice measures. In line with international human rights standards, reparations packages should include restitution, compensation, rehabilitation, satisfaction (apology) and guarantees of non-repetition.<sup>19</sup>

## **2. What will the impact of the new exemption be on:**

### **ii) the individuals, organisations and insurers who might be involved in defending claims**

The decision to remove cases relating to historical childhood abuse from the limitation regime will have an effect on those involved in defending claims, most notably it engages the right to peaceful enjoyment of possessions (Article 1

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<sup>17</sup> *BD v. Murray* [2012] CSOH 109; *W v. Trs of the Roman Catholic Archdiocese of St Andrews and Edinburgh* [2013] CSOH 185; *DK v. Marist Brothers* [2016] CSOH 54.

<sup>18</sup> [\*Stubbings and others v United Kingdom\*](#), (1996) Application No. 22083/93, para 52, para 52.

Protocol 1 ECHR), respect for private and family life (Article 8 ECHR), including the right to protection of reputation and the right to a fair hearing (Article 6 ECHR) in courts.

The Bill allows claimants, including those whose claims were previously rejected by a court because they were time barred to raise their claims, and compensation may be awarded. The case law of the ECtHR does not exclude the possibility that a legitimate expectation of an exclusion of liability (for example on the part of institutions or insurance companies) from a delictual claim would qualify as an asset for the purposes of Article 1, Protocol 1. However, this right is qualified and can be limited where a fair balance is struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights.

The right to peaceful enjoyment of possessions protected by Article 1 of Protocol 1 of the ECHR has extensively been discussed in the AXA case. Among other issues considered in the case was the balancing of human rights of alleged victims of asbestos related disease to bring damages claims, with the rights of the private companies providing employers liability insurance to peaceful enjoyment of their funds - since they would be defending those claims.<sup>20</sup> The right protected by Article 1 Protocol 1 extends to both natural and legal persons and so would apply equally to residential child care providers and their insurers.

Article 1 of Protocol No. 1 comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property. The second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognises that Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule. Both forms of interference defined must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised.

The ECtHR has made clear that eliminating what are judged to be social injustices are a function of a modern legislature, and gives a wide margin of appreciation to the State in relation to such decisions, noting that:

*"Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'.*

*Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken.*

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<sup>20</sup> [AXA General Insurance Limited and others v The Lord Advocate and others \[2011\] UKSC 46](#)

*Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.*

*Furthermore, the notion of ‘public interest’ is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. **The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment be manifestly without reasonable foundation.**”<sup>21</sup>*

It is submitted that the removal of limitations as proposed in the Bill falls squarely within the margin of appreciation in the above terms. The availability of this particular component of the overall effective remedy for victims of childhood historic abuse as the Bill seeks to do does not necessarily mean that the potential burden being placed on all defenders is disproportionate. The legislation clearly allows for the balance between the rights of the victim and rights of civil defenders to be assessed by the court on a case by case basis to ensure compatibly with the ECHR.

The fact that there are other ways to provide reparation to victims of childhood abuse, does not affect whether the proposal in this Bill is justified in the public interest: As the Supreme Court observed in AXA, the ECtHR had considered this point in *James v United Kingdom*, para 51 observing:

*“The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a ‘fair balance’. Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way.”*

In assessing whether a fair balance is struck the court will also consider whether the defendant will be “substantially prejudiced” or if their rights will be disproportionately impacted. In each individual instance, consideration will be given to whether the legitimate aim, in this instance the access to justice of a survivor of historic child abuse, is being pursued in a way which is proportionate to the interference with the right to property of the defender in question. This analysis will take into account the gravity of alleged abuse covered by the Bill and the overriding aim of the legislation. However, this would be subject to the provisions of section 17D discussed below, which may limit the case at the preliminary stage.

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<sup>21</sup> *James v United Kingdom* [1986] ECHR 2, para 46

Finally, the Committee should note that international practice, including in Ireland, suggests that both state and private institutions should contribute to reparations packages to the extent to which they are responsible for causing harm. While ensuring adequate, effective and prompt reparation is an obligation of the State, *“in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.”*<sup>22</sup> Individual reparations should also be determined with the participation victims and should be appropriate and proportionate to the gravity of the violation and the harm suffered.

**3. The Scottish Government consulted on whether the proposed exemption in the Bill should cover all children or be restricted to those abused in a care setting. The Bill takes the wider approach – do you agree with its proposed scope in this regard?**

The Commission is of the view that the exemption should apply to all cases of abuse that took place when the person who sustained the injuries was a child irrespective of the setting. Under human rights law, the critical factor is the vulnerability of the pursuer who was a child at the time of the abuse and not where the abuse took place.

The obligation under Article 1 of the ECHR to secure Convention rights to everyone taken in conjunction with Article 3 requires States to take measures designed to ensure that individuals within their jurisdiction - in any setting - are not subjected to degrading treatment or torture; this includes ill-treatment administered by private individuals.<sup>23</sup>

Under the ECHR, the positive duty to protect extends beyond Art. 3 to several specific rights such as the right to life (Art. 2) prohibition of slavery (Art. 4) and the right to respect for private and family life (Art. 8). Furthermore, a State cannot absolve itself from its positive obligations to protect by delegating those duties to private bodies or individuals dealing with children.<sup>24</sup> It is therefore clear that the right to protect and provide for effective remedy for violations of human rights extends to any setting.

**4. Do you agree with the definitions of “child” found in the proposed new section 17A (2) of the 1973 Act (which would be inserted by section 1 of the Bill)?**

Yes. The UN Convention on the Rights of the Child (UNCRC), ratified by the UK in 1991, defines “child” for its purposes as: “every human being below the age of eighteen years - unless under the law applicable to the child, majority is attained earlier”. The Committee on the Rights of the Child, the monitoring body for the

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<sup>22</sup> Van Boven Principles, IX, para 15. This has been the case in other contexts such as Ireland, where institutions such as churches have provided elements of reparation including compensation.

<sup>23</sup> See *O’Keeffe v. Ireland* and *X and Y v. the Netherlands*, 26 March 1985, §§ 21-27; *A. v. the United Kingdom*, 23 September 1998, *Z and Others v. the United Kingdom*, [no. 29392/95], and *M.C. v. Bulgaria*, no. 39272/98.

<sup>24</sup> *Storck v. Germany*, no. 61603/00, § 103, ECHR 2005-V.

Convention, has encouraged States to review the age of majority if it is set below 18 and to increase the level of protection for all children under 18.

The Age of Majority (Scotland) Act 1969 sets the “age of majority” at 18, but there are various different ages applying for different purposes in Scots law. This is also consistent with the Children and Young People (Scotland) Act 2014, the Children (Scotland) Act 1995 and section 13 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Commission considers that the broadest definition of child should apply.

**4. Do you agree with the definitions of “abuse” found in the proposed new section 17A (2) of the 1973 Act (which would be inserted by section 1 of the Bill)?**

All of the actions contained within the definitions of section 17A (2) are covered within international human rights law as violations of physical and mental integrity rights: particularly the right to freedom from torture and other forms of cruel, inhuman or degrading treatment or punishment (ill-treatment), and the right to privacy, protection of the home and family life.

The Commission considers that the Scottish courts are well placed to make the necessary assessments in relation to whether such activity meets the relevant thresholds, taking into account all the circumstances of the case, including the duration of the treatment, its physical and mental effects and, in some cases, the sex, age, religion and state of health of the victim.<sup>25</sup>

The courts are also well placed to consider the vulnerable position of a child victim is an aggravating factor and may be a determinative factor assessing whether conduct rises above a minimum threshold of severity to be considered cruel, inhuman or degrading.<sup>26</sup>

The Commission further considers that neglect should be explicitly included in the definition of abuse to bring it into line with international human rights law standards and definitions.

In international human rights law standards, child abuse includes physical, emotional, or sexual mistreatment of a child or the neglect of a child, in the context of a relationship of responsibility, trust or power, resulting in actual or potential harm to the child’s physical and emotional health and development.<sup>27</sup>

The Committee may find useful the 1999 World Health Organisation [Consultation on] Child Abuse Prevention’s definition:

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<sup>25</sup> *Ireland v United Kingdom* (1978) ECHR (Series A) No 25, at 162.

<sup>26</sup> *Costello-Roberts v the United Kingdom*

<sup>27</sup> See Article 19 of the CRC which requires States Parties to take all appropriate measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. The term violence has been chosen here to represent all forms of harm to children and it is in conformity with the terminology used in the 2006 United Nations study on violence against children.

*“Child abuse [or maltreatment] constitutes all forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child’s health, survival, development or dignity in the context of a relationship of responsibility, trust or power.”*

This definition covers a broad spectrum of abuse; in any case a narrow interpretation of abuse should at minimum cover physical abuse, including sexual abuse; emotional abuse and neglect - which is the lack of appropriate care.

European jurisprudence confirms this view. The European Court of Human Rights has found that long-standing physical and emotional neglect can amount to inhuman and degrading treatment. In *Z v UK* the ECtHR found that children being locked out in an unsanitary garden for long and repeated periods, living in a state of neglect with filthy bedrooms including soiled and broken beds, no lighting, no toys, and being deprived of affection amount was a breach of Article 3.

UN mechanisms share also this approach, in his report to the UN General Assembly of 2000, Sir Nigel Rodley, UN Special Rapporteur on Torture considered that neglect in residential care may amount to cruel and inhuman treatment, particularly among younger children.<sup>28</sup> The Commission considers therefore that neglect should be explicitly integrated in this definition.

**5. The exemption in the Bill does not just apply to entirely new claims. Section 1 of the Bill (which would insert a new section 17C into the 1973 Act) allows claims previously raised but found to be time-barred to be raised again under the new regime. What are your views on this aspect of the Bill?**

Limitation periods for civil claims are a matter of procedural rules rather than substantive law. There is a significant difference between retrospectively changing the type of conduct which is criminal or subject to delictual claim, and retrospectively expanding procedural access for claims relating to actions that were already covered by law at the time. Limitation is also different from prescription in that its effect is to prevent an action proceeding in court after a period of time rather than to remove the right to raise the action itself. This is an important distinction in terms of legal certainty and finality.

The opportunity to benefit from the change in the law should not depend on whether or not a person has previously tried to exercise their rights under the existing law, as the policy arguments for the change in law are equally applicable whether or not a pursuer has previously made a claim for damages. Furthermore, it is for the courts to consider whether it is equitable to allow a case to proceed in consideration of the defender’s Convention rights (e.g. Article 6 and Article 1 Protocol 1).

Retrospective effect in relation to Article 1 Protocol 1 is not prohibited.<sup>29</sup> The question is whether the retrospective application is unreasonable and whether it strike a fair balance between property rights on one hand and preserving the integrity

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<sup>28</sup> A/55/290, 2000.

<sup>29</sup> *MA v Finland* (2003) 37 EHRR CD 210, 217; *Bäck v Finland* (2004) 40 EHRR 1184.

of the legislation on the other. The duty on the State to ensure an effective remedy and reparation, is not extinguished by the fact that a claim has been previously raised. The Commission view is therefore that the removal of the 3 year limitation period in the Bill should apply to cases that have been raised previously.

**6. Section 1 of the Bill (which would insert a new section 17D into the 1973 Act) empowers the court to dismiss a case in two specific sets of circumstances. These are where the defender can demonstrate either that i) it would not be possible for a fair hearing to take place; or ii) the defender would be subject to “substantial prejudice” if the case did proceed. What are your views on the proposed new section 17D?**

The courts already have a specific duty under the Human Rights Act 1998 to interpret legislation in accordance with Convention rights, which means, inter alia, ensuring the right to a fair hearing, rights to remedies and property rights are upheld and balanced against competing rights and interests. The Commission is therefore not convinced of the need for section 17D.<sup>30</sup>

When considering the current test under the 1973 Act to allow an action “*if it seems equitable*” to do so, the court has placed great weight on the prejudice to the respondent and loss of evidence, particularly where the alleged abuser has subsequently died. By making such a finding at a preliminary proof stage, survivors are denied the opportunity to present their case. While the courts would be mindful of the intention of this legislation to allow previously limited abuse cases to proceed, the Commission is concerned that proposed section 17D could have the effect of undermining certainty and limiting the right to a remedy which lies at the heart of this legislation.

Scottish Human Rights Commission  
18 January 2017

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<sup>30</sup> See sec 3 HRA 1998.