

# Limitation (Childhood Abuse) (Scotland) Bill

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## Policy Memorandum

### Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Limitation (Childhood Abuse) (Scotland) Bill introduced in the Scottish Parliament on 16 November 2016. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.
2. The following other accompanying documents are published separately:
  - statements on legislative competence by the Presiding Officer and the Cabinet Secretary for Justice (Michael Matheson MSP) (SP Bill 1–LC);
  - a Financial Memorandum (SP Bill 1–FM);
  - Explanatory Notes (SP Bill 1–EN).

### Policy objectives of the Bill

3. The Scottish Government has a clear vision for Scotland which is one of a fair, equal and prosperous nation with opportunity for everyone to grow and thrive. It is a country in which difficult and challenging issues are not shied away from and where the Scottish Government seeks to support and respect those in society who have been harmed. Compassion and a drive for fairness sits at the heart of the Scottish Government's values.
4. The Scottish Government's Justice Strategy sets out an ambitious and innovative approach to justice in Scotland. This approach is all about doing what is right for the people of Scotland, using all of the powers at its disposal to achieve better outcomes. One of the Scottish Government's

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priorities is to widen access to justice and advance law reform. This supports the justice outcome that public services are fair and accessible. It is clearly in the public interest of a modern and just society that those who seek to access the justice for the terrible wrongs they have suffered are supported.

5. Over the past few years there has been an ever increasing awareness of the blight of historical childhood abuse. The policy aim of the Bill is to improve access to justice for survivors of childhood abuse. The Bill removes the current three year limitation period in actions seeking damages in respect of personal injury where the action relates to abuse when the person bringing the action was a child at the time of the abuse. The Bill is concerned only with the limitation period (also known as the time bar) applicable to claims pursued in the civil courts. It does not alter or affect the substantive law which applies to such cases.

6. This Bill is one of a number of measures which have been taken, and are being taken, to address historical childhood abuse in Scotland. The Victims and Witnesses (Scotland) Act 2014 established a National Confidential Forum to which survivors of institutional abuse can provide confidential testimony. In May 2015, the Scottish Government established a statutory inquiry, with extensive terms of reference<sup>1</sup>, into the abuse of children in care in Scotland. The Scottish Government has made a commitment to work with survivors to develop an enhanced Survivor Support Fund<sup>2</sup>. The Scottish Government also supported the Bill which became the Apologies (Scotland) Act 2016 (which protects the giving of apologies in certain civil actions) and has carried out an initial consultation with survivors on the form a commemoration suitable to survivors should take.

7. When she announced the establishment of the Inquiry into Historical Child Abuse, the then Cabinet Secretary for Education and Lifelong Learning said on 28 May 2015 that:

“We want to make Scotland the best place for all our children to grow up. Children and young people must grow up feeling cared for, nurtured and loved, as well as being protected from harm, abuse and

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<sup>1</sup> <http://www.gov.scot/Topics/People/Young-People/protecting/child-protection/historical-child-abuse/terms-of-reference>

<sup>2</sup> <http://www.survivorscotland.org.uk/>

neglect. We have a particular commitment to our most vulnerable young people – those for whose care and protection the state is directly responsible.

Although we cannot undo the deeds of the past, we can acknowledge them, address their impact and learn how to do much better in the future to protect Scotland’s most vulnerable children.<sup>3</sup>”

8. Today, the long-term effects of childhood abuse are well understood. It is recognised, in particular, that, because of the effects of childhood abuse, survivors often do not acknowledge or disclose the abuse for many years. For the reasons set out below, the Scottish Government takes the view that the current law on limitation does not strike the right policy balance in relation to this type of case. In acknowledging the deeds of the past, this Bill will redress that balance, with a view to improving access to justice for survivors of childhood abuse.

## Background

### The current law

9. Under the existing law, in order to be able to raise an action for damages in the civil court in Scotland for any form of personal injury, the action must be raised within the timeframes specified in the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”). The 1973 Act proceeds on the basis that ordinarily personal injury proceedings should be raised within three years of the date of the injury. This is not an absolute rule. If the injuries were attributable to continuing acts or omissions, the three year period starts from the date when the acts or omissions ceased. If the pursuer did not, at the date of the injuries, have the requisite knowledge (i) about the seriousness of the injuries, (ii) that they were attributable to an act or omission or (iii) that the defender was a person to whose act or omission the injuries were attributable, the three year period starts from the date when the pursuer had (or ought to have had) the requisite knowledge. In calculating the limitation period, any period during which the pursuer was under 16 or legally disabled by unsoundness of mind (mental incapacity), is

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<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=9973&i=91608&c=1832383&s=child%2520abuse>

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disregarded, and the three year period accordingly does not start until the pursuer is 16.

10. Under section 19A of the 1973 Act, the court may “if it seems to it equitable to do so” allow an action for damages to proceed even if it would otherwise be time barred. The starting point in relation to an application to the court to exercise this power is that the limitation period, which is the general rule, has expired. The onus is accordingly on the pursuer to show that justice requires the action to proceed even though the limitation period has expired. It is of critical importance that the pursuer provides a reasonable explanation for not raising the action earlier, and if the pursuer does not provide what the court considers a reasonable explanation then the application is likely to be refused<sup>4</sup>. Against the background of the three year period, the courts have typically not accepted explanations for failing to raise actions within that period where the pursuer has been aware of the abuse, and indeed may have disclosed the abuse well before raising the action. 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>5</sup>. A case in which the court allowed an action against the alleged abuser to proceed well after expiry of the three year period, on the basis of evidence of systematic abuse from childhood well into adulthood which had rendered the pursuer emotionally dependent on the defender, was described by the judge as “somewhat exceptional”<sup>6</sup>. Further, given that the ordinary limitation period will have expired, if the defender can show actual prejudice or the real possibility of prejudice in defending the action, that will usually determine the section 19A issue in favour of the defender<sup>7</sup>. In approaching these cases in the way that they have, the courts have been applying the policy of the 1973 Act – given, in particular, that these cases are, in principle, subject to the three year limitation period and that the pursuer requires to persuade the court to

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<sup>4</sup> B v. Murray (No. 2) 2005 SLT 982; BD v. Murray [2012] CSOH 109; W v. Trustees of the Roman Catholic Archdiocese of St Andrews and Edinburgh [2013] CSOH 185.

<sup>5</sup> For example, 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>6</sup> A v. N [2013] CSOH 161, [2015] CSIH 26.

<sup>7</sup> AS v. Poor Sisters of Nazareth 2008 SC (HL) 146, para. 25 per Lord Hope of Craighead.

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allow the action to proceed out of time. That is why legislation is necessary.

11. For any actions arising out of abuse that took place prior to 26 September 1964, the law of prescription applies. The law on prescription is different from limitation in that, while limitation places a procedural bar on an action proceeding, prescription extinguishes an individual's right to raise an action after the specified period of time if there has not been a relevant claim or relevant acknowledgement, such as a clear written acknowledgement of the associated obligation (see sections 9 and 10 of the 1973 Act for what constitutes a relevant claim and a relevant acknowledgement). The law on prescription was changed by the Prescription and Limitation (Scotland) Act 1984. That Act removed personal injury reparation from the scope of the law on prescription from the date it came into force (26 September 1984) so that, from that date onwards, no obligations to make reparation for personal injuries would be extinguished through prescription. However, if an obligation had been extinguished before that date, the 1984 Act did not revive the obligation. Under the law in force before the 1984 Act, the specified period relevant to personal injuries was a period of 20 years running from the date the obligation became enforceable. Unless the obligation arose from a "continuing act, neglect or default" the period would be reckoned from the date on which the injury occurred. If the obligation did arise from a continuing act, neglect or default then the period would be reckoned from the date the act, neglect or default ceased (if that was later than the date of the injury). So whilst some obligations arising (in part) from abuse prior to 26 September 1964 may have survived past the coming into force of the 1984 Act, most obligations arising from abuse before 26 September 1964 will have been extinguished through prescription<sup>8</sup>. This is subject to exceptions where, for example, the running of the 20 year prescriptive period has been interrupted by a court action for damages having been raised in respect of the abuse.

## Other jurisdictions

12. Growing awareness internationally of childhood abuse and its impact on survivors means that the Scottish Government is in a position to learn from other jurisdictions. In 1992, British Columbia abolished limitation periods for actions based on sexual abuse. Eight of the nine provinces of

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<sup>8</sup> See for example *DK v. Marist Brothers* [2016] CSOH 54 at paragraphs 76 to 77.

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Canada have now excepted sexual abuse from the ordinary limitation periods, as have all three territories. These pieces of legislation vary; however, most apply to sexual abuse of both children and adults. In Ireland, a Bill was passed in 2000 removing the three year limitation period for childhood sexual abuse cases for one year only.

13. In Australia, a Royal Commission into Institutional Responses to Child Sexual Abuse was established in 2013 to investigate how institutions like schools, churches, sports clubs and government organisations have responded to allegations and instances of childhood sexual abuse. The Commission's work resulted in a recommendation to remove any limitation periods for personal injury actions resulting from childhood sexual abuse. The Commission also recommended that "State and territory governments should ensure that the limitation period is removed with retrospective effect and regardless of whether or not a claim was subject to a limitation period in the past."<sup>9</sup>

14. So far, Victoria and New South Wales have passed legislation of this type, and similar legislation is being considered in Canberra. In Victoria,<sup>10</sup> the limitation period has been removed for cases of child sexual abuse and child physical abuse, as well as child psychological abuse that arises out of an act of physical/sexual abuse. The legislation applies retrospectively to injuries sustained before the commencement of its provisions but states that the legislation does not affect the powers of the court to dismiss proceedings where a fair trial is not possible. Similar legislation has been implemented in New South Wales<sup>11</sup> which also allows for an action on a previously barred case to be brought even though a judgment on the cause of action has, on the ground that a limitation period had expired, been given previously.

### Scottish Law Commission Report on Personal Injury Acts: Limitation and Prescribed Claims, December 2007

15. In Scotland, concerns have been expressed for some time that the current law in relation to limitation does not strike an appropriate balance

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<sup>9</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, Final report Redress and Civil Litigation, 2015, p. 459

<sup>10</sup> Limitation of Actions Amendment (Child Abuse) Act 2015 (no. 9 of 2015)

<sup>11</sup> Limitation Amendment (Child Abuse) Act 2016 No 5: New South Wales, Australia

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and, in particular, does not adequately reflect the barriers which inhibit victims of abuse from raising a claim within the required period. Following a petition<sup>12</sup> raised in the Scottish Parliament, the Scottish Ministers invited the Scottish Law Commission (SLC) to review the law and make recommendations for reform. The SLC made a number of recommendations but of particular relevance in the context of this Bill are the recommendations that:

- Claims in respect of personal injury which had been extinguished by negative prescription before 1984 should not be revived;
- Personal injury actions should be subject to a five year limitation period; and
- Section 19A of the 1973 Act should be amended to include a non-exhaustive list of matters to which the court may have regard in determining whether to allow an action to be brought.

16. The second and third recommendations above are alternatives to the approach taken in the Bill and they are discussed below in paragraphs 55 to 58.

17. The report considered whether a special category of claims in respect of personal injury resulting from institutional childhood abuse which had been extinguished by negative prescription before 1984 should be recognised to allow this category only to be revived (for further discussion on prescription as opposed to limitation, see paragraphs 11 and 93 to 97). The SLC concluded that such a category should not be created in respect of prescribed claims but it did not consider whether victims of abuse, or a class of victims of abuse, should be recognised in the context of the limitation regime.

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<sup>12</sup> PE888, Mr C Daly, - calling on the Scottish Parliament to urge the Scottish Executive in the interests of those who have suffered institutional child abuse, to (a) reform Court of Session rules to allow 'fast-track' court hearings in personal injury cases; (b) review the implementation of the Prescription and Limitation (Scotland) Act 1973; and (c) to implement the recommendations of the Law Commission report on the Limitation of Actions. 27 September 2005.

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## Scottish Human Rights Commission's InterAction

18. 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 for survivors of historical childhood abuse. The Framework was published in February 2010 and outlined what the SHRC described as a “comprehensive approach to ensuring effective access to justice, remedies and reparation for childhood abuse”. The Framework 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 to the Scottish Government.

19. 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 a number of recommendations 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.”<sup>13</sup>

20. The Scottish Government responded to the recommendations in the Action Plan in October 2014 and, in that response, committed to working with survivors and other key stakeholders across the legal sector to understand what the difficulties were in that context and how they could be overcome.

## The Scottish Government Consultation “Civil Law of Damages: Issues in Personal Injury” and response

21. In 2012, during the same period as the development of the SHRC Action Plan, the Scottish Government separately published the consultation Civil Law of Damages: Issues in Personal Injury<sup>14</sup>. The paper asked a series of questions in relation to proposals to reform the law of damages for personal injury. The proposals were based on a number of SLC reports

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<sup>13</sup> <http://www.shrcinteraction.org/Portals/23/Action-Plan-on-Historic-Abuse-of-Children-in-Care-Nov-2013.pdf>

<sup>14</sup> <http://www.gov.scot/Resource/0041/00411137.pdf>

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(“Damages for Wrongful Death”, “Damages for Psychiatric Injury”, and “Personal Injury Actions: Limitation and Prescribed Claims”), and included psychiatric injury and issues around time bar. The consultation did not specifically ask whether limitation should be removed for any particular category of pursuer.

22. The Scottish Government response<sup>15</sup> to the consultation, published in December 2013, included, among other things, a proposal to amend the 1973 Act to increase the limitation period for raising an action for damages for personal injury from three years to five years and provide a non-exhaustive list of matters which the court may take into account in exercising its discretion under section 19A, as recommended by the SLC. The combination of these measures was intended to address some of the practical difficulties in pursuing claims for personal injuries. It was thought in particular that 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 difficulties faced by survivors of historical childhood abuse.

## Further stakeholder engagement

23. Following the Scottish Government’s commitment in response to the SHRC’s recommendation to further explore the issue of limitation in relation to childhood abuse actions, additional work was undertaken. Scottish Government Ministers and officials attended a number of facilitated discussions and workshops<sup>16</sup>. 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. Their contributions highlighted the specific issues faced by survivors of childhood abuse in relation to time bar. Ministers also wrote to the Lord President, the Scottish Legal Aid Board, the Law Society of Scotland and the Faculty of Advocates to further inform their views.

## The policy underpinning limitation periods

24. It is of the nature of a limitation period that it may prevent a well-founded claim from being pursued to a conclusion. A limitation period accordingly interferes with access to justice by preventing potential

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<sup>15</sup> <http://www.gov.scot/Resource/0044/00440957.pdf>

<sup>16</sup> A series of regional engagement events facilitated by CELCIS on the National Inquiry and related issues which took place in March 2015.

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claimants from securing a determination of their civil rights from the courts. Notwithstanding their effects in that regard, limitation periods (or other provisions preventing or inhibiting actions by reason of the passage of time) are ordinarily justified by a number of policy considerations<sup>17</sup>. Delay may adversely affect the quality of justice: witnesses may die or become incapacitated; and the quality of evidence may deteriorate. The public interest requires that disputes should be resolved as quickly as possible – in the interests of both pursuers and defenders. Considerations of legal certainty justify, as a general rule, a cut-off beyond which claims may not be litigated. The Scottish Government affirms the importance of these considerations. However, the question of whether or not a limitation period should apply to a particular class of claim, and, if so, what the appropriate limitation period should be is, ultimately, a question of policy which falls to be determined in light of the specific characteristics of the class of claim in question.

## Survivors of childhood abuse as a unique category

25. The Scottish Government is persuaded that cases of childhood abuse have unique characteristics which warrant a specific limitation regime. These characteristics derive from the abhorrent nature of the act, the vulnerability of the victim (who was a child at the time), and the effect of abuse on children. In particular, it is now recognised that the effects of childhood abuse often themselves inhibit disclosure to third parties until many years after the event. As Lady Hale observed in the House of Lords case of *A v Hoare*:

“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.”<sup>18</sup>

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<sup>17</sup> See *Brisbane Regional Health Authority v. Taylor* [1996] 186 CLR, pp. 551-4 per McHugh J.

<sup>18</sup> *A v Hoare* [2008] UKHL 6, para 54.

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26. Abuse at a time when a person is vulnerable and in a dependent relationship has been shown to have long-lasting severe adverse consequences.<sup>19</sup> These may include serious mental health issues, effective incapacity, addiction, post-traumatic stress, and self-harming behaviours.<sup>20</sup> It is common for adult survivors of childhood abuse to suppress the abuse because of shame, guilt or fear and/or because of the stigma associated with abuse; this is often referred to as the “silencing effect”. The social taboo which has long attached to childhood abuse has added to the reluctance of survivors to come forward.

27. The independent review of historical abuse in residential schools and children’s homes in Scotland 1950 to 1995, led by Tom Shaw, highlighted the ‘silencing effect’:

“A major theme among former residents’ 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 learned to be silent about what they experienced as grave injustices [sic].”<sup>21</sup>

28. Many survivors of historical childhood abuse came from difficult home circumstances and as a result were especially vulnerable. Some survivors do not know or understand that they were in fact subject to abuse until many years later – indeed, in some cases the abuse occurred when the survivor was an infant or toddler. In other cases, the ‘grooming’ of a child encourages the child’s complicity and silence about the abuse. Childhood abuse creates in people feelings of insecurity, a persecution complex, a belief that everyone is hostile towards them and a deep resentment of authority<sup>22</sup>. Anxiety about being disbelieved and difficulties with people in

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<sup>19</sup> Long-Term Effects Of Childhood Abuse On The Quality Of Life And Health Of Older People: Results From The Depression and Early Prevention of Suicide in General Practice Project. Draper B1, Pfaff JJ, Pirkis J, Snowdon J, Lautenschlager NT, Wilson I, Almeida OP; Depression and Early Prevention of Suicide in General Practice Study Group, 2008

<sup>20</sup> Long-Term Consequences of Child Abuse and Neglect, Child Welfare Information Gateway, Children’s Bureau/ACYF/ACF/HHS, 2013

<sup>21</sup> Historical Abuse Systemic Review Residential Schools and Children’s Homes in Scotland 1950 to 1995, Tom Shaw, 2007, p. 150, <http://www.gov.scot/Publications/2007/11/20104729/27>

<sup>22</sup> Historical Abuse Systemic Review Residential Schools and Children’s Homes in Scotland 1950 to 1995, Tom Shaw, 2007, p. 150.

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authority means that survivors can find it very difficult to engage in the justice system.<sup>23</sup> It is only relatively recently that childhood abuse has become less of a taboo subject.

29. These considerations explain why survivors do not raise an action within the current statutory limitation period, which usually ends on their 19<sup>th</sup> birthday. It is often not until later in life that survivors are able to address their experiences of abuse – sometimes at a point when they have been able to establish loving, trusting relationships or when they are in the process of addressing addiction or substance misuse. Evidence<sup>24</sup> also suggests that childhood abuse may be divulged under conditions of stress, a catastrophic life event, or serious illness. For these reasons, there will very often be a significant delay between the abuse and the point in time when the survivor feels able to take action to address the abuse and its consequences, and that delay often reaches well beyond reaching the age of maturity. In a study of sexual abuse allegations by 180 survivors against Anglican clergy in Australia, the average time from the alleged sexual abuse to making a complaint was 25 years for males and 18 years for females.<sup>25</sup>

30. The Australian Royal Commission into Institutional Responses to Child Sexual Abuse concluded:<sup>26</sup>

“Many survivors are unable to disclose their abuse until well into adulthood. Analysis of our early private sessions revealed that, on average, it took survivors 22 years to disclose the abuse.... Their

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<sup>23</sup> A study of victims who had contact with the legal system revealed that, as a result of that experience 87% felt bad about themselves, 71% were depressed, 89% felt violated, 53% felt distrustful of other people and 80% reported being reluctant to seek further help: quoted in Anthony Gray, ‘Extending Time Limits in Sexual Abuse Cases in Australia, America and Canada’ (2011) 10:2 Whittier Journal of Child and Family Advocacy 227 at p. 230.

<sup>24</sup> Time to be Heard Pilot Forum, An Independent Report by Tom Shaw Commissioned by the Scottish Government, Scottish Government 2011, <http://www.gov.scot/Resource/Doc/344008/0114448.pdf>

<sup>25</sup> P. Parkinson, K. Oates & A. Jayakody, ‘Breaking the long silence: Reports of child sexual abuse in the Anglican Church of Australia’ (2010) 6(2) Ecclesiology 183

<sup>26</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, Final report Redress and Civil Litigation, 2015, p. 444

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compromised psychological position often means they wrongly blame themselves for the abuse and are grossly embarrassed and ashamed, all of which make it difficult for them to tell anyone about the abuse for many years.”

31. Similar conclusions are reported by the Betrayal of Trust Report for the Inquiry into the Handling of Child Abuse by Religious and other Non-Government in Victoria, Australia:<sup>27</sup>

“Many of the written submissions received by the Inquiry marked the first time victims revealed the fact they had been abused decades earlier as children. No doubt many victims of criminal child abuse have passed away with their account remaining a painful secret.”

32. The Australian Royal Commission concluded that limitation periods are inappropriate for this class of civil actions. The Scottish Government agrees with this conclusion. It considers that whatever factors might govern the exercise of the court’s discretion, the application of a limitation period to cases of childhood abuse creates an inbuilt resistance to allowing historical claims to proceed which is not appropriate in the context of this class of case. It has the practical effect of protecting abusers (and their employers) from being held to account in the civil courts, while preventing abused survivors from obtaining access to justice and, if they can establish their claims, obtaining reparation for the wrongs done to them.

## The impact of the operation of the current limitation period on survivors of historical childhood abuse

33. The consultation paper<sup>28</sup> which resulted from the stakeholder events referred to above (see paragraph 21) 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

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<sup>27</sup> Betrayal of Trust Report for the Inquiry into the Handling of Child Abuse by Religious and other Non-Government — in Victoria, Australia, 2013., Part B, p 52.

<sup>28</sup> 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;

<http://www.gov.scot/Resource/0047/00477569.pdf>.

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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.”

34. Representatives of survivor service provider organisations advised of the perceived unfairness of time bar which, in their view, acted as a real barrier to survivors of historical childhood abuse accessing justice. They commented that there are many reasons why individuals may not be able to come forward; that survivors of abuse experience conflicted feelings; that they may have been pressurised to keep silent; and that they have a suspicion of authority and legal processes.

35. Although the current limitation period does not (because of section 19A) prevent a survivor of historic childhood abuse raising an action, it creates an inbuilt resistance to allowing such cases to proceed – indeed, it presents a barrier which, in practice, has often proved insurmountable. Commenting on the Scottish courts' response to survivors of childhood abuse seeking reparation, one academic commentator has observed: “the response has been far from positive with most of the victims having their actions dismissed and being left uncompensated. The perpetrators of abuse and those who employed them are routinely succeeding in evading

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their obligations and the law appears impotent in all but the most exceptional cases to prevent the defenders from escaping justice.”<sup>29</sup>

36. As a result of the InterAction process<sup>30</sup>, the SHRC concluded that “the time bar is a real barrier to survivors getting access to civil justice. Its consequences include survivors being unable to obtain legal aid” (p. 9). The Royal Commission into Institutional Responses to Child Sexual Abuse<sup>31</sup> in Australia drew similar conclusions. It suggested that although state legislation can allow for limitation periods to be extended by a court’s exercise of discretion, the existence of limitation periods in and of itself creates significant barriers for many survivors.

37. In an Australian paper<sup>32</sup> about extending the time limits in sexual abuse cases in Australia, America and Canada, the author examines the law’s struggle to accommodate this type of case:

“Jurisdictions require that claims be brought within a certain time frame, with provisions for extension. Often, as we will see, the legislation calls for members of the judiciary to assess the “reasonableness” of the delay in bringing proceedings, and this is one of the perceived deficiencies of the law in this area.”

38. The author goes on to question whether the test of “reasonableness” is appropriate in these types of cases and concludes that it is not. Unless the court is informed by relevant psychological literature in this area, the author questions how is it possible for a court to understand what it would be ‘reasonable’ for a survivor of historical childhood abuse to do:

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<sup>29</sup> Eleanor J Russell, Historic Abuse: The Hard Reality For Victims, Judicial Review, April 2015, found in the Abstract, Page 1,

<http://fbga.redguitars.co.uk/historicAbuseArticleEleanorRussell2015.pdf>

<sup>30</sup> SHRC InterAction on Historic Abuse of Children in Care; Action Plan on Justice for Victims of Historic Abuse of Children in Care;

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

<sup>31</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, Final report Redress and Civil Litigation, 2015, p. 435

<sup>32</sup> Extending time limits in sexual abuse cases in Australia, America and Canada. Anthony Gray. Whittier Journal of Child and Family Advocacy, Vol 10:2, 2010-11

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“The law must... abandon its judgement of whether the bringing of a claim by the survivor was, in terms of the time frames involved, “reasonable” because it is ill-equipped to make this assessment. The approach of some Canadian provinces, in abolishing limitations [sic] periods in relation to these kinds of cases, is the most desirable reform.”

39. Childhood abuse can of course also result in criminal prosecutions. The relevant criminal offences are not, in Scotland, subject to any limitation period. If there is sufficient evidence that the accused has committed a criminal offence, a criminal prosecution in respect of childhood abuse may be brought long after the event. In recent years, there has been a very significant increase in the number of such prosecutions. That experience has demonstrated that someone accused of historical childhood abuse may be successfully prosecuted notwithstanding the passage of considerable time. Any difficulties in adducing sufficient evidence, even to the higher standard of proof applicable in criminal cases, have not proved to be insurmountable. A fair hearing has been achievable. Under the current law, it is accordingly quite possible for an abuser to be convicted of a criminal offence, but for a civil claim against the abuser (or against the abuser’s employer on the basis of vicarious liability) to fail by reason of time bar – and there are, indeed, examples of this very situation in the Scottish courts<sup>33</sup>.

## Retrospective application

40. The Bill will apply to rights of action that accrued before it comes into force (“existing rights of action”) whether or not the limitation period has already expired. Limitation is a procedural rule rather than a rule of substantive law. Its effect is to prevent an action proceeding in court after the lapse of a period of time rather than to extinguish the right of action itself. The Bill accordingly removes a barrier which currently inhibits or prevents access to justice in relation to this class of case.

41. The Bill responds to society’s recognition of the impact of historic abuse. Historic abuse has involved serious and deliberate wrongdoing perpetrated on vulnerable individuals. It is clear that, for the reasons

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<sup>33</sup> Four employees of Quarriers were prosecuted and imprisoned but the related actions for damages claims failed by reason of the limitation period.

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already outlined, it can take many years, and even decades, for survivors to reach the point where they are, practically, able to raise an action. If the legislation were not to be applied to existing rights of action, those survivors of past abuse who have now reached the point of contemplating a civil action would not benefit, and indeed the benefits of the legislation may take many years to filter through. This would not satisfy the policy objective of removing a barrier to access to justice in relation to historic wrongdoing. The justification for applying the new law to past abuse, as well as to rights of action which arise in the future was recognised by the Australian Royal Commission into Institutional Responses to Child Sexual Abuse which stated that “State and territory governments should ensure that the limitation period is removed with retrospective effect and regardless of whether or not a claim was subject to a limitation period in the past”<sup>34</sup>.

## Previously raised cases

42. The application of the Bill to existing rights of action requires consideration to be given to pursuers who have already sought to pursue their claims but the court has disposed of the action on the basis of the existing law of time bar. Given the application of the new law to existing claims, it would be unfair that a survivor of historic abuse who has already litigated, but who has been prevented from pursuing the claim by reason of the current law on time bar, should not have the benefit of the new regime.

43. The same issue arises in relation to cases which were settled by reason of the current law on time bar. This may be illustrated by reference to *S v. Poor Sisters of Nazareth*, the leading House of Lords case<sup>35</sup>. In his judgment in that case Lord Hope observed:-

“... the appeals are concerned only with the issue of time bar... the issue should be seen in a wider context... several hundred other actions have been raised against the same religious order... Several hundred more have been raised against other institutions... QC for the appellants was at pains to stress that these appeals are not to be taken as test cases. Nevertheless it is plain that the issues which they raise are of critical importance not only to the appellants themselves but also to all those who claim to have been abused.

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<sup>34</sup> Op Cit – Page 459

<sup>35</sup> *B v Murray (No.2)*; *Whitton v Poor Sisters of Nazareth* Also known as: *S v Poor Sisters of Nazareth* and *Bowden v Poor Sisters of Nazareth* 2008 S.C. (H.L.) 146

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The way the issue of time bar is disposed of in their cases is likely to affect the many others that remain in the pipeline.”

44. Following the House of Lords decision the hundreds of cases referred to by Lord Hope were, as far as can be established, in the main settled by means of the court interponing authority to a joint minute and pronouncing an interlocutor disposing of the case. It would be unfair to give the benefit of the new law to the pursuer in the “lead” case, which was determined by the court, but not to pursuers in cases which were settled in the expectation that, if they were to be pursued, they would be dismissed by reason of the law of time bar as it had been explained in the “lead” case.

45. Certainty and finality are important legal values. One of the fundamental aspects of the rule of law is the principle of legal certainty which requires amongst other things that where the court has reached a final determination on an issue, the ruling should not subsequently be interfered with. A defender in such a situation has a legitimate expectation that the matter is at an end. The Scottish Government recognises and supports these principles and also recognises that any departure from them requires very special justification.

46. For these reasons, the Scottish Government would not ordinarily consider it appropriate to legislate to allow previously litigated cases to be re-opened. However, in the very particular circumstances addressed by this Bill, the Scottish Government considers that, having regard to the policy objective, there are unique and special circumstances that justify the application of the Bill to cases that have been previously litigated and decided by the court or settled on the basis of time bar. The change in the law is designed to improve access to justice for individuals who were, as children, the innocent victims of abhorrent acts which will often have been deliberate. There is a strong and compelling basis, set out above, for concluding: (a) that the current law on time bar does not strike the right policy balance in relation to the unique case of childhood abuse; and (b) for applying the new law to existing rights of action. In these circumstances, it would be unfair to give the benefit of the new law to survivors with existing rights of action who have never sought to vindicate their rights in the courts but to exclude survivors who have previously litigated, but whose claims have never, because of the current law on time bar, been adjudicated upon in substance by the court. Further, as explained below, the Bill contains safeguards which strike an appropriate balance between the general interest which it pursues and the rights of defenders.

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## Safeguards

47. The Scottish Government recognises that, in removing any statutory time bar for this particular class of case, it is necessary to build in safeguards which acknowledge the implications of the change in the law for defenders who may be required to meet claims long after the events in question. The Bill accordingly identifies two circumstances in which the court may not allow an action to proceed.

48. Firstly, the Bill states that the court may not allow an action to proceed where the defender satisfies the court that it is not possible for a fair hearing to take place. Even if there were no specific provision to that effect, the court could not permit an action to proceed if it is not possible for a fair hearing to take place. The onus will lie on the defender to satisfy the court that a fair hearing is not possible. As noted above, experience in the criminal courts would suggest that the mere passage of time – even considerable time – will not make a fair hearing impossible.

49. Secondly, where the pursuer's right of action accrued before the commencement of the new law, the Bill states that the court may not allow the action to proceed where: (a) the defender satisfies the court that, as a result of the retrospective operation of the law, the defender would be substantially prejudiced were the action to proceed, and (b) having had regard to the pursuer's interest in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed. This provision reflects a recognition that the retrospective application of the new law may (particularly in its application to claims which have previously been litigated) engage the rights of defenders under Article 1 of the First Protocol of the European Convention on Human Rights. The provision will enable the court, having regard to the circumstances of any particular case, to strike a fair balance between the protection of those rights and the aim of the legislation.

50. If the Bill is enacted, as a matter of principle, no time bar would apply to the pursuer's claim. It follows that no onus would lie on the pursuer to justify or explain the time which has elapsed before the action is brought. Rather, the onus, under this provision, will lie on the defender. And it will not suffice for the defender to assert, as under the current law, that there is a real possibility of prejudice. Rather, the defender will need to satisfy the court that, as a result of the retrospective application of the law, the defender would be substantially prejudiced were the action to proceed, and

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the court will require to be further satisfied, having had regard to the pursuer's interest in the action proceeding, that the prejudice to the defender is of such gravity that the action should not proceed.

## Alternative approaches

51. As noted above, the starting point is that circumstances of historic childhood abuse have unique characteristics which justify a special limitation regime. In arriving at the conclusion that the removal of the limitation period from this category of pursuer is required to achieve the policy aim, the Scottish Government has considered alternative approaches.

### Presumption

52. It would have been possible to introduce a presumption that a pursuer was unable to raise proceedings until the date that proceedings were actually raised. In effect, the purpose of such a presumption would be to avoid the need for the pursuer to lead evidence to explain why the action was not raised earlier, unless the defender leads evidence to rebut the presumption.

53. The Scottish Government does not consider that a presumption of this sort would go far enough. While it would shift the burden of proof to the defender, it would still allow the defender to lead evidence to rebut the presumption. In that event, the pursuer would still have to lead evidence to counter the defender's position and to satisfy the court that the pursuer has a reasonable explanation for not raising the action earlier. This approach would be highly likely to result in some defenders leading evidence to rebut the presumption and pursuers in turn having to prove why they have not litigated sooner. The reasons for not raising an action sooner would remain a key issue when the policy aim is to remove this, so far as possible, as a factor in these cases. This alternative would therefore not meet the policy intention.

54. Such an approach would also result in an inappropriate focus on any time which may have elapsed between first disclosure and raising an action. Such an approach would not adequately acknowledge the disabling long-term effects of abuse and the process which may need to take place between an individual first disclosing abuse and being in a position to pursue a legal action. Some survivors are only able to confront and address the impact of childhood abuse in the context of treatment for an

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addiction where causal links are examined. For others the initial disclosure of childhood abuse may precipitate the need for counselling and support. At this early stage, the focus should be on wellbeing, safety and recovery. Recovery itself can be an on-going and lengthy process, and it would be unreasonable for the law to proceed on the basis that a survivor should have to contemplate raising a civil action for damages at an early stage in the process.

## Scottish Law Commission's recommendations

55. An alternative approach was identified in the Scottish Law Commission's Report on Personal Injury Actions: Limitation and Prescribed Claims<sup>36</sup> which was published in December 2007. On the issue of limitation in personal injury actions, including in cases of childhood abuse, the Commission did not recommend any reforms to the section 19A process other than the insertion of a non-exhaustive list of relevant factors which a court ought to take into account when applying that section. They also recommended that the limitation period should be extended from three to five 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.

56. The Scottish Government has given careful consideration to the question of whether these proposed changes to the general limitation regime would adequately deal with the particular class of cases with which the present Bill is concerned. Although they 'may go some way to delivering justice to such victims'<sup>37</sup>, the Scottish Government is of the view that the unique position of survivors of historic childhood abuse merits a different approach to the application of the limitation regime. Whatever factors might govern the exercise of the court's discretion, the nature of a limitation period, of itself, creates an inbuilt resistance to allowing historical claims, which is not appropriate in the context of childhood abuse. The Scottish Government is of the view that in order to achieve a step change in how these cases are handled, the limitation period should be removed completely for these cases.

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<sup>36</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>37</sup> Historic Abuse: the hard reality for victims, Eleanor J Russell, April 2015, Page 35

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## Extension

57. Another alternative would be to extend the current three year limitation period. Indeed the Scottish Government has considered extending the period to five years for all cases. There was, though, considerable opposition to such an extension based on a general consensus that it is in the public interest for disputes between parties to be concluded as quickly as possible, that facts rarely become clearer with the passage of time and that the longer the period, the greater the risk of the quality of evidence reducing.

58. In any event, an additional two years would be of little assistance to survivors of historical childhood abuse. Any extension would have to be substantial to reflect the research findings that it may be many years, indeed decades, before a survivor of childhood abuse is in a position to raise an action. While an extension of the limitation period could no doubt be introduced for this category of case, the question is where the line should be drawn, having regard to that evidence which would support a very extensive period. Whatever extended period might be settled on, by its very nature, would operate arbitrarily. The Scottish Government therefore does not consider that this would meet the policy aim.

## Window legislation

59. In the United States, some states have operated so called 'window' legislation. For historical cases the legislation allows a window of opportunity where it removes any limitation period but the removal only applies for a limited period of a year or more. Some states, due to demand, have ended up operating more than one window period. A similar proposal was made in Ireland.

60. Such an approach seeks to provide an opportunity for survivors of historic abuse to raise proceedings, without effecting a permanent change in the law. This approach does have a number of drawbacks. Only an individual who is at the right point of recovery would be able to take advantage of any temporary lifting of the limitation period. For individuals who are not at the right point of recovery, any 'window' of opportunity may be of little use.

61. The approach also assumes that, going forward, any current survivors of childhood abuse will be in a position to raise a civil action timeously. Whilst it is hoped that there will be less childhood abuse in the

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future and that society is more sensitive to childhood abuse, there is nothing to suggest at this point in time that a child abused today will be more able to raise an action within the limitation rules. The impact of the abuse on a child today is likely to have a similar effect. Window legislation therefore does nothing to resolve the position of survivors going forward.

## Blanket approach

62. A different alternative approach would be to remove the three year limitation period for all personal injury actions. However, the Scottish Government considers that such an approach would be unnecessary and disproportionate. 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.

63. A time bar period for personal injury claims exists in nearly all similar developed systems in the world. The detailed rules differ but the underlying policy aims are the same. The Scottish Government believes strongly that the current limitation period is appropriate for most types of personal injury actions. But, for the reasons outlined above, it considers that there are special circumstances which apply uniquely to cases of childhood abuse and which justify a different approach for this group. As a variation on this alternative, the Scottish Government also considered whether the three year limitation period should be removed for a wider category of cases. However, for the reasons set out at paragraphs 100 to 102 below, this was rejected.

## Conclusion: alternative approaches

64. Having considered these alternative approaches, the Scottish Government does not consider that any of them would meet the policy aim as satisfactorily as the approach which has been taken in the Bill.

## Scottish government consultation

65. The background to the Scottish Government having arrived at the policy objectives described above (including extensive engagement with stakeholders and other bodies) is set out at paragraphs 12 to 23, and the reasons why the Scottish Government has decided to pursue those objectives, and not the alternatives, is set out at paragraphs 51 to 64 above. Having identified this as its preferred option, the Scottish

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Government issued a consultation seeking views on a number of matters: The Consultation On The Removal Of The Three Year Limitation Period From Civil Actions For Damages For Personal Injury For In Care Survivors Of Historical Child abuse ran from 25 June 2015 to 18 September 2015.<sup>38</sup>

66. The paper asked a series of questions in relation to the removal of the three year limitation period for cases of historical childhood abuse. Thirty-five written responses were received representing a range of interests including insurance bodies, legal body representatives, solicitors, academics, representative bodies of survivors of historical childhood abuse, individual members of the public and others. A participative workshop was held with survivors of historical childhood abuse to discuss the issues and listen to their views.

67. At the end of the formal consultation period, the Scottish Government commissioned independent, external analysis of all the responses received. The independent analysis, along with the full contents of each individual response and the views expressed during the participatory workshop, were considered fully by the Scottish Government in formulating its response.

68. Of those providing a view in written responses, 58% agreed that the Scottish Government should remove cases relating to historical childhood abuse from the limitation regime. A significant minority of 42% respondents disagreed. Participants at the workshop supported the proposal. The most common rationale provided in support of the proposal was that there are genuine reasons why survivors of historical childhood abuse may not raise actions within the current limitation period. Some felt that the current time bar constitutes a barrier to achieving justice for survivors; a few commented in particular that judicial discretion to allow an action outwith the limitation period does not work effectively. Four main criticisms against the proposal were: deterioration of quality of evidence over time; judicial discretion over limitation already exists; potential negative impact on current employers, including charities; and inconsistencies in relation to childhood abuse taking place outwith care settings.

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<sup>38</sup> You can view the consultation paper at <http://www.gov.scot/Publications/2015/06/5970>.

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69. The Scottish Government published the independent analysis report<sup>39</sup>, the Scottish Government's response to the consultation<sup>40</sup>, and a draft Limitation (Childhood Abuse) (Scotland) Bill on 14 March 2016<sup>41</sup>.

70. The former Minister for Community Safety and Legal Affairs, Paul Wheelhouse MSP, met with survivors ahead of publication of the draft Bill in March 2016 and Annabelle Ewing MSP, the current Minister, met with survivors in November 2016.

71. Following the publication of the draft Bill, Scottish Government officials sought input from key stakeholders, including legal practitioners, representing both pursuers and defenders, to ensure the Bill was fit for purpose and would realise the policy intentions when applied in practice. This road-testing of the Bill allowed the Bill to be refined to ensure that it achieved its policy aim. Some changes were therefore made to the drafting, mainly in terms of the definition of abuse, provisions about previously raised cases, and provisions safeguarding the rights of defenders. These are described in detail under the heading "Specific Provisions".

## What will removing time bar from childhood abuse cases mean?

72. As described above, the Bill amends the Prescription and Limitation (Scotland) Act 1973 ('the 1973 Act'). It includes specific provision to remove the three year limitation period for personal injury actions:

- where the person raising the action was a child (under the age of 18) at the time the abuse occurred (or, where the abuse took the form of a continuing act/omission, at the time the abuse began), and
- where the act or omission to which the injuries were attributable constituted abuse ("abuse" is defined as including physical, sexual or emotional abuse); and
- where the action is brought by the person who sustained the injuries.

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<sup>39</sup> <http://www.gov.scot/Resource/0049/00496538.pdf>

<sup>40</sup> <http://www.gov.scot/Resource/0049/00496566.pdf>

<sup>41</sup> <http://www.gov.scot/Resource/0049/00496677.pdf>

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73. The removal of the limitation period applies to this category of action whether the abuse occurred before or after commencement of the new provisions. It will also apply regardless of whether the pursuer has previously raised a case if:

- (a) the reason why the previous case was not successful was the limitation period; or
- (b) the case was settled by reason of the limitation period and the pursuer did not benefit financially from the settlement of the action (other than, at most, having expenses reimbursed).

74. This approach means that survivors will no longer have to persuade a court, as is currently the case under section 19A of the 1973 Act, to exercise its power to allow an action to proceed notwithstanding the three year limitation period. Instead, pursuers in these cases will have a right to raise an action if they fall within the category defined in section 17A regardless of the time which has elapsed since the events described in the writ. This will have the practical effect that a survivor should not need to explain why the action was not raised at an earlier date; there will no longer be a statutory expectation that a claim of this nature should have been brought within three years.

75. This change in the law will not necessarily mean that all cases raised by pursuers in childhood abuse cases will proceed, or succeed.

- (a) A pursuer who is able, by virtue of this change in the law, to bring an action will still have to establish that the defender is liable according to the ordinary rules of evidence and procedure.
- (b) In assessing eligibility for legal aid funding, the ordinary rules will continue to apply. A pursuer who seeks legal aid funding will still require to establish *probabilis causa litigandi* (reasonable prospects of success) to qualify for legal aid.
- (c) A defender may be able to satisfy the court that a fair trial is impossible or that the defender will suffer substantial prejudice such as to outweigh the interest of the pursuer in pursuing the claim.

The change will, however, remove a barrier to pursuers bringing claims which could not currently be brought because of the statutory limitation period.

## Specific provisions

### Section 1: Removal of three year limitation period in certain actions

#### Definition of child

76. The removal of the three year limitation period applies only where the person who sustained injuries was a child at the time of the abuse. In the Bill, “child” is defined as an individual under the age of 18. Although there are a number of different definitions of ‘child’ in Scotland for different purposes, under the Children (Scotland) Act 1995<sup>42</sup> a child is generally defined as a person under the age of eighteen years. Similarly, the United Nations<sup>43</sup> define a child as anyone under the age of 18 unless majority is attained earlier under the law applicable to the child. A majority of respondents to the public consultation agreed with the approach taken in the Bill.

#### Definition of abuse

77. The definition of “abuse” includes sexual abuse, physical abuse, and emotional abuse. Legislation in some other jurisdiction limits the relevant provisions to sexual abuse. This is the position in Ireland and most provinces in Canada. Others apply the legislation to sexual and physical abuse, and this is the position in places such as the Australian states Victoria and New South Wales.<sup>44</sup> The Scottish Government has concluded that expressly including physical and emotional abuse as well as sexual abuse will ensure that the Bill covers all situations where the Scottish Government does not consider the limitation rule to be appropriate.

78. This conclusion is based on, firstly, the fact that most recognised definitions of childhood abuse include sexual, physical and emotional abuse<sup>45</sup>. Different forms of abuse often co-occur. As noted in the

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<sup>42</sup> Children (Scotland) Act 1995 c.36 section 15

<sup>43</sup> United Nations Convention on the Rights of Children Article 1

<sup>44</sup> Legislation in Victoria and New South Wales also includes other types of abuse connected the sexual and physical abuse.

<sup>45</sup> World Health Organisation (WHO)

[http://www.who.int/topics/child\\_abuse/en/](http://www.who.int/topics/child_abuse/en/), NSPCC

<https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/>

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discussion paper in relation to the recent legislation in New South Wales, Australia,<sup>46</sup> “If serious physical abuse were excluded, and victims of historical physical abuse continued to be statute barred, this would raise questions about how courts could approach matters where sexual and physical abuse have been claimed, but where different limitation periods apply to the different causes of action.” Other legislation, such as the Children (Scotland) Act 1995, the Protection from Abuse (Scotland) Act 2001, and the Matrimonial Homes (Family Protection) (Scotland) Act 1981 define abuse in terms of both physical and mental injury. The first two define abuse as including “violence, harassment, threatening conduct, and any other conduct giving rise or likely to give rise, to physical or mental injury, fear, alarm or distress”.

79. Secondly, although the different forms of abuse often co-occur, this is not always the case<sup>47</sup> and the severe impacts of childhood abuse described above are linked to all forms of abuse, not just sexual abuse.<sup>48</sup> A systematic review<sup>49</sup> summarising the evidence relating to the possible relationship between physical abuse, emotional abuse, and neglect, and subsequent mental and physical health outcomes concluded that the evidence suggested a causal link. Mental disorders, drug use, suicide attempts, sexually transmitted infections, and risky sexual behaviour were linked to these non-sexual forms of abuse. There is also increasing evidence from follow-up and longitudinal studies to demonstrate the harm of emotional abuse and that this harm extends into adult life.<sup>50</sup> For example, a study analysed data from 5,616 youths with lifetime histories of

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<sup>46</sup> Discussion Paper Limitation Periods In Civil Claims For Child Sexual Abuse, New South Wales Government, 2015.

<sup>47</sup> <https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/emotional-abuse/what-is-emotional-abuse/>, Emotional abuse and neglect (psychological maltreatment): a conceptual framework, Danya Glasera, 2002, Child Abuse & Neglect Volume 26, Issues 6–7,

<sup>48</sup> Child abuse and neglect in the UK today, Lorraine Radford, Susana Corral, Christine Bradley, Helen Fisher, Claire Bassett, Nick Howat and Stephan Collishaw, NSPCC, 2013

<sup>49</sup> “The Long-Term Health Consequences of Child Physical Abuse, Emotional Abuse, and Neglect: A Systematic Review and Meta-Analysis”, R. Norman

<sup>50</sup> Emotional abuse and neglect (psychological maltreatment): a conceptual framework, Danya Glasera, 2002, Child Abuse & Neglect Volume 26, Issues 6–7,

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one or more of three types of abuse: psychological maltreatment (emotional abuse or emotional neglect), physical abuse and sexual abuse. They found that children who had been psychologically abused suffered from anxiety, depression, low self-esteem, symptoms of post-traumatic stress and suicidality at the same rate and, in some cases, at a greater rate than children who were physically or sexually abused. Among the three types of abuse, psychological maltreatment was most strongly associated with depression, general anxiety disorder, social anxiety disorder, attachment problems and substance abuse.<sup>51</sup>

80. Given that other types of abuse can have the same kind of impact as sexual abuse, differentiating between these different types of abuse in relation to the limitation period does not seem appropriate. In the independent forum Time to be Heard, which involved residents at Quarriers, Tom Shaw<sup>52</sup> reports in relation to emotional abuse and neglect:

“Many spoke of being denigrated in a variety of ways. Some reported being told they were the children no-one wanted, not even their parents; others spoke of highly derogatory things being said, in their presence, about their parents. Some reported preferential treatment and favouritism being shown to other residents and to the children of the house parents. Some said that bedwetting commonly resulted in humiliating treatment” p. 59.

81. Expressly including each of these three types of abuse within the definition for the purposes of the limitation rule does not affect the substantive law which will apply. Scots Law allows the courts to provide damages in cases where there has been no physical harm<sup>53</sup>. While the Scottish Government acknowledges that it is challenging to define and prove emotional abuse<sup>54</sup>, if such abuse causes psychiatric injury in

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<sup>51</sup> “Unseen Wounds: The Contribution of Psychological Maltreatment to Child and Adolescent Mental Health and Risk Outcomes,” Joseph Spinazzola et al. Psychological Trauma: Theory, Research, Practice, and Policy, 2014.

<sup>52</sup> Time to be Heard Pilot Forum, An Independent Report by Tom Shaw Commissioned by the Scottish Government, Scottish Government 2011, <http://www.gov.scot/Resource/Doc/344008/0114448.pdf>

<sup>53</sup> Gordon Cameron, Delict, Law Basics, 2<sup>nd</sup> edition, 2002, p. 80

<sup>54</sup> Emotional abuse: The hidden form of maltreatment, Adam M. Tomison and Joe Tucci, 1997, NCPC Issues No. 8; “Emotional abuse and expert

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circumstances where the law gives a right of action for reparation (which will be a matter for the courts to decide) then the survivor should have the benefit of the change in the law made by this Bill.

82. The definition of abuse in the Bill is narrower than that which was consulted on and what was published in the draft Bill. Some consultation responses highlighted that the proposed definition was too broad and could risk unintended consequences, confusion and legal challenge. It was suggested that the term ‘unacceptable practices’ has no meaning in delict. Informal road-testing of the draft Bill also suggested that ‘neglect’ could become problematic by inadvertently extending the scope beyond what was intended. The Scottish Government was persuaded by these arguments and these terms have therefore been removed from the definition.

83. Harm from neglect may, in some cases, properly be characterised as physical or emotional abuse. However, the Scottish Government is ensuring that it is only actions arising from ‘abuse’ that are exempted from the limitation period, rather than any negligent behaviour that may have caused an injury. The key justification for a special case for childhood abuse survivors in relation to the limitation period is the long-lasting negative impacts of the abuse on the individual’s mental health, coping strategies, and trust in authorities, and the stigma that surrounds childhood abuse. The change in the law should therefore only capture truly abusive behaviour, and not acts of negligence which do not amount to abuse. Section 19A of the 1973 Act remains in place for any cases not covered by the Bill.

84. In line with the majority view in the public consultation, the Bill does not restrict the removal of the limitation period to actions of childhood abuse where the abuse took place ‘in care’. Restricting the exception to cases of ‘in care’ abuse could potentially create injustices. The impact of the abuse on the child and the long term consequences of that abuse are likely to be similar regardless of where the abuse took place. Restricting the exception to abuse ‘in care’ could create inconsistencies where, for example, two children who were abused at the same school but one

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evidence”, Carole A. Kaplan and Anne E. Thompson, 1995; Family law 25 (Nov),

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attended as a day pupil and the other on a residential basis, as only the latter would be able to raise a claim.

### Prejudice to the defender

85. Section 17D as inserted by section 1 of the Bill requires the court to dismiss an action in two defined circumstances: (i) where the defender satisfies the court that it will be impossible for there to be a fair hearing; and (ii) where the defender satisfies the court that by reason of the retrospective application of the new law the defender will suffer substantial prejudice sufficient to outweigh the pursuer's interest in pursuing the claim. This provision will enable the court to give effect to the rights of the defender under Article 6 of the European Convention on Human Rights and Article 1 of the First Protocol to that Convention.

86. The draft Bill published in March 2016 provided that the court may not allow a previously raised case to be re-raised if it is satisfied that a defender's Convention rights would be breached. Following consideration of the stakeholder feedback on the draft Bill, the Scottish Government concluded that the provision which requires dismissal of the action if a fair trial is impossible should apply to all cases raised under this legislation (whether raised for the first time or re-raised). The question of whether a fair hearing is impossible is not exclusive to previously raised cases or to cases where the law is being given retrospective effect.

87. This provision is in line with the recent pieces of legislation in Victoria and New South Wales in Australia. Based on the Royal Commission's<sup>55</sup> recommendation that:

“State and territory governments should expressly preserve the relevant courts' existing jurisdictions and powers so that any jurisdiction or power to stay proceedings is not affected by the removal of the limitation period” (p. 459), the Victorian legislation states that “This Division does not limit a court's power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.”

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<sup>55</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, Final report Redress and Civil Litigation, 2015, p. 459

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88. The provision dealing with substantial prejudice to the defender applies only to a case where the law is being given retrospective effect, including cases where a pursuer who has previously raised proceedings unsuccessfully is permitted to raise new proceedings. In order to invoke this provision the defender will need to demonstrate substantial prejudice (not just a real possibility of prejudice), and will have to satisfy the court that the prejudice is such that, notwithstanding the pursuer's interest in pursuing the claim, it should not be allowed to proceed.

89. Whether or not a particular action falls to be dismissed by reference to this provision will be a matter for the court to assess and determine. It should be noted that the onus is on the defender, rather than the pursuer, to satisfy the court that the action must be dismissed under this provision.

Childhood abuse actions: previously accrued rights of action

90. Section 17B as inserted by section 1 of the Bill provides for the removal of the three year limitation period to apply to rights of action that accrue before commencement of section 17A as well as those that accrue afterwards. This means that regardless of when the abuse took place, the three-year limitation period will be removed for these types of actions. The reasons for taking this approach are given at paragraphs 40 and 41 above. It should be noted however that for actions arising out of abuse that took place before 26 September 1964, the law of prescription will continue to apply (see paragraph 11 above and paragraphs 93 to 97 below).

Childhood abuse actions: previously litigated rights of action

91. Section 17C as inserted by section 1 of the Bill allows a person to bring an action in respect of relevant personal injuries even where a previous action has been dismissed by a court by reason of section 17 (time bar) or on the basis of a relevant settlement. The reasons for taking this approach are given at paragraphs 42 to 46 above.

92. Section 17C(5)(b) (as inserted by section 1 of the Bill) defines a "relevant settlement" as one agreed by the parties to the initial action; where the pursuer decided to enter into under the reasonable belief that, were the action to proceed, it would be disposed of by the court by reason of section 17; and where any financial settlement did not exceed the pursuer's expenses in connection with bringing and settling the initial action. If a previously raised case has settled for reasons other than the existence of the limitation period, the policy rationale set out above does

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not apply and it would not be appropriate that such a previously settled case should be capable of being raised again under this Bill.

## Matters not covered by the legislation

### Prescribed cases

93. The Bill removes the three year limitation period, as set out in the Prescription and Limitation (Scotland) Act 1973, for personal injury actions arising from childhood abuse. For abuse that took place prior to 26 September 1964, a different law applies, that of prescription. The law of prescription is different from the law of limitation in so far as it extinguishes an individual's right to raise an action after a prescribed period of time. The court has no discretion to allow the case to proceed because of the length of time that has passed. Any obligation to pay damages no longer exists in law.

94. In relation to personal injury claims, the prescriptive period used to be 20 years. This meant that an individual had to begin any personal injury action within 20 years of the date when the obligation to make reparation for the injury 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. However, claims which had already prescribed by 26 September 1984 were not revived by this change.

95. The Scottish Law Commission 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 Article 1 of the First Protocol to the Convention (interference with the right to enjoy peaceful possession of property/possessions – see paragraph 111 for further details). In 2013 the Scottish Government accepted the Scottish Law Commission's recommendation that such claims should not be revived. Given the continuing concerns about these cases, the Scottish Government considered the position again before reaching its current position.

96. The Scottish Government takes the view that it would not be compatible with the European Convention on Human Rights to reverse the law that was put in place in 1984. These claims have not only been extinguished, but have been legally extinct for at least 30 years. During that period, the law has been beyond doubt. Considerations of legal certainty preclude reviving such claims. Therefore, any individual whose right to

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bring an action for damages had been extinguished through prescription prior to 26 September 1984 will continue to be unable to raise proceedings, despite this change in the law.

97. The proposed legislation only applies to the limitation regime, leaving the law of prescription as it is (see paragraph 11 above).

### Section 18 of the 1973 Act - Death has resulted from personal injury

98. Section 18 of the 1973 Act applies to any action in which, following the death of any person from personal injuries, damages are claimed in respect of the injuries or death. Subject to subsections (3) and (4) of this section, an action for damages must be brought within three years of “the date of death of the deceased; or the date (if later than the date of death) on which the pursuer in the action became (or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become) aware of both of the following facts:-

- (a) that the injuries of the deceased were attributable in whole or in part to an act or omission; and
- (b) 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.”

99. The Scottish Government has considered whether the limitation period for actions in respect of death as a result of personal injuries in terms of section 18 of the 1973 Act should also be excepted from the limitation period and has concluded that this would not be appropriate. The policy justification for removing the time bar from actions arising as a result of childhood abuse is to reflect the personal impact and effect that abuse can have on a survivor. The unique effect of childhood abuse on survivors themselves would not extend to the ability of a family member to raise an action following that survivor’s death.

### Other stakeholders

100. The Scottish Government has considered whether there are other identifiable classes of pursuers which may warrant similar treatment to survivors of childhood abuse.

101. It has considered whether the Bill should be extended to vulnerable adults who have suffered abuse and survivors of domestic violence.

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However, the policy approach in respect of childhood abuse is based on the unique combination of the victim being a child; the type of harm suffered; and the known impacts of that type of harm. This often involves the child being in a position of complete dependence, not being able to understand what is happening to them, and not being able to communicate to others what is happening, all at a time when they should be developing personally. This sets cases of childhood abuse apart from survivors of adult abuse - not all of the factors relating to childhood abuse are in play where the abused person is an adult. In circumstances where an adult lacks capacity – for example an elderly person subject to abuse in a care home – the law as it stands means that the period does not start to run in terms of the three year limitation period whilst that person does not have capacity. The limitation period in and of itself is therefore not a barrier in these types of cases.

102. The Scottish Government has also considered the position of those who suffer from a latent industrial disease – such as pleural plaques or mesothelioma arising from exposure to asbestos some decades before. In such cases there is also frequently a delay between the injury and the action being raised. However, the law as it stands provides that whilst an individual does not have the necessary knowledge of the harm caused by a historical injury, the limitation period is suspended. Sufferers of industrial disease are also less likely to struggle with the taboo, stigma, shame, and mental health challenges that make it difficult for survivors of childhood abuse to come forward. It is concluded that whilst this group of personal injury claimants may potentially share some characteristics with survivors of historical childhood abuse (i.e. the historical nature of the claim; or the potential impact of the abuse), they do not have the unique combination of characteristics which are typically found in cases of childhood abuse survivors, and their position is adequately dealt with by the existing law.

**Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.**

### **Equal opportunities**

103. An Equality Impact Assessment (EQIA) has been carried out and will be published on the Scottish Government website <http://www.scotland.gov.uk/Publications/Recent>.

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104. The Scottish Government has engaged with stakeholders throughout the policy development process and considered their comments, both positive and negative, to minimise disproportionate impact of the policy on people of protected characteristics (age, disability, sex (including pregnancy and maternity), gender reassignment, sexual orientation, race or religion and belief).

105. The EQIA was conducted based on an evidence review and engagement with analytical colleagues. This enabled policy officials to identify relevant data and establish an informed picture of how this legislative change will impact on equality matters. The EQIA did not identify any differential impacts against the protected characteristics and no changes were required.

### Island communities

106. The provisions of the Bill apply equally to all communities in Scotland and the Scottish Government is satisfied that the Bill has no differential impact upon island or rural communities.

### Local government

107. The Scottish Government is satisfied that the Bill has minimal direct impact on local authorities. However, there is likely to be indirect impact on some local authorities who find themselves as defenders in these actions. This impact is described in the Financial Memorandum and the Business and Regulatory Impact Assessment<sup>56</sup>.

### Sustainable development and environmental issues

108. The Scottish Government is satisfied that the Bill has no negative effect on sustainable development. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is, therefore, exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

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<sup>56</sup> The BRIA will be published on <http://www.gov.scot/Topics/Justice/law/damages/damagesetc>.

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## Human rights

109. The Scottish Government has considered the effect of the provisions in this Bill on human rights: in particular, Article 6 (right to a fair trial) of the European Convention on Human Rights (the ECHR) and Article 1 of Protocol 1 (right to peaceful enjoyment of property) to the ECHR.

### Article 6

110. The removal of the limitation period removes an interference with the victim's ability to access justice via the civil courts. However, it could adversely impact on some defenders' ability to defend the action and in some cases that impact may be such that a fair trial is no longer possible. The Bill includes provision which explicitly requires the court to dismiss an action if it is satisfied by the defender that that a fair hearing is no longer possible. This provision accordingly protects defenders' Article 6 rights. Insofar as the Bill would allow a case which has been disposed of to be re-raised or otherwise has retrospective effect and accordingly interferes with principles of legal certainty, the Scottish Government has sought to ensure that defenders' Article 6 rights are protected in two ways. First, it is only cases which were disposed of by reason of the current law on time bar which may be re-raised. And, secondly, the Bill requires the court to dismiss the action if the defender satisfies the court that, by reason of its retrospective effect, the defender will suffer substantial prejudice such as to outweigh the pursuer's interest in pursuing the action.

### Article 1 of the First Protocol ("A1P1")

111. In terms of the right to peaceful enjoyment of property, ECHR and domestic jurisprudence has interpreted 'property' to include the possession of a legal right. Removal of a defence to an action may engage rights to the peaceful enjoyment of property. The abolition of a limitation defence which would currently be available to a defender is capable of raising an issue under Article 1 of the First Protocol ("A1P1"). The Article is also engaged where a pursuer who has previously raised a case which has been disposed of by the court or settled is permitted by the Bill to raise new proceedings. Legislation which interferes with A1P1 rights retrospectively may be justified if it is pursuant to a legitimate aim, is proportionate, and provided that there is special justification for the measure. The Scottish Government considers that there is a legitimate aim in removing a barrier which prevents survivors of historic childhood abuse from obtaining access to justice via the civil courts for the reasons detailed above. The legislation is proportionate in that alternative measures will not provide adequate

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redress or are not practical in the circumstances. The context of historic childhood abuse, the particular impact that childhood abuse has on survivors (as set out above at paragraphs 25 to 39) and the fact that limitation periods have, in the past, operated so as to frustrate access to justice for survivors, provides the necessary special justification. In any event, the mechanism described above by which the court may not allow the action to proceed if the defender will experience substantial prejudice enables the court to protect defenders' A1P1 rights on a case by case basis.

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# Limitation (Childhood Abuse) (Scotland) Bill

## Policy memorandum

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