

# RESPONDENT INFORMATION FORM: CONSULTATION PAPER ON REMOVAL OF THE 3-YEAR LIMITATION PERIOD FROM CIVIL ACTIONS FOR DAMAGES FOR PERSONAL INJURY FOR IN CARE SURVIVORS OF HISTORICAL CHILD ABUSE

Please Note That This Form **Must** Be Returned With Your Response To Ensure That We Handle Your Response Appropriately

## 1. Name/Organisation

Organisation Name

Faculty of Advocates

Title Mr  Ms  Mrs  Miss  Dr  Please tick as appropriate

Surname

Forename

## 2. Postal Address

Advocates' Library

Parliament House

Edinburgh

Postcode EH1 1RF

Phone 0131 226 5071

Email

## 3. Permissions

I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

- (a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate  Yes  No

- (b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

- (c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate  Yes  No

- (d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate  Yes

CONSULTATION QUESTIONS

B.01 This Annex summarises all the questions that appear in this consultation paper. Respondents should not feel obliged to answer all of them. However, the Scottish Government would appreciate all responses, whether from individuals or from organisations, with views on any or all of these matters.

B.02 Please explain and, where possible, provide evidence for each answer that you give.

### **Chapter 5: Proposal to Remove the Application of the Limitation Period to Survivors of Historical Child Abuse Who Wish to Raise Personal Injury Actions**

Q.1 Do you agree with our proposal to remove cases relating to historical child abuse from the limitation regime?

Yes

No

Don't know

**Please set out your reasons:**

See paper apart
-----------------

Q.2 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?

**Please set out your reasons for your answer:**

See paper apart.
------------------

### **Chapter 6: Application of the Proposed Change in law**

Q.3 Do you agree that child should be defined as someone who has not yet attained the age of 18?

Yes

No

**If no, please explain your reasons:**

See paper apart.

Q.4 Do you agree that any definition of 'child abuse' should cover physical, sexual, emotional, psychological, unacceptable practices and neglect?

Yes

No

**If not, why not:**

See paper apart.

Q.5 Do you agree that types of care (outlined in Para's 6.9 to 6.11) should be covered?

Yes

No

**If not, why not:**

See paper apart.

Q.6 Do you think that the proposed exemption from the limitation regime should be extended to cover all children, not just those abused "in care"?

Yes

No

**If not, why not:**

See paper apart

Q.7 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:-

**Q.7(a) Is it likely that more or fewer actions will be raised?**

It would seem likely that more actions will be raised. We are unable to speculate on how many.

**Q.7(b) Is it likely that more or fewer cases come to court?**

We are unclear on what is meant by "come to court". As we understand it, the term is synonymous with the raising of an action.

**Q.7(c) Is it likely that more or fewer cases will be settled out of court?**

Given the uncertain quality of evidence in such cases and the potential for relatively high awards, we are unable to predict the likelihood of settlement.

**Q.7(d) Is it likely that cases will require more or less preparation time?**

Given that it would seem likely that more proofs on the merits of cases would at least be allowed, it would seem likely that more preparation time will be required.

**Q.7(e) Is it likely that cases will require more or less court time?**

For the same reason as the foregoing, and leaving aside uncertain numbers of settlements, it would seem to us that more court time is likely to be required.

**Q.7(f) Can you quantify the benefits for pursuers?**

No.

**Q.7(g) Can you quantify the benefits for defenders?**

Yes: none.

**Q.7(h) Can you quantify the drawbacks for pursuers?**

No, although we would comment that the Consultation appears not to have given much consideration to the inherently stressful nature of a court action on a litigant, particularly in relation to subject matter of this nature, and particularly where their credibility is in issue and it is possible they will not be believed.

**Q.7(i) Can you quantify the drawbacks for defenders?**

**Faculty of Advocates' response to *Consultation paper on removal of the 3-year limitation period from civil actions for damages for personal injury for in care survivors of historical child abuse***

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

No. In our view, any waiver of the limitation regime in relation to such claims ought to be made on a case-by-case basis, as at present.

In the first place, the policy objectives underlying the limitation regime, as stated at paragraph 2.3 of the Consultation, seem to us to apply equally in relation to such cases as to other types of claim. These policy objectives are uncontroversial, which is why, as the Consultation notes, "A time-bar period for personal injury claims exists in nearly all similar developed systems in the world". It is an unavoidable consequence of these policy objectives that otherwise sympathetic claimants may in some circumstances be unable to proceed with their cases, although any harshness in this rule in the Scottish courts is mitigated by their discretion to allow time barred claims to proceed where it is equitable to do so.

Indeed, a case could be made that these policy objectives are particularly pressing in actions of this nature. The defender is frequently the institutional care provider rather than the alleged abuser (who will typically either have died, or will be financially unable to meet any claim). Defenders of the former kind are obviously under an inherent disadvantage in defending such claims, as they may have no direct knowledge of the alleged abuse, and may also have difficulty in obtaining evidence relating to allegations which frequently date back decades. Further, it is our understanding that there are frequently difficulties in obtaining indemnity in relation to such cases, either because the care provider is unable to trace the insurer which provided cover at the time in question, or because the insurer refuses cover under the relevant policy. In either case, it will be the care providers themselves who require to pay any damages. It ought also to be noted that the law as it stands allows interest to run on damages at the rate of 8% per annum from the date of injury. Given that allegations often date back decades in these cases, defenders may therefore be exposed to significant liabilities in terms of interest alone where a claim dates back decades.

Secondly, as the Consultation notes, the legislation implementing these policy objectives was recently reviewed by the Scottish Law Commission in its *Report on Personal Injury Actions: Limitation and Prescribed Claims* (No. 207, 2007), and a number of recommendations made, which have been accepted by the Scottish Government and therefore appear likely to be included in a Damages Bill. This may have some

ameliorating effect upon the application of time bar to abuse victims. It seems to us to be precipitous to embark upon a radical change of the nature proposed before an assessment can be made as to whether this has been the case.

The Scottish Law Commission's *Report* also considered whether a special regime ought to be created for cases of child abuse. Although the special regime it considered related to prescription and not limitation, we find much of its reasoning in relation to the former, at paragraphs 5.16-5.21, equally convincing in relation to the latter, in particular that it would treat abuse victims more favourably than other victims of similarly traumatic events, and more favourably than other claimants for whom contemporary social inhibitions played a part in inhibiting them from raising an action. The Commission also noted the difficulty in defining the persons who may be covered by an exemption, more fully explained in the preceding *Discussion Paper* (No. 132, 2006, paras. 5.15-5.18)

We agree with the Scottish Law Commission's reasoning. Furthermore, it seems to us that, where the Commission has recently considered a subject, its recommendations ought to be given substantial weight.

Finally, whilst the reasons provided for waiving the time bar in cases of this nature may be attractive in the generality, when courts have scrutinised individual cases brought before them, these justifications have on occasion been found not to apply to those cases. As the Consultation puts it, "in a number of the reported cases...pursuers have been unable to provide a cogent justification for failing to raise proceedings within the required timescale and, frequently for a significant period thereafter". We would tend to agree with this observation.

For example, in *C W v Trustees of the Roman Catholic Archdiocese of St Andrews and Edinburgh* [2013] CSOH 185, the pursuer's justification for seeking the waiver of the time bar came down to "not consider[ing] his injury in the context of suing for that injury until 2010": the alleged abuse had come to an end in 1992. In *B v Murray* (No. 2) 2005 SLT 982, the Lord Ordinary held that the three pursuers "did not think about the possibility of court proceedings" until 1997, when there was newspaper coverage of compensation claims relating to the home in question. The alleged abuse in that case had come to an end in 1979. It is, in our view, not clear why a defender, and in particular an institutional defender of the type described above, ought to suffer the serious prejudice of defending a decades old claim on such a basis.

We note from the Consultation that the Scottish Government's justification for the waiver of time bar in such cases is that "it is the abuse which is the reason why people do not come forward until many years after the event even where there was knowledge of what had happened". As we have noted, it would seem from reported judgments that this may not always be the case, at least in relation to some of the delay in coming to court. Where it is the case that the abuse itself has played a part in delaying the raising of proceedings, we would expect the courts to take account of this in considering whether to waive the time bar, and indeed it seems to us that they

do so, whether in respect of all of the delay, as was the case where the Lord Ordinary found in favour of the pursuer in *EA v GN* [2013] CSOH 161, or part of it, as in *B v Murray*, where the Lord Ordinary accepted that personal and psychological problems would have inhibited the pursuers from raising court proceedings for a period of three years after the date of majority.

We further note the reference to the “silencing effect”. We do not dispute that such an effect may apply to a particular claimant. However, in our view, the existence or otherwise of such an effect in relation to a particular claimant ought to be established on a case-by-case basis, rather than being assumed to apply in every instance. In *B v Murray*, the Lord Ordinary heard expert psychiatric and psychological evidence relating to three pursuers from both parties. On the basis of that evidence, he rejected a diagnosis of post-traumatic stress disorder relating to the pursuers, and held that there was no particular psychological or medical condition which might explain the pursuers’ non-disclosure beyond general distress and embarrassment of the sort which might apply to other types of claimants. Indeed, each of these pursuers had, in fact, spoken to a number of people about their experiences in excess of three years prior to the raising of the action (as had the pursuer in *CW*). It is therefore unclear to us why the “silencing effect” ought to be thought to justify the time bar being waived in every case.

In our view, where there is a doubt that sufficient mitigating factors will apply to every claimant, and a defender may be significantly prejudiced by allowing a claim to proceed, the appropriate way to resolve the application of limitation is to consider claims on a case-by-case basis, as happens at present. We do not agree that the current regime invariably leads to a pursuer’s case failing, as is demonstrated by *EA v GN*. However, it does permit the fairness to both parties of allowing a case to proceed to be scrutinised and assessed. This seems to us to be preferable to a regime whereby a seriously prejudiced defender may have no recourse against a claimant whose reasons for delaying litigation were largely or entirely without merit, as may theoretically be the case should the current proposal be enacted.

We would finally note that any legislation removing limitation from previously time barred cases may be regarded as an interference with the property of a defender, specifically their financial resources. On that basis, such legislation may be challenged as unlawful on the basis that it contravenes article 1 of protocol 1 to the European Convention on Human Rights (“A1P1”). If the legislation did constitute such an interference, the Scottish Government would require to satisfy the court that the policy aims supporting the legislation have a reasonable foundation (*James v United Kingdom* ) (1986) 8 EHRR 123) and that the legislation is proportionate (*Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35). It is not clear to us that it will be able to do so where the courts already have a power to waive the time bar in relation to a particular case where it is equitable to do so.

**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?**

We noted above certain difficulties which may be encountered in relation to A1P1. This question raises further issues.

Court actions are resolved in favour of a defender in one of two ways: by decree of dismissal, or by decree of *absolutor*. The former is broadly appropriate where the action is brought to an end for procedural reasons, whilst the latter is a judgment on the substantive issues raised by the case. As a result, a case can be re-litigated where decree of dismissal has been granted, whereas decree of *absolutor* is a final judgment, which will prevent further litigation by affording the defender a defence of *res judicata* to any subsequent action.

Many cases brought to an end on the basis of a plea of time bar following a court hearing will have had a decree of dismissal pronounced. However, it is our understanding that a large number of cases were settled extra judicially on the basis that decree of *absolutor* was granted, following a refusal by the Scottish Legal Aid Board to provide further funding.

Legislation which removes a limitation period from time barred cases may be regarded as having retroactive effect. It has been held that there has to be a “special justification” for A1P1 rights to be affected by legislation of retroactive effect (*Bäck v Finland* (2004) 40 EHRR 1184). The retroactive nature of any legislation is considered as part of the court’s assessment of the proportionality of that measure, and will be objected to where an “individual and excessive burden” is placed upon a person. It seems to us that defenders holding decrees of *absolutor* in particular will have cause for complaint in relation to the re-imposition of a liability in circumstances where such judgments were previously regarded as being final, and the principle of legal certainty militates against the reopening of such claims.

Whether or not such complaints had merit, any legislation seeking to allow the latter group of cases to be re-litigated would require to address the availability of *res judicata* as a defence in addition to limitation.

**Q.3: Do you agree that child should be defined as someone who has not yet attained the age of 18?**

No. Whilst we note that a number of pieces of legislation define a child as somebody under the age of 18, the law on limitation has, since the commencement of the *Age of Legal Capacity (Scotland) Act 1991*, regarded a child as someone under the age of 16. We do not regard the age of majority under other statutory regimes as relevant for present purposes, and see no justification for changing the current position generally, or in relation to this specific type of case.



**Q.4 Do you agree that any definition of 'child abuse' should cover physical, sexual, emotional, psychological, unacceptable practices and neglect?**

In our view, this definition of "child abuse" is vague, unspecific and subjective. The Consultation does not elaborate on whether "unacceptable practices" ought to be determined according to the standards of the time of the alleged abuse, or the present day.

**Q5 Do you agree that types of care outlined above should be covered?**

We have outlined above our opposition to the proposed amendment. However, if the amendment is nonetheless progressed, then, yes, we agree that the types of care outlined should be covered.

**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"?**

Again, we do not believe that the proposed exemption should be enacted at all. However, if it was, then it seems to us that the regime should be extended to cover all children. Insofar as the "silencing effect" is regarded as a justification for such an exemption, it seems to us to be likely that it would have at least as significant an effect where the abuser was a close family member as where they were a professional carer, and possibly more so. Further, if abuse by a professional carer is regarded as a sufficiently egregious breach of trust to justify the waiving of the time bar, then it seems to us that this applies with greater force to abuse by a family member.