

**Scottish Government
Removal of the 3 year limitation period from civil actions
for damages for personal injury for in care survivors of
historical child abuse**



**A response by the Association of Personal Injury Lawyers
September 2015**

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 25-year history of working to help injured people gain access to justice they need and deserve. We have around 3,400 members, committed to supporting the association's aims and all of whom sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, Governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

APIL is encouraged by the proposals in this consultation paper, and welcomes the opportunity to put forward views. Currently, an abuse victim who has not come forward within three years of the alleged abuse must rely on the exercise of judicial discretion as to whether it is equitable to allow the case to proceed. Judges interpret this discretion very narrowly, and a large proportion of pursuers are refused the right to proceed with litigation. The present situation, therefore, means that many abuse victims are being failed, denied access to justice and unable to obtain closure from their ordeal. APIL welcomes the proposals in this paper, and applauds the Scottish Government's recognition that abuse victims are a unique category of pursuer.

Q1 Do you agree with our proposal to remove cases relating to historical child abuse from the limitation regime?

We agree with the Scottish Government's proposal to remove cases relating to historical child abuse from the limitation regime. APIL agrees that the circumstances of survivors of historical abuse – the type of pursuer, the type of injury and the impact of the abuse on the victim are such that they should be treated differently. At the time of the abuse, the pursuer would have been young, in a vulnerable position, and may not have realised what had happened to them was wrong. Often, victims of child abuse may suppress memories and may struggle to recall what had happened.

Whilst the current law allows judges to use equitable discretion to decide whether a case should proceed after the limitation period has expired, we believe that the use of this discretion by the courts is highly unsatisfactory, and has not allowed abuse victims to access justice. We agree with the Government that whatever factors may govern the exercise of the court's discretion, the nature of the limitation period creates an inbuilt resistance to allowing stale claims which is not appropriate in the context of child abuse.

Currently, the defender can easily prove that the passage of time since the alleged abuse will cause difficulty in the investigation and presentation of the defence. Meanwhile, the reasons that the pursuer did not come forward (as outlined in the consultation paper, the harm caused by the abuse leads to suppression of the knowledge of the abuse due to fear, shame and guilt i.e. "the silencing effect") are ignored, despite the fact that they are directly related to the abuse that the pursuer suffered. We would refer to cases such as *AS or B v Sister Bernard Mary Murray and the Poor Sisters of Nazareth*¹, where it was held that the prejudice caused to the respondents by the lapse of time in raising the proceedings (including the loss of evidence that resulted from it) was by itself a sufficient reason for not allowing the actions to be brought under section 19A. This case in particular demonstrates that the use of equitable discretion is simply not working, and that the current system is unjust. It is important that the law recognises the reasons why the pursuer has not come forward within the time limit, and to make provision for them to have their case heard.

¹ [2007] CSIH 39

Q2 What are your views on how the proposed change in the law may apply to cases which have been raised unsuccessfully on the basis of the current law on limitation?

Limitation

Provision should be made for those who have brought their case previously, but who were rejected on the basis of limitation, to receive reparation. To do otherwise would create a grossly unjust state of affairs whereby people who have dared to come forward earlier are rejected but people who have waited longer are permitted to pursue their case. Additionally, those people who have previously come forward and been rejected on the basis of limitation will have had their case decided under a law which the Government has now decided is unworkable. If the case was originally struck out on the basis of limitation alone, and as such the facts of the case were never heard in a court of law, we recommend that the Government legislates to allow the pursuer to bring their case again.

Alternatively, a redress scheme should be set up to provide compensation to those whose case was struck out under the limitation law. A redress scheme would circumvent the potential issue of res judicata, and as the case has already been decided as such, the judges and courts of the land would not be undermined or brought into disrepute. A redress scheme may also avoid potential human rights challenges from defenders, as the previous decision would stand but the pursuer would be entitled to redress.

Prescription

We appreciate that this consultation asks for views only on the removal of the time bar and not on issues relating to prescribed claims. We do believe, however, that if the limitation period is removed for historical child abuse cases, the law on prescription should not apply to these cases. Whilst we accept that there are difficulties in ascertaining facts for cases that happened so long ago- as the consultation points out, witnesses may have died, individuals may have difficulty recalling what happened a long time ago, or evidence may no longer be available - we struggle to see the difference between obtaining the facts of an abuse case that occurred in October 1964 or August 1964. The pursuer in the former case would be able to proceed, yet the latter claim would be deemed to have "prescribed" and the pursuer would be denied their day in court.

The consultation also raises arguments that it would be difficult to apply the current law to the different standards of the time. We believe this difficulty is overstated. In most cases that arise, there will be no doubt that there was abuse. Most cases will contain sexual abuse or grossly excessive physical punishment. There will, of course, be borderline cases which may involve minor corporal punishment, which, in the 1960s was commonplace in schools - but these are matters which we are confident the courts would easily be able to distinguish. Further arguments about opening floodgates or similar can also be addressed by the fact that the pursuer will still need to prove their case, even if they are no longer time barred.

Simply put, to disallow claims before September 1964 is arbitrary, and arbitrary cut off dates cause injustice.

If, for the reasons stated in the consultation document, exempting these cases from the law of prescription is not a viable option for the Government, we suggest that there should be a redress scheme established to compensate those whose claims had prescribed.

Q3 Do you agree that child should be defined as someone who has not yet attained the age of 18?

We agree with the definition of child set out in the consultation paper. We also suggest that it is made clear in any legislation that the limitation exception applies in all cases where the abuse began before the age of 18 – even in cases where the abuse continued after the person attained the age of 18.

Provision should be made for the limitation period to be removed for vulnerable adults, as well as for children. Vulnerable adults with mental capacity issues would be exempt from the time bar under the limitation act (17(3) of the Prescription and Limitation (Scotland) Act 1973 provides that in the computation of the [limitation period] there shall be disregarded any time during which the person who sustained the injuries was under legal disability by reason of nonage or unsoundness of mind). There will be, however, a large portion of people who are extremely vulnerable but would not satisfy the requirements of 17(3) and who would be time barred. Provision must be made for these people to access redress.

Q4 Do you agree that any definition of “child abuse” should cover physical, sexual, emotional, psychological, unacceptable practices and neglect?

We agree with this broad definition, but suggest it is logical that the definition should mirror exactly the terms of reference of the public inquiry, so medical experimentation would also be specifically included as a form of physical abuse. As there is a tendency to interpret the legislation in a very restrictive way, a broad definition is required to ensure that all those who are entitled to come forward with their claim are encouraged to do so. Again, the onus remains on the pursuer to demonstrate that their case falls within this definition, so a wider definition does not mean that the courts will be inundated with claims.

Q5 Do you agree that types of care (outlined in paras 6.9 to 6.11) should be covered?

We agree that the types of care outlined in the consultation should be covered. We are pleased to note that foster care is included in the types of care. At present in England and Wales, the position of a Local Authority in foster care abuse cases is unclear. That foster care is included in the legislation as a “type of care” in Scotland may help with legal difficulties south of the border.

Q6 Do you think that the proposed exemption from the limitation regime should be extended to cover all children, not just those abused “in care”?

We strongly agree that the proposed exemption should cover all children. It is illogical to include those abused “in care”, but to prevent access to justice for those abused in a non-residential school, church, an after-school club or other setting that would not fall under the definition of “in care”.

Q7 What do you think the impact of implementing these proposals would be in relation to the issues below? Where possible please illustrate your answer with figures.

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

It is likely that more actions will be raised as a result of the exemption, as more people will come forward who previously thought that they had left it too late and were unable to claim. As above, the onus will remain on the pursuer to prove that they have a case, however.

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

More actions will be raised, therefore more cases will come to court.

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

It is likely that more cases will be settled out of court, as there will not be limitation issues to deal with.

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

It is likely that cases will require less preparation time as a major obstacle and pre-trial issue will be stripped away.

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

It is likely that cases will require less court time as again, a major obstacle has been removed.

Can you quantify the benefits for pursuers?

Pursuers will have a chance to "have their day in court" and have their case heard. Ultimately, more people will be able to access justice and obtain the reparation that they deserve.

Can you quantify the benefits for defenders?

There is a benefit to defenders in giving certainty to the law, by removing the court's current discretion as to whether to allow claims through out of time, or not.

Can you quantify the drawbacks for pursuers?

Obviously simply removing limitation will not mean that all pursuers that come forward will be successful. Given the choice, however, we assume that most people would rather have the chance to be heard in court, even if they are not successful in the end.

Can you quantify the drawbacks for defenders?

The drawbacks for defenders, i.e. that they had a valid defence to claims which is now going to be denied, can be offset by the huge benefits that the removal of the limitation period will have on society in general. By permitting those pursuers to come forward, the principle of polluter pays will be satisfied - the burden of providing compensation for the victim is on the tortfeasor. The victim will be compensated for what they have been through, which in turn

will mean that the burden they will have placed on the welfare system/society will be alleviated. These people can move on, obtain education that they may have missed, and go on to be productive members of society.

Further general comments

There is an assertion that there will be cost implications for the legal aid fund - as more cases would attract legal aid funding and would therefore be heard in court (paragraph 6.12 of the consultation). We disagree that there will be cost implications for the legal aid fund. A large proportion of cases would not qualify for legal aid. As the consultation states at 5.20, removal of the time bar does not resolve the underlying issue that in many cases the availability or quality of the evidence may be insufficient to enable them to prove their case. Legal aid funding may still be refused on the grounds that there are limited prospects of success due to a lack of evidence or witnesses.

- Ends -

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