

SPICe Briefing

Limitation (Childhood Abuse) (Scotland) Bill

19 January 2017

17/04

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Under the current law, there is a three year statutory time limit for bringing a civil court claim for damages in relation to personal injuries.

The [Limitation \(Childhood Abuse\) \(Scotland\) Bill](#) contains provisions which would remove the statutory time limit where the claim relates to childhood abuse. However, the Bill also sets out two specific sets of circumstances where the court will be required to dismiss such a claim.

This briefing summarises the current law and explains why the Scottish Government wants to change it. It also explores some of the policy issues arising as a result of the proposed change.



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EXECUTIVE SUMMARY

The Bill in its wider policy context

The Bill represents one of a package of measures designed to improve the lives of survivors of historical childhood abuse in Scotland.

Limitation of court actions – the law and policy

The Bill's focus is on a rule of court procedure, known as **time bar** or the law of **limitation of actions**. The current legislation on this topic is the Prescription and Limitation (Scotland) Act 1973 (c 52) ('the 1973 Act').

At present, those individuals suing in the civil courts for damages for personal injuries generally have **three years** from the date of the injury or – as is often relevant to childhood abuse – their sixteenth birthday in which to bring a court action. Thereafter they are usually prevented from doing so. The policy aim of this law is to balance the rights of those raising the action with the protection of individuals and organisations from problems associated with open-ended legal liability.

The Bill amends the 1973 Act to remove the three year limitation period where the court action in question is about childhood abuse.

A special regime for childhood abuse cases

The Scottish Government believes that cases of childhood abuse have unique characteristics which justify a special limitation regime, exempting childhood abuse survivors from the general rule described above.

The Scottish Government consulted on a special regime for childhood abuse victims in 2015. Fifty eight per cent of respondents to this consultation who provided a clear view agreed with the suggested approach. A significant minority of respondents (42%) disagreed.

Key definitions

Important definitions which appear (with some amendments) in the Bill were also consulted on in 2015. They include the definition of **child** (as someone under 18) and what constitutes **abuse** for the purposes of the new regime (defined in the Bill as including sexual, physical and emotional abuse).

The proposed definitions were supported by the majority, with some reservations expressed by respondents.

Retrospective effect – including previously concluded cases

A key feature of the Bill is that the new limitation regime will have **retrospective effect**.

In particular, the new regime can apply to claims relating to events occurring before the law was changed (section 1 of the Bill inserting section 17B into the 1973 Act). The Bill also allows court actions concluded prior to the commencement of the new law to be raised again in certain

circumstances. Specifically, where: a) the court had ruled the case in question was time barred; or b) the case was settled on the reasonable belief that it would have been time barred, which may often be based on legal advice (section 1 of the Bill inserting section 17C into the 1973 Act).¹

The Scottish Government consulted on what the approach should be to previously concluded cases. A minority of respondents (10 out of 35) clearly expressed their support for this aspect of the proposals. As well as the resource implications for organisations of old cases being revived, opponents raised the possibility of human rights-based challenges to the new law. In particular, they highlighted cases suggesting that retrospective legislation will not be looked at favourably by the courts unless the legislation has a **special justification**.

Section 17D – an overview

Section 1 of the Bill inserts a new section 17D into the 1973 Act. The latter provision is particularly important in policy terms. Notwithstanding the general lifting of the three year limitation period for an action for damages relating to childhood abuse, section 17D requires a court to dismiss such a court action where it considers certain specified conditions are met.

The inclusion of section 17D in the new law represents some shift in emphasis from the Scottish Government's proposals consulted on in 2015 (which did not explicitly refer to such a requirement on the court). A major policy driver for this shift seems to have been the concerns expressed about the original proposal by some consultees relating to some aspects of the European Convention on Human Rights.

An important point to note is that it is the person or organisation defending the action who has to prove that section 17D should apply to their particular case. This contrasts with the current law where the court has discretion to depart from the general three year rule (exercised very sparingly in practice). However, it is the person claiming damages who has to persuade the court to exercise it in their favour.

Section 17D – “fair hearing” and “substantial prejudice”

Section 17D has two separate tests which may apply to a particular case.

The first test can be used in any court case where the new limitation regime would apply. It requires the court to dismiss a case where the defender satisfies the court that **a fair hearing would not be possible**.

The second test can only apply where the new limitation regime has retrospective effect in a particular case. It requires the court to rule that a case should not go ahead where the court finds a) that the person or organisation defending the action would be **“substantially prejudiced”**; and b) when weighed against the interest of the person bringing the claim in the case proceeding, the associated balancing exercise suggests the case should not go ahead.

The Scottish Government has said there is an important role for future case law in developing the detail of the tests contained in section 17D.

¹ Any financial settlement received by the person who had raised the court action also must not have exceeded the his or her legal costs associated with raising and settling the claim.

THE BACKGROUND TO THE BILL

The [Limitation \(Childhood Abuse\)\(Scotland\) Bill](#) ('the Bill') is a Scottish Government Bill which was introduced in the Scottish Parliament on 16 November 2016. The policy aim of the Bill is to improve access to justice for survivors of historical abuse.

The Bill is accompanied by documents including a [Policy Memorandum](#), [Explanatory Notes](#) and [Financial Memorandum](#).

The Bill was preceded by a Scottish Government [consultation](#) in 2015 (Scottish Government 2015a). This received 35 substantive responses, including [28 responses](#) which the Government had permission to publish. The largest categories of respondent were insurance bodies and bodies representing aspects of the legal profession. Four care providers and one survivor representative body were amongst the respondents.

In March 2016, the Scottish Government published an analysis of the consultation responses (see the [summary research findings](#) and the [full analysis](#)) (Scottish Government 2016a and 2016b). It also published its [response](#) to the consultation (Scottish Government 2016c). The latter included a [draft bill](#) and [explanatory notes](#) (Scottish Government 2016d and 2016e).

The Scottish Parliament's [Justice Committee](#) has been made the lead committee at Stage 1 of the parliamentary consideration of the Bill. The Committee issued a [call for evidence](#), which closed on 11 January 2017. [Fifteen written submissions](#) were received.²

RETROSPECTIVE LEGISLATION/THE ROLE OF PRESCRIPTION

The Bill applies to abuse occurring **before or after** the commencement of the new law (section 1 inserting new sections 17B and 17C into the 1973 Act).

However, if the abuse occurred **prior to 26 September 1964**, any legal obligations arising from the abuse will usually have been **extinguished**, meaning it will not be possible to raise a court action.³

This is because the provisions of the Bill sit alongside a related area of law known as **prescription** (which the Bill itself does not alter).⁴ Although there are differences between the two concepts, both prescription and limitation relate to time limits which the court must consider. For prescription the relevant time period is twenty years. With prescription the legal right is extinguished altogether after the time period has elapsed, with no possibility of the court exercising its discretion.

In 1984 the law was amended so that, **in future**, the twenty year prescriptive period would not apply to personal injury claims (Prescription and Limitation (Scotland) Act 1984 (c 45). However, claims which had already "prescribed" were **not** revived by the 1984 Act.

²There has been insufficient time between the Committee's call for evidence closing and the required publication date of this briefing to incorporate consideration of the written submissions to the Committee in the briefing. This is due to the fact that SPICe Briefings are peer reviewed by external organisations.

³ For some exceptions to this, see the [Policy Memorandum](#), para 11. In particular, for abuse which was "continuing" under the 1973 Act, beginning before this date and ending after it, the twenty year period starts to run from the date the abuse ended.

⁴ For the Scottish Government's reasoning as to why prescription should not be further reformed by the Bill in relation to childhood abuse victims, see chapter 3 of its 2015 [consultation paper](#) (Scottish Government 2015a).

THE BROADER POLICY CONTEXT

It is important to view the Bill in its broader policy context. The appropriate policy and legal response to historical childhood abuse in Scotland has been considered by policymakers since the early years of devolution. An important milestone was the [apology in December 2004, by the then First Minister Jack McConnell MSP](#) (Scottish Parliament 2004), on behalf of the people of Scotland, for past child abuse in residential care homes.

In the twelve years since then, there have been multiple policy initiatives, completed and ongoing, involving a wide range of individuals and organisations. Of particular importance was the work of the [Scottish Human Rights Commission](#) (SHRC) carried out in conjunction with the [Centre for Excellence for Looked After Children in Scotland](#) (CELCIS). The work led to an [Action Plan on Justice for Victims of Historic Abuse of Children in Care](#) (SHRC/CELCIS 2013) which the Government made various commitments in relation to, including reform to the time limits in personal injury actions (Scottish Parliament 2014).

A key [announcement](#) by the Scottish Government was that there would be a public inquiry into historical child abuse (Scottish Parliament 2014). This high-profile [inquiry](#) was set up in October 2015 with extensive terms of reference. A further important initiative was the Apologies (Scotland) Act 2016 (asp 5), which received Royal Assent in February 2016. This Act aims to encourage the giving of apologies by organisations, including in relation to historical childhood abuse.

THE CURRENT LAW AND POLICY

PERSONAL INJURIES ACTIONS – AN OVERVIEW

The Bill is about a specific legal rule and, in particular, how it should be altered in relation to one category of individuals. However, it is useful to understand the key features of the wider area of law and practice in which the rule operates – including being familiar with some related legal terminology.

Some key terms

In Scotland, the person or organisation raising a civil court action is known as the **pursuer**. The person or organisation defending the action is known as the **defender**.⁵

Individuals who wish to claim damages for personal injuries through the civil courts can do so under the law of **delict**.

What are personal injuries?

Personal injuries recognised by the law include, not only physical injuries, but also **psychological injuries** which result in recognised medical conditions, for example, depression, anxiety and PTSD.⁶

⁵ Simple procedure is the new Scottish court procedure used for lower value claims. Here, the **claimant** brings an action against the **respondent**. The equivalent terms in England and Wales are the **claimant** and the **defendant**.

⁶ Note the law which relates to psychological injuries is itself widely recognised as being in need of reform and this topic was also covered in chapter 2 of the Scottish Government's [consultation](#) in 2012 (Scottish Government 2012).

Who can be sued?

The individual whose wrongdoing caused the personal injuries can be sued directly. However employers can be found to be **vicariously liable** for the wrongdoing of their employees, including their former employees. This means a claim for damages can be raised against employers in some circumstances too.⁷

If such an employer is insured against wrongdoing by its employees then, in practice, it is likely to be the **employer's insurance company who defends the personal injuries claim**. They will be trying to avoid or minimise the losses caused by having to pay out to the employer under the relevant insurance policy.

Settling out of court

Another practical point to be aware of is that most personal injuries cases are **settled out of court**, either before or after the court action begins. The size of any sum which one party agrees to pay the other as part of this process will reflect legal advice on the prospects of the case being successful. Accordingly, a change to the law on the time limits in personal injury actions would also affect the legal advice given in the many cases which settle out of court.

THE CURRENT LAW ON LIMITATION OF ACTIONS

In order to be able to bring a court action in the civil courts the pursuer must start the action in the correct timeframe as set out in the Prescription and Limitation (Scotland) Act 1973 (c 52) ('the 1973 Act').

Generally, a court action for personal injuries must begin **within three years of the injury being sustained**. However, the law also takes account of **continuing injuries** which happen to a person over a period of time. For those injuries, the time limit can start to run from the point such an injury **ceases** (1973 Act, section 17(2)(a)).

Furthermore, sometimes a victim will not know at the time of the injuries how serious those injuries were; that they were caused by the wrongdoing in question; or that the wrongdoing could be attributed to the particular defender. In these circumstances the time limit starts to run from the point when **the pursuer acquired that knowledge or ought to have acquired that knowledge** (1973 Act, section 17(2)(b)).

The three year time period does not include the period when the person who would be raising the action is **under 16** or any period where they are "**of unsound mind**", for example, due to serious mental illness (1973 Act, section 17(2)(c)).

An important part of the current law is that judges have a **discretion in individual cases to allow a court action to be started after the time period has lapsed**. They can do this if, on the evidence presented to them, they consider that it would be "equitable" for them to do so (1973 Act, section 19A). However, in practice, the test is a strict one. As explored in more detail below, it can be hard for victims of childhood abuse to satisfy it.

⁷ Since 2001, the law has said that an employer can be found vicariously liable for the criminal acts of an employee which were closely connected with his or her employment (Lister & others v Hesley Hall Ltd (2002)). The key case in question concerned the abuse of children by a warden in a boarding school. Prior to 2001, employers in abuse cases couldn't be found vicariously liable for the criminal actions of individuals where an employer had taken all practicable safeguarding measures.

THE POLICY BEHIND THE LIMITATION OF ACTIONS

In policy terms, people first encountering the law of limitation of personal injury actions sometimes find it difficult to understand why this area of law exists at all.

The right to bring a well-founded claim

A person's first instinct can be that if a person has suffered a personal injury which gives rise to a claim for damages, they should always have the right to raise the court action. However, a time-bar period for personal injury claims exists in nearly all similar developed legal systems in the world. There are a number of policy reasons for this.

Ensuring a fair trial/loss of evidence

One of the main reasons for the time bar is that, where there has been a delay, it will become harder to ensure that a case will be fairly determined.

In particular, the longer the delay the more likely it is that the case will be decided on less evidence or poorer quality evidence than was originally available. For example, a crucial witness may be dead, incapacitated or untraceable. Furthermore, key documents might have been lost or destroyed. Important, perhaps decisive, evidence may have disappeared without anyone ever discovering it ever existed (Scottish Law Commission (SLC) 2007, p 3).

Speed, certainty and finality

A time limit also supports the public interest in ensuring claims are resolved reasonably quickly.

Likewise, it is thought that a well-functioning legal system should offer individuals and organisations the certainty of a final cut-off point. After this, individuals and organisations can organise their affairs knowing there are no pending legal claims.

Sometimes these ideas are referred to as promoting the values in the legal system of "certainty" and "finality". For organisations, in particular, these values help them, for example, to budget and to obtain insurance for their current operations (SLC 2007, p 3).

AN OVERVIEW OF THE BILL

The Bill creates a special regime for childhood abuse cases in relation to the time period associated with personal injuries actions.

The Bill has three sections and only section 1 is substantive in policy terms. It makes provision for four additional sections to be inserted into the 1973 Act. What these new sections would do is summarised in the table on the next page of this briefing.

Note that, for the remainder of this briefing, references to sections 17A–D are to the new sections which would be inserted into the 1973 Act, not the actual provisions of the Bill.

New section in the 1973 Act	What it would do
Section 17A	<p>This would remove the three year limitation period where four conditions are met. These are:</p> <ul style="list-style-type: none"> • the damages must be for personal injuries • the pursuer must have been a child, i.e. under 18, when the circumstances giving rise to the claim took place or began • the circumstances giving rise to the court action must be abuse – this includes sexual, physical or emotional abuse • the pursuer must be the person who sustained the injuries – not a third party. This precludes claims on behalf of an abuse victim who has subsequently died
Section 17B	<p>This provision says that the removal of the three year limitation period (under section 17A) applies to claims for damages where the events giving rise to the claim occurred before the commencement of section 17A. This means the Bill will have retrospective effect.</p>
Section 17C	<p>This provision supplements section 17B. It makes specific provision to deal with the situation where there has been previous litigation which was concluded prior to the commencement of section 17A.</p> <p>It allows these court actions to be re-raised in certain specific circumstances. These circumstances are where either:</p> <ul style="list-style-type: none"> • the court ruled the case was time barred under section 17; or • the case was settled based on the reasonable belief that it would have been time barred under section 17. (Any sum of money paid from defender to pursuer in this context must not have exceeded the pursuer’s legal expenses associated with raising and settling the claim.) <p>Note that section 17C does not allow the re-raising</p>

	of actions where the court has already ruled on the actual merits of the case itself.
Section 17D	<p>This says that, notwithstanding the general rule set out in section 17A, a court may not allow a court action to proceed where the defender satisfies the court that:</p> <ul style="list-style-type: none"> • a fair hearing would not be possible (section 17D(2)); or • the law would apply retrospectively; the defender would be substantially prejudiced if the action were to proceed; and (when weighed against the pursuer’s interest in the case proceeding) the prejudice is such that the action should not proceed (section 17D(3)).

Individual provisions of the Bill are discussed in more detail later in the briefing. As several parts of the Bill raise human rights considerations, an overview of this topic is contained in the next section of the briefing.

HUMAN RIGHTS CONSIDERATIONS

An Act of the Scottish Parliament is not law in so far as it is not compatible with ‘Convention rights’ (Scotland Act 1998 (c 46), section 29). These are rights protected by the [European Convention on Human Rights](#) (ECHR), incorporated into domestic law by the Human Rights Act 1998 (c 42).

Likewise, public bodies, including the courts, must act in accordance with Convention rights (Human Rights Act 1998 (c 42), section 6).⁸

RELEVANT CONVENTION RIGHTS

The Scottish Government, along with some respondents to its 2015 consultation, have identified two key Convention rights as relevant in the context of the Bill ([Policy Memorandum](#), paras 109–111; Scottish Government 2016b, paras 3.8, 3.13 and 3.20).⁹

These Convention rights are not absolute rights but “qualified rights”, meaning they may be interfered with where certain legal tests are satisfied.

Article 6 – right to a fair trial

Article 6 of the ECHR sets out the right to a fair trial. In relation to civil cases, it applies to both pursuers and defenders. The right has various components. It includes a right to practical and effective access to a court (or tribunal). On the other hand, there are also various protections for

⁸ Unless the wording of an Act of the **UK Parliament** means they have no choice but to do otherwise (Human Rights Act 1998 (c 42), section 6).

⁹ Article 14 of the ECHR is also relevant as it requires that all other Convention rights are secured without discrimination.

defenders in Article 6 (European Court of Human Rights 2013; Reed and Murdoch 2008, chapter 5).

Article 1 of the First Protocol to the ECHR

Article 1 of the First Protocol to the ECHR (A1P1) provides a person with a right to peaceful enjoyment of “possessions”.

The Government’s assessment of the potential significance of A1P1 in the [Policy Memorandum](#) (at para 111) reflects the fact that “possessions” has been interpreted broadly by the courts. In two recent cases, the UK Supreme Court considered legislation which removed, with retrospective effect, a defence previously available to defenders in a court action for damages. This, in turn, increased the financial burden on those defenders. The Supreme Court said this amounted to an interference with possessions under A1P1 (AXA General Insurance Ltd, Petitioners (2011); Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, Re (2015)).¹⁰

PROPORTIONALITY

When the ECtHR and the UK courts are reviewing legislation for compatibility with the ECHR, various tests are applied. **Proportionality** is an important concept.

For the UK courts, the test of proportionality involves considering whether there is a **legitimate aim** of sufficient importance which could justify the restriction of a Convention right; whether the measure adopted is **rationally connected** to that aim; and whether the aim could have been achieved by a **less intrusive measure**. The review by the court also looks at the severity of the consequences for the individuals directly affected by the legislation. Ultimately, it considers whether a **fair balance** has been struck between their interests and the importance of the objectives of the legislation (Bank Mellat v HM Treasury (No 2) (2014); Cross and Knight 2016; Williams 2017).

LIMITATION PERIODS AND ARTICLE 6

The SLC (2007, para 1.19) and the SHRC (2013, p 6) have both highlighted the case of *Stubbings and others v United Kingdom* (1993). (See also European Court of Human Rights 2011, p 9). In this case the ECtHR said that limitation periods in the case of historical child abuse did not necessarily breach the ECHR. They helped ensure adherence to the values of certainty and finality and cases not being decided on limited or poor quality evidence. Furthermore, different limitation periods may be appropriate for different circumstances. On childhood abuse specifically, the ECtHR said:

“There has been developing awareness in recent years of the range of problems caused by child abuse and its psychological effects on victims, and it is possible that the rules on limitation of actions applying in member states...may have to be amended to make special provision for this group of claimants in the near future”

However, the ECtHR also said that, like all restrictions, limitation periods must be proportionate. More recent case law has emphasised that, in assessing the proportionality of limitation periods, it is not just what the law says but how it is applied by the courts in practice which must be proportionate (*Roman v Finland* (2013); *Simor and Emerson* 2016, para 6.087; SHRC 2013, pp 5–6).

¹⁰ See also SLC 2007, para 5.13; Faculty of Advocates 2015, p 3; Scottish Government 2015b, p 3 and Scottish Government 2015e, pp 6–7.

LEGISLATION HAVING RETROSPECTIVE EFFECT

As discussed earlier in the briefing, the Bill will have retrospective effect. To be compatible with Convention rights, the Scottish Government has recognised that such legislation requires a **special justification** ([Policy Memorandum](#), para 111).¹¹

LEGISLATION DISTURBING FINAL COURT JUDGEMENTS

Furthermore, an important aspect of Convention rights is the principle that, reflecting the values of legal certainty and finality, the final judgement of a court should not be disturbed. Accordingly, to the extent legislation disturbs a final court judgement, this requires justification on the basis of **circumstances of a substantial and compelling character** (European Court of Human Rights 2013, para 115; *Brumarescu v Romania* (2001)).

A SPECIAL REGIME FOR CHILDHOOD ABUSE CASES (SECTION 17A)

THE SCOTTISH GOVERNMENT'S APPROACH

The Scottish Government's policy justification for introducing a special limitation regime for childhood abuse cases has two main strands. In terms of ECHR compliance, the Scottish Government believes that they operate together to provide the necessary "special justification" for retrospective legislation ([Policy Memorandum](#), para 111).

The characteristics of childhood abuse cases

First of all, the Government's view is that cases of childhood abuse have unique characteristics which justify a special limitation regime. These characteristics derive from the abhorrent nature of the act, the particular vulnerability of the victim and the effect of abuse on children ([Policy Memorandum](#), para 25).

Abuse at a time when a person is vulnerable and in a dependent relationship has been shown to have long-lasting severe adverse consequences. These include serious mental health issues; effective incapacity; addiction; post-traumatic stress and self-harming behaviour ([Policy Memorandum](#), para 26).

It is common for adult survivors to suppress the abuse because of shame, guilt or fear or because of the stigma associated with abuse (the so-called "silencing effect"). Furthermore, some survivors do not know or understand that they were in fact subject to abuse until many years later ([Policy Memorandum](#), paras 26 and 28).¹²

Childhood abuse often creates in people feelings of insecurity; a persecution complex; a belief that everyone is hostile to them; and a deep resentment of authority. Anxiety about being disbelieved, as well as difficulties with people in authority, means that survivors can find it very difficult to engage with the justice system ([Policy Memorandum](#), para 28).

¹¹ See also: *Bäck v Finland* (2004); Recovery of Medical Costs For Asbestos Diseases (Wales) Bill, Re (2015); Faculty of Advocates 2015, p 4; Scottish Government 2015b, p 4; Scottish Government 2015c, p 2; Scottish Government 2015d, p 2; Scottish Government 2015e, pp 6–7 and SLC 2007, paras 3.12–3.13.

¹² In addition, the "grooming" of a child, which involves establishing an emotional connection with the victim to enable the abuse to happen, encourages complicity and silence about the abuse.

Putting these factors together, the Scottish Government (2016c, p 4) concludes in its [response](#) to the consultation preceding the Bill:

“We are of the view that the law should recognise that it is the abuse which is the very reason why people do not come forward until many years after the event”

Issues with the court’s current discretion

The other key part of the Scottish Government’s explanation for the special regime is the way the courts have applied their existing discretion to waive the time limit. It believes this has operated to frustrate access to justice for survivors ([Policy Memorandum](#), para 10).

The court’s starting point under section 19A is that the time period has expired. Accordingly, the onus is on the pursuer to show that there is a reasonable explanation for the delay. Judges, through decisions in individual cases, have developed factors which the court must take into account in this regard. In the context of childhood abuse cases, various explanations for the delay have been unsuccessful. These explanations have included factors such as ignorance of legal rights, as well as shame, fear and psychological difficulties as a result of the childhood abuse (B v Murray (No 2) (2007); W v. Trs of the Roman Catholic Archdiocese of St. Andrews and Edinburgh (2013); DK v Marist Brothers (2017); [Policy Memorandum](#), para 10).¹³

If the defender can show actual prejudice, or the real possibility of significant prejudice, in pursuing the action, then this is also a very significant factor which the court will take into account (AS v Poor Sisters of Nazareth (2008)). In this regard, the focus is often on the difficulties associated with the investigation of the claim and the presentation of a defence. These are most acute where the defender is the abuser’s employer who may have been unaware of the abuse.

THE SCOTTISH GOVERNMENT’S CONSULTATION

One of the most fundamental policy issues associated with the Bill is whether it is the correct legislative response to create a specific limitation regime for childhood abuse cases.

In the Scottish Government’s 2015 consultation, 33 out of 35 respondents provided a clear view on this topic. **Of these, 58% of respondents agreed that such a regime should be created. A significant minority of respondents (42%) disagreed** (Scottish Government 2016b, paras 1.4 and 3.1).

Note that the consultation made no specific reference to the courts being required to dismiss a case in certain circumstances (in contrast to the Bill as introduced). The level of support for the original proposal and the arguments for and against the new regime (set out below) should be viewed in that context.

For ease of presentation, the arguments against the new regime are set out first.

Arguments against the proposed new regime

The most frequent argument to emerge (from 11 respondents, including all insurance bodies) related to the risk, due to the passage of time, of poor quality and/or missing evidence, which could lead to an unfair trial (Scottish Government 2016b, paras 3.8).

¹³ In one case a court did allow an action against the alleged abuser to proceed well after expiry of the three year period. However, this was on the basis of evidence of systemic abuse from childhood well into adulthood which had rendered the pursuer emotionally dependent on the defender. This set of facts was described by the judge as “somewhat exceptional” (A v N (2013; 2015)).

Four respondents said that a blanket lifting of the limitation period, without considering the merits of individual cases, would be disproportionate. Six respondents referred to A1P1 and the possibility of a potential breach (Scottish Government 2016b, paras 3.8).

Another recurring theme (from ten respondents) was that there was no need to change the law because of the current judicial discretion contained in the 1973 Act. Respondents saw it as part of a well-balanced system which is in the wider public interest (Scottish Government 2016b, para 3.10).

Ten respondents (including four insurance bodies and three care providers) expressed concern that the proposal could significantly affect employers, including charities. These respondents argued that, due to the law on vicarious liability not changing until 2001, such organisations would not have been held liable if the claims had been brought in good time.¹⁴ There was concern that care providers might not be able to receive protection from an insurance policy in respect of claims. (Scottish Government 2016b, para 3.11). They might be unable to trace a previous insurer, or an insurer might refuse to cover them under their current policy.

The final strand of argument (from eight respondents) was that carving out an exemption for a specific type of case from the main limitation regime would create inconsistencies and anomalies. To resolve these, respondents suggested there would then be arguments made for a further change to the law, for example to address the situation of survivors of trauma which occurred in adulthood (Scottish Government 2016b, para 3.12).

Arguments in favour of the proposed new regime

There was a significant overlap between the arguments given by respondents to the consultation in favour of the new regime and the arguments advanced on this topic by the Scottish Government in the [Policy Memorandum](#).

The most common reason given in support of introducing a new regime (from seven respondents) was that there are genuine reasons why survivors of historical abuse may not raise actions in time, relating to the effect of the abuse itself. Respondents argued that, as research shows many children do not report abuse until adulthood, the current time-bar represents an important barrier to achieving justice for survivors (Scottish Government 2016b, paras 3.4–3.5).

Five respondents argued that the court's current discretion is not working effectively for survivors of childhood abuse (Scottish Government 2016b, para 3.6). One academic responding to the consultation compared the approach in criminal prosecutions to the approach in civil cases for personal injuries and criticised the inconsistency. The relevant criminal offences for childhood abuse are **not** subject to a limitation period. Yet criminal prosecutions have successfully gone ahead, in fact with increasing frequency in recent years. This, it was argued, shows the passage of time does not necessarily cause the quality of justice to deteriorate. (Scottish Government 2016b, paras 3.6, 3.7 and 3.9).

ALTERNATIVE APPROACHES

An important part of evaluating the merits of the Government's key proposal in the Bill is considering what it could have done instead to give effect to its policy aims. Alternative approaches are also relevant in the context of the ECHR-related test of proportionality (discussed above at p 12)). The table on the next page sets out a range of possible alternative approaches, including the main reasons why these were not pursued, where these are available.

¹⁴See footnote 7.

Alternative approach	Origins of the alternative approach	Reasons it was not pursued
<p>Give greater judicial guidance to the courts on how they operate their existing discretion.</p>	<p>Suggested by a respondent to the Scottish Government’s consultation (Scottish Government 2016b, para 3.14).</p>	<p>No explicit discussion of this in the published material associated with the Bill.</p> <p>However, the reasons are likely to be very similar to those applicable to the creation of a list of statutory factors (see below).</p>
<p>Create a statutory non-exhaustive list of factors which the court has to take into account.</p> <p>This could explicitly refer to emotional/psychological issues associated with childhood abuse.</p>	<p>The Scottish Law Commission’s 2007 report on the law of limitation in personal injury actions (SLC 2007, recommendation 15 and para 3.37).</p> <p>Also suggested by a respondent to the Scottish Government’s consultation, with reference to factors particularly relevant to childhood abuse victims (Scottish Government 2016b, para 3.14).</p>	<p>Would offer some improvement in access to justice for victims but the nature of the limitation period, of itself, with an “inbuilt resistance” to allowing historical claims, is ultimately not appropriate in the context of childhood abuse (Policy Memorandum, para 56).</p>
<p>Extend the existing limitation period from three to five or six years.</p>	<p>The Scottish Law Commission’s 2007 report on limitation in personal injury actions (five years) (SLC 2007, recommendation 9 and para 2.59).</p> <p>A respondent to the Scottish Government’s consultation (six years) (Scottish Government 2016b, para 3.14).</p>	<p>Against the public interest for cases involving classes of pursuer other than childhood abuse victims.</p> <p>Short extensions would be of little assistance to victims and whatever fixed time period chosen is arbitrary (Policy Memorandum, paras 57 and 58).</p>
<p>Creating a legal presumption that the childhood abuse victim was unable to raise proceedings until proceedings were actually raised.¹⁵</p>	<p>Policy Memorandum, paras 52–54.</p>	<p>The defender could still overturn the presumption by leading evidence to show why it shouldn’t apply in a particular case.</p>

¹⁵ A legal presumption is an assumption that the court makes until the defender leads evidence explaining why it is not true in the particular case.

		There would still be an inappropriate focus on the reasons for not raising the action sooner (Policy Memorandum , paras 53–54).
‘Window’ legislation – changing the law on limitation of actions as proposed in the Bill but only for a limited period of time. Thereafter it would revert to the original law.	Some states of the USA and Ireland – see the Policy Memorandum , para 59–61.	Only an individual who is at a point in their recovery process that they can face raising court proceedings in the relevant ‘window’ would benefit (Policy Memorandum , para 60).
Lift the three year limitation period for all childhood abuse victims with no equivalent to section 17D in the legislation (i.e. the requirement on the court to dismiss a case in certain circumstances)	Scottish Government’s 2015 consultation paper (see, for example, paras 1.3 and 4.10)(Scottish Government 2015a).	Likely to be associated with concerns expressed by respondents to the Government’s consultation as to whether such legislation was compatible with Convention rights. (See, for example, Scottish Government 2016b, para 3.13 and 3.20; Scottish Government 2016c, pp 7–8; Policy Memorandum , para 110 and 111). ¹⁶
Lift the three year limitation period for all personal injury actions or for a wider category of cases than appears in the Bill (e.g. including vulnerable adults and domestic abuse survivors).	Policy Memorandum , paras 62 and 63; paras 100–102).	For all personal injury actions this would be a disproportionate response to the issue (Policy Memorandum , paras 62 and 63.) For a regime applicable to a wider category of cases, they do not share enough of the unique characteristics of childhood abuse victims (Policy Memorandum , paras 101–102).

¹⁶ However, note that, regardless of whether a provision like section 17D appears in the legislation, the UK courts, as a public body, have an obligation to act in a way which is compatible with Convention rights (Human Rights Act 1998 (c 42), section 6).

KEY DEFINITIONS IN THE BILL

THE DEFINITION OF “CHILD” (NEW SECTION 17A(2))

Background

When a child or young person is interacting with the Scottish legal system a variety of different ages are important for different purposes. Significant landmarks in the Scottish legal system for young people in terms of age include 16 and 18.

The Bill

Section 17A(2) defines a child as someone **under the age of 18**.

The Scottish Government’s consultation

The Scottish Government consulted on this definition and 66% of respondents who provided a clear view on the topic supported it (Scottish Government 2016b, para 4.2).

Very few reasons were given for this support. Two respondents said that, whilst there were different definitions of child in different contexts, the older age limit of under 18 was better to ensure no unnecessary barriers to justice are created for would-be pursuers. One care provider remarked that defining a child as an under 18 is consistent with existing child and adult protection legislation (Scottish Government 2016b, para 4.3). However, this area of law is more complex than the respondent was suggesting, with different ages relevant for different pieces of legislation.¹⁷

One of the key reasons to oppose the definition was that 16 is the main point from which, subject to certain safeguards, a young person can enter into “transactions”, such as renting a property or taking out a credit card (Age of Legal Capacity (Scotland) Act 1991 (c 50)). Respondents also argued that 16 is the age the limitation period runs from under the 1973 Act and there is no reason to change this in updated legislation (Scottish Government 2016b, para 4.4).

THE DEFINITION OF “ABUSE” (NEW SECTION 17A(2))

The Bill

Section 17A(2) defines abuse in a non-exhaustive fashion as including “sexual abuse, physical abuse and emotional abuse”.¹⁸ The individual categories of abuse mentioned in the definition are not further defined in the Bill or in the Explanatory Notes.

There is no restriction in the Bill relating to where the abuse took place.

¹⁷ For example, the UN Convention on the Rights of the Child, in general, defines a child as anyone under 18. This has influenced is the policy direction of recent domestic legislation relating to children, including, for example, the Children and Young People (Scotland) Act 2014 (asp 8) (not yet in force). On the other hand, most of the legislation aimed at the protection of vulnerable adults defines an “adult” as someone aged 16 or over. See, for example, the Vulnerable Witnesses (Scotland) Act 2004 (asp 3), section 11(1) and the Protection of Vulnerable Groups (Scotland) Act 2007 (asp 14), section 94(1)).

¹⁸ The draft bill which accompanied the Scottish Government’s response to the consultation was similarly worded to the Bill. However, it included “neglect” as an additional possible category of abuse (section 1 inserting section 17A(2)) (Scottish Government 2016d).

The Scottish Government's consultation

In its consultation, the Scottish Government asked whether “child abuse” should cover “physical, sexual, emotional, psychological abuse; unacceptable practices and neglect” (Scottish Government 2015a, para 6.5).

The majority of respondents who gave a clear view (70%) supported the proposed definition and 30% opposed it (Scottish Government 2016b, para 4.7).

Very few substantive comments were received explaining the reasoning of the majority. Two respondents welcomed what they perceived to be the broad, inclusive nature of the consultation's definition. They envisaged that it would encourage pursuers to come forward to raise claims. One respondent commented that, logically, the definition should align with that used for the public inquiry on child abuse (Scottish Government 2016b, para 4.8).

The most prominent objection to the proposed definition, which emerged across all categories of those in opposition, was that the terminology was so broad as to risk unintended consequences, confusion and legal challenge. Some respondents emphasised the importance of ensuring the definition is very clear, on account of the serious issues at stake. Three respondents called for comprehensive explanations to accompany each element of the definition (Scottish Government 2016b, para 4.9).¹⁹

The starting point of the Scottish Government's consultation was childhood abuse which took place in a formal care setting, such as a children's home or boarding school. However, the Government (2015a, para 6.11) also consulted on whether the special limitation regime should be extended to cover all children, not just to those abused 'in care'.

Of those respondents to the Scottish Government's consultation who provided a view on this topic, 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 and youth organisations and parents (Scottish Government 2016b, para 1.17).

CASES WHICH HAVE BEEN THE SUBJECT OF PREVIOUS LITIGATION (SECTION 17C)

As discussed earlier, section 17C allows court actions concluded prior to the commencement of the new law to be raised again in certain circumstances. Specifically a) where the court had ruled the case in question was time barred; or b) the case was settled on the basis of a reasonable belief that it would have been time barred. (In relation to the latter, there will often be legal advice to that effect).²⁰

¹⁹ Respondents appeared to be content with the inclusion of the “physical” and “sexual” aspects of the proposed definition (which now appear in the Bill). However, some questioned how several of the other elements, including “emotional abuse” (which also appears in the Bill) could be clearly understood. Several respondents commented specifically on “unacceptable practices”, which is not a category explicitly mentioned in the (non-exhaustive) definition appearing in the Bill. The concern was that common historical practices, such as corporal punishment, are unacceptable by current standards. Yet the consultation did not make clear whether the practices were to be judged by standards of the time or standards of the present day (Scottish Government 2016b, paras 4.9–4.12).

²⁰ For a settlement to fall within the scope of section 17C one of the conditions is that any sum of money paid must not exceed reimbursement of the pursuer's expenses in connection with bringing and settling the initial action (section 17C(4) and (5)).

THE SCOPE OF SECTION 17C – INCLUDING FINAL JUDGEMENTS

By virtue of section 17C(3), the provision extends to cases where a **decree of absolutor** is granted by the court. This is a final judgement of the court and, in the absence of statutory provision to the contrary, it usually prevents the same issue being litigated again.

It can be contrasted with a **decree of dismissal** (also within the scope of section 17C). The latter type of court order is usually appropriate where the defender has failed to clear some procedural hurdle set by the court, including time bar. With such a decree it is (in theory) open to the pursuer to raise the case again.

It is likely the Scottish Government has included decrees of absolutor within the scope of section 17C because of evidence suggesting that sometimes the pursuer agrees to a decree of absolutor as condition of a settlement out of court (see, for example, Faculty of Advocates 2015, p 4).

THE SCOTTISH GOVERNMENT’S CONSULTATION

When the Scottish Government consulted on the substance of section 17C, it did not make explicit reference to the possible inclusion of settled cases. It also did not elaborate on which types of court decree might be included, although some respondents did opt for the broader interpretation, in line with the Bill, as introduced.

A minority of respondents (10 out of the 33 respondents who addressed the topic) expressed clear support for allowing previously unsuccessful cases to be raised again under the new regime (Scottish Government 2016b, para 3.17).

Those in favour of retrospective effect argued that not to permit this was grossly unfair, placing new claimants in a more favourable position than survivors who raised claims earlier (Scottish Government 2016b, para 3.17). On the other hand, a recurrent view amongst opponents (mainly insurance bodies) was that it could lead to ECHR challenges, particularly where a final judgement had been given (i.e. a decree of absolutor was granted) and there was a “legitimate expectation” that cases would not be open to re-examination (Scottish Government 2016b, para 3.20).

Two respondents who were opposed focused on the cost and manpower implications of resurrecting old cases, diverting much needed funds and resources away from current needs. Another two respondents pointed out that there were other policy responses to achieving justice for survivors in old cases, including some form of publicly funded reparation or compensation scheme (Scottish Government 2016b, para 3.21).

WHEN THE COURT CAN DISMISS A CASE (SECTION 17D)

Section 17D is a particularly important provision as it requires the court to prevent the court action proceeding in certain, specified circumstances.

Accordingly, section 17D’s scope and operation in practice have the potential to impact on the main policy aim of the Bill, i.e. ensuring access to justice for survivors.

POLICY DEVELOPMENT OF SECTION 17D

The Scottish Government’s 2015 consultation (2015a) did not contain a specific question on whether a provision like section 17D should be included in the legislation.

However, as noted above, some responses to the consultation highlighted ECHR issues, including that a “blanket lifting” of the three year period for childhood abuse victims might be a disproportionate response. One suggested compromise approach by some respondents involved the court retaining discretion in limited circumstances (Scottish Government 2016b, paras 3.13 and 3.14).

The draft Bill, published in 2016, said that, where the law was being applied retrospectively, the court was required to dismiss a case if satisfied that it was necessary to ensure compliance with “Convention rights” (section 1 of the [draft bill](#) inserting section 17B(4) and (5)) (Scottish Government 2016d).

WHAT SECTION 17D SAYS

Further policy development work by the Scottish Government has resulted in section 17D having two separate tests, one of which can apply even where the law is not being applied retrospectively. A recap of these tests is provided in the box below.

The ‘fair trial’ test

This can be used in **any childhood abuse case** where the new limitation regime would apply. It The court must dismiss a case where the defender proves that a **fair trial would no longer be possible**.

The ‘substantial prejudice’ test

This can only apply where the new limitation regime has **retrospective effect** in a particular case.

It requires the court to dismiss a case where it finds a) “**substantial prejudice**” to the person or organisation defending the action; and b) that, when weighed against the pursuer’s interest in the case proceeding, the prejudice is such that the action should not proceed (section 17D(3)).

The approach in the new section 17D differs from the court’s existing discretion in a number of ways. In particular, the onus is **on the defender** to show why the case should not proceed (Explanatory Notes, para 89). (That said, the pursuer may still have to lead evidence on topics including the reasons for the delay in bringing litigation, to counter any evidence of the defender related to section 17D.)

Another difference between section 17D and the court’s existing discretion is that the latter is, at least on the face of the statute, very wide.²¹ On the other hand, for section 17D, **the court must make an assessment based on specific criteria**. However, although to a lesser extent than was the case with the existing law, the detail of the new law would still have to be developed by judges’ decisions in individual cases.²²

²¹ The court can do this dismiss the action under section 19A if, on the evidence presented to it, it considers that it would be “equitable” for it to do so. The factors which are relevant to the exercise of this discretion have been developed by extensive case law.

²² Telephone call between the Scottish Government and SPICe on 15 December 2016.

SECTION 17D – HOW WOULD IT OPERATE IN PRACTICE?

There are some important practical unknowns relating to how section 17D would operate in practice, including how often defenders would seek to rely on section 17D and how often they would be successful. The tests are arguably one of the more complex aspects of the Bill and, as such, if they become law, it might conceivably take a period of time for them to ‘bed down’ in the courts.

ECHR considerations

From the [Policy Memorandum](#) it is clear that the Scottish Government considers one of the benefits of section 17D is it allows the courts to consider, on a case by case basis, whether Article 6 and A1P1 have been complied with (see, especially, paras 110 and 111). One consequence of this is that existing ECHR case law, with its emphasis on proportionality, will be important in the context of section 17D. This, in turn, will mean that there will be a weighing of the defender’s interests with the wider policy aims of the legislation.

The role for future case law

SPICe asked the Scottish Government to provide more information on the specific types of factor which might be relevant in individual cases associated with section 17D. This was in the context of the ‘fair trial’ test and in relation to the balancing of the pursuer’s and defender’s interests said to be relevant to the ‘substantial prejudice’ test.

Other than highlighting the likely relevance of ECHR-related case law, the Scottish Government did not provide this information. Instead it emphasised the key role for future decisions of judges in Scottish cases in developing the detail of the tests contained in section 17D.²³

Existing case law on the discretion in the 1973 Act

As well as ECHR cases, there are many previously decided court cases relating to the current discretion of the courts to waive the time bar, both north and south of the border.²⁴

The need for caution

These cases may provide some assistance in working out the types of factors that might be relevant in the context of section 17D. However, **caution should be exercised in this regard**, for several reasons. These include a significantly different policy emphasis in the existing legislation, with its strong emphasis on the importance of fixed time limits. In this context, the exercise of discretion in favour of the pursuer is an exceptional matter.²⁵ On the other hand, an important policy objective of the proposed legislation is ensuring access to justice for childhood abuse victims ([Policy Memorandum](#), para 5).

Also, whilst existing case law does refer to prejudice to the defender as an important concept, the bar has also been set high for the defender in this regard in the proposed new legislation – in section 17D(3) the individual or organisation must prove “substantial prejudice”, not just “prejudice”.²⁶

²³ *Ibid.*

²⁴ The equivalent discretion for England and Wales is contained in section 33 of the Limitation Act 1980 (c 58). Unlike section 19D in the 1973 Act, there is a non-exhaustive list of factors which the court must take into account in section 33 itself.

²⁵ Accordingly, exercising the discretion in favour of the pursuer is, as it was described in one key English case, “an exceptional indulgence” to that person (KR v Bryn Alyn Community (Holdings) Ltd (2003)).

²⁶ On the other hand, judges will acknowledge “significant prejudice” where they find this exists – see, for example, B v Murray (No 2)(2005).

SPICe disclaimer

A flavour of the existing case law is given below, although this is not intended as an exhaustive treatment of the relevant law. SPICe cannot give advice or guidance on how the courts might develop the detail of the tests contained in section 17D in future.

Types of prejudice

According to the existing cases, prejudice can include **prejudice related to the passage of time**. The length of the delay is important, with the longer the delay, the more likely there is to be prejudice (KR v Bryn Alyn Community (Holdings) Ltd (2003); B v Murray (No 2)(2005; 2007; 2008; B v Nugent Care Society (2010)). Recent cases suggest that the English courts are mainly interested in delay where it has a **detrimental effect on the ability of the defender to investigate and defend a claim** (A v Hoare (2008); Cain v Francis (2008); B v Nugent Care Society (2010)).

In the [Policy Memorandum](#) (para 48), the Government emphasises that, in the context of the ‘fair trial’ test in section 17D, the passage of time (even the significant passage of time) on its own will **not** be enough to decide the matter. This might be a reference to the need to look at the effects of any delay (as per the recent English cases) in preference to the more ‘hardline’ approach of the courts in cases such as B v Murray (No 2)(2005; 2007; 2008). In the latter case a long delay (20 years) was treated as sufficient, of itself, to prejudice the defender.

Note there is no comparable statement by the Scottish Government in the [Policy Memorandum](#) in relation to the ‘substantial prejudice’ test on how the passage of time should be treated.

Under existing case law **prejudice can also be caused by a change to the law**. For example, in the important Scottish case of B v Murray (No 2)(2005; 2007; 2008) the court found “significant prejudice” to the defender as a result of the fact that the law had changed in 2001 to make it easier to establish vicarious liability of employers for criminal acts of employees. Had the case been brought on time, the judge noted it would have been determined under the old law, not the law which applied at the time the case was actually brought.²⁷

Weighing prejudice against other factors

Generally, in considering whether or not to exercise its discretion, a court will weigh up **the pursuer and defender’s respective interests**.

Some cases involve a weighing up of factors affecting the defender’s interests against the **strength of the pursuer’s case and/or the size of any likely award of compensation** (B v Murray (No 2)(2005; 2007; 2008); B v Nugent Care Society (2010); D v Harrow LBC (2008); EB v Haughton (2011); Nash v Eli Lilly & Co (1993)). For example, in B v Murray (No 2)(2005; 2007; 2008) the court found the scale of the litigation (and the associated costs to the defender) was disproportionately large compared to the value of the claims.

Cases where the law will have retrospective effect – overlaps between the two tests

Under the Bill, where the law would have retrospective effect, it seems the defender could make arguments in favour of the court dismissing a case under both the ‘fair trial’ test and the ‘substantial prejudice’ test.

²⁷ Some respondents to the Scottish Government’s (2015a) consultation in 2015 also picked up this point – see p 15 of this briefing.

The [Policy Memorandum](#) (paras 110 and 111) identifies the substantial prejudice test as relevant in the context of the protection of rights protected under both Article 6 and A1P1 of the ECHR. This means we cannot assume that each test is associated with a distinct Convention right.

Furthermore, based on previously decided cases on the existing judicial discretion, the types of factors relevant in the context of the two tests contained in section 17D may overlap. For example, as we have seen, prejudice to the defender can include prejudice caused by the passage of time, making it hard to investigate and defend a claim. However, such considerations are also potentially relevant in the context of the fair trial test. The [Policy Memorandum](#) and the [Explanatory Notes](#) do not have any specific information on this possible overlap.

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