

**CRIME AND JUSTICE**

## **Consultation on the Removal of the 3 Year Limitation period from Civil Actions for Damages for Personal Injury for In Care Survivors of Historical Child Abuse: Analysis of Written Responses**

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The Prescription and Limitation (Scotland) Act 1973 sets out a 3 year limitation period during which personal injury actions must be raised. The Scottish Government intends to lift the 3 year time-bar on civil actions in cases of historical child abuse that took place in care settings after 26 September 1964.

On 25 July 2015 the Scottish Government published a written consultation paper to seek views on matters associated with the removal of the time-bar, with responses invited by 18 September 2015. A participative workshop was also held with survivors of historical child abuse to discuss the issues and hear views.

35 written responses to the consultation were received. The largest categories of respondent were insurance bodies and legal representative bodies, each comprising 17% of all respondents. Four care providers and one survivor representative body were amongst the respondents. The responses to the consultation and the views expressed at the participative workshop will inform the development of legislative proposals to remove the 3 year limitation period.

### **Main Findings**

- 58% of those providing a written view agreed that the Scottish Government should remove cases relating to historical child abuse from the limitation regime. Participants at the workshop also supported the proposal.
- Amongst opponents to the proposal, the criticism most frequently raised was that the passage of time between the alleged abuse and raising the action could result in poor quality of evidence.
- There was some support for allowing previously unsuccessful cases to be raised again under the new regime; others, however, considered that this proposal could lead to legal challenges from defenders.
- The majority view (66%) amongst respondents to the written consultation and those at the workshop was for “child” to be defined as someone who has not yet reached the age of 18.
- 70% of written respondents who addressed the issue supported the definition of child abuse as covering physical, sexual, emotional, psychological, unacceptable practices and neglect.
- 86% of those who provided a view in written responses agreed that “in care” settings should include residential care; children’s homes; secure care (list D schools); borstals and young offenders’ institutions; foster care; “boarded out” children; child migrants; independent boarding schools; and healthcare establishments providing long stay care.
- Amongst those responding to the written consultation, 62% agreed that the proposed exemption should be extended to cover all children and not just those abused “in care”.

## Background

On 28 May 2015 the Cabinet Secretary for Education and Lifelong Learning addressed the Parliament on the National Inquiry into Historical Child Abuse<sup>1</sup>. In her announcement, the Cabinet Secretary set out a package of measures to support survivors of historical abuse including:

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

The Cabinet Secretary also advised of the action that the Scottish Government is taking in response to the Scottish Human Rights Commission (SHRC) recommendation on the time-bar, presented within the Action Plan developed to implement the recommendations in the SHRC Human Rights Framework. 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".

Acknowledging that delivering the right to reparation called for by survivors through the SHRC interaction process would involve removing the time-bar, which requires a civil case for damages to be brought to court within the 3 year limitation period, the Cabinet Secretary announced that the Scottish Government intends to lift the 3 year time-bar on civil actions in cases of historical childhood abuse that took place after 26 September 1964.

Ministers hold the view that victims of child abuse should not have to demonstrate to the court that they have a right to raise litigation before the case can proceed. They consider that the circumstances of survivors of historical abuse, in particular, the class of pursuer, the type of injury and the impact on the victim are such that they should be treated differently. Whilst Ministers acknowledge that removing the law on time-bar for survivors of historical child abuse will not address all of the challenges of bringing a case to court or guaranteeing a successful outcome, it is

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

anticipated that this proposal will at least provide pursuers with better opportunity to raise their action without having first to hurdle the burden of proof stage to exempt their case from the limitation rules.

On 25 June 2015 the Scottish Government published a written consultation paper to seek views on matters associated with the removal of the time-bar for survivors of historical abuse with responses invited by 18 September 2015<sup>2</sup>. The responses to the consultation will inform the development of legislative proposals to remove the 3 year limitation period. A participative workshop was also held with survivors of historical child abuse to consider the issues raised by the consultation.

## Overview of respondents

The Scottish Government received 35 written responses to the consultation. The largest categories of respondent were insurance bodies and legal representative bodies, each comprising 17% of all respondents. Four care providers and one survivor representative body were amongst the respondents.

## Views on removing cases relating to historical child abuse from the limitation regime

58% of those providing a view in written responses agreed that the Scottish Government should remove cases relating to historical child 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 as to why survivors of historical child 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

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<sup>2</sup> <http://www.gov.scot/publications/2015/06/5970>

considered 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 child abuse taking place outwith in care settings.

Those attending the workshop considered that in addition to the removal of the time-bar, there should be a scheme for financial support for survivors which includes interim payments, to enable survivors to access care required.

## **Views on how the proposed change in law may apply to cases previously raised unsuccessfully**

There was some support for allowing previously unsuccessful cases to be raised again under the new regime. It was felt that it would be unfair to deny this possibility and would place new claimants in a more favourable position than their counterparts who had raised claims earlier, particularly when the law is now under question. Participants at the workshop agreed with this view.

In contrast however, some respondents (largely insurance bodies) considered that this proposal could lead to legal challenges from defenders who may consider their human rights to be breached under Articles 1 and 6 of the European Convention of Human Rights. Another prominent view was that defenders and insurers should have a legitimate expectation that previous cases have been finalised and will not be open to re-examination.

## **Views on how “child” should be defined under the proposed change in law**

The majority view amongst respondents to the written consultation (66% of those who provided a clear view) and amongst participants at the workshop, was for “child” to be defined as someone who has not yet attained the age of 18. A recurring theme was that the legislation should allow for exceptions, particular in relation to vulnerable adults and

pursuers, the abuse of whom began before they were 18 and continued after this.

## **Views on what type of abuse should be covered**

70% of written respondents who addressed the issue supported the definition of child abuse as covering physical, sexual, emotional, psychological, unacceptable practices and neglect.

The most prominent objection to the proposed definition was that the terminology is too broad and could risk unintended consequences, confusion and legal challenge.

Workshop participants were largely in support of the proposed definition, but recommended that spiritual, ritual and human rights abuse be added.

## **Views on which settings should be covered by the carve out**

86% of written respondents who addressed the issue agreed that “in care” settings should include residential care; children’s homes; secure care (list D schools), borstals and young offenders’ institutions; foster care; “boarded out” children; child migrants; independent boarding schools; and healthcare establishments providing long stay care.

Additions to the list of settings were made by some respondents and by participants at the workshop and included: children placed in kinship care; children with disabilities in respite care; former looked-after children aged 16 – 18 years in care leavers’ accommodation; church settings; sports clubs; armed forces/M.O.D; scouts and guides; and youth and community groups.

A few respondents raised concern that the proposal could create anomalies in relation to survivors being treated differently depending on the way they were cared for within the same setting (e.g. pupils at a school where some board and others do not).

## **Views on whether the proposal should be extended to cover all children and not just those abused “in care”**

Of those respondents to the written consultation who provided a view, 62% agreed that the proposed exemption should be extended to cover all children. Supporters considered that any other regime would be hard to justify and illogical. Some concern was expressed, however, that the extension may impact significantly on bodies such as charities, the Scout Association, church, youth organisations, and parents.

## **Views on the financial and resource impact of the exemption**

The majority view amongst those responding to the written consultation was that, as a result of the exemption, more actions will be raised (at least in the short-term), more cases will come to court and more settled out of court. Most envisaged cases requiring more preparation time due to the work involved in tracking down witnesses and other evidence relating to older cases.

Views were more diverse on whether cases will require more or less court time, with some arguing that this would depend on the details of individual cases.

## **Benefits identified for pursuers and defenders**

The three most frequently identified benefits for pursuers were: opportunity to access justice; opportunity to have voices heard; and opportunity to obtain reparation.

A few respondents considered that compensation to pursuers would provide a means by which survivors can access specialist support, thus alleviating pressure on the welfare system and society in general.

Workshop participants identified key benefits to pursuers as including the opportunity to find answers and to demonstrate to perpetrators that they will not be allowed to escape the consequences of their actions.

Amongst the benefits identified for defenders were: greater certainty with the removal of judicial discretion regarding limitation; opportunity to have voice heard and defend accusations in a court of law; opportunity to learn lessons regarding good practice in safeguarding children. A minority of respondents stated that they could not envisage any benefits for defenders.

## **Drawbacks identified for pursuers and defenders**

Concerns were expressed that raising actions will require survivors to re-live past experiences which may be physically and mentally stressful. Another key drawback envisaged was that outcomes are not certain and expectations of pursuers may be raised which are not then met, leading to feelings of resentment that alleged abusers have escaped justice.

The prevailing view amongst those who provided a response was that organisations could be held financially responsible for events occurring prior to the employment of any current employees. Some respondents cautioned that insurance may not be traceable or valid for the period relating to the action, with expenses not likely to be recoverable even where an organisation has successfully defended the action.

Other drawbacks identified for defenders included: fair trials being compromised due to lack of robust evidence; the risk of adverse media and loss of reputation; stress and anxiety associated with the court proceedings; creation of open-ended liability which will curtail business planning for organisations; and the potential rise in spurious and fraudulent claims.

### **How to access background or source data**

The data collected for this social research publication:

are available in more detail through Scottish Neighbourhood Statistics

are available via

<http://www.gov.scot/Topics/Justice/law/damages/damagesetc>

may be made available on request, subject to consideration of legal and ethical factors.

cannot be made available by Scottish Government for further analysis as Scottish Government is not the data controller.



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