

This document relates to the Limitation (Childhood Abuse) (Scotland) Bill as amended at Stage 2 (SP Bill 1A)

# Limitation (Childhood Abuse) (Scotland) Bill

## [As Amended at Stage 2]

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### Revised Explanatory Notes

#### Introduction

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Limitation (Childhood Abuse) (Scotland) Bill (which was introduced in the Scottish Parliament on 16 November 2016) as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.
2. These revised Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Limitation (Childhood Abuse) (Scotland) Bill ("the Bill") and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or a part of a section does not seem to require any explanation or comment, none is given.

#### The Bill

4. The Bill amends the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). It removes the current three year limitation period in actions seeking damages in respect of personal injury where the action relates to abuse when the person who sustained the injuries and is bringing the action was a child at the time of the abuse. It applies to abuse occurring before or after commencement of the provisions.

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## Commentary on sections

### **The structure of the Bill**

5. The Bill contains 3 sections. Section 1 provides for the removal of the three year limitation period in particular actions (namely, childhood abuse actions), including in relation to rights of action accruing before commencement and certain previously litigated rights of action. It does this by inserting new sections 17A to 17D into the 1973 Act which will limit the circumstances in which the current limitation period applies. Section 2 deals with commencement and section 3 sets out the short title of the Act.

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

6. Under the existing law (see section 17 of the 1973 Act), a pursuer who wishes to raise a personal injury action for damages must generally do so within three years of the date on which the injuries were sustained or, where the act or omission to which the injuries were attributable was a continuing one, the later of three years from that date or from the date on which the act or omission ceased. The three year period will, though, run from a later date where the pursuer only later became aware of certain facts. It will then run from the date of knowledge or from the date that, in the opinion of the court, it would have been reasonably practicable for the pursuer to have become aware of those facts. These facts are that the injuries were sufficiently serious to justify bringing an action of damages; that those injuries were attributable to an act or omission; and that the defender is a person to whom the act or omission is attributable (or the employer or principal of such a person). Under section 17(3) of the 1973 Act, in computing the limitation period, the court must disregard any time during which the person who sustained the injuries was under legal disability by reason of nonage (that is, under 16: see the Age of Legal Capacity (Scotland) Act 1991, section 1(2)) or unsoundness of mind.

### **Inserted section 17A - Actions in respect of personal injuries resulting from childhood abuse**

7. Section 17A of the 1973 Act, as inserted by section 1 of the Bill, removes the three year limitation period for actions where four conditions are met. The conditions are set out in subsection (1). The conditions relate to—

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- the nature of the damages claimed (they must be damages in respect of personal injuries),
- the age of the person at the time the abuse occurred (the person must have been a child – under 18 – when the act/omission constituting abuse took place (or began, where the act/omission was a continuing one)),
- the nature of the act or omission which is the subject of the action (the delict which gives rise to the action must be abuse, which includes sexual abuse, physical abuse and emotional abuse),
- the identity of the pursuer (the person bringing the action must be the person who sustained the injuries mentioned above, not a third party).

8. For the limitation period to be removed, it is the “act or omission” (i.e. the abuse) that must have taken place when the pursuer was a child, regardless of the timing of the injury that arose from that act or omission. Although both may occur simultaneously, this section allows for a situation where the abuse occurred when the pursuer was a child but the injury manifests itself at a later date when the pursuer is an adult.

9. Subsection (2) defines what is meant by “abuse”. The definition is non-exhaustive and covers a wide range of abusive behaviour – sexual abuse, physical abuse, emotional abuse, and abuse which takes the form of neglect. The Bill does not alter what is an actionable delict and any successful action will depend on the person bringing the action being able to show that the behaviour falling under the definition of abuse has caused an actionable (non-negligible) injury.

10. The application of the limitation period is relevant at the point the action is raised and also to those cases where a final judgment has not yet been pronounced. This means that this section will apply to any case where there is still a right of appeal or where an appeal has been lodged against a judicial decision under section 17 or 19A of the 1973 Act. (Section 19A provides courts with a power to override the section 17 time limit where the court considers it equitable to do so).

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### **Inserted section 17B - Childhood abuse actions: previously accrued rights of action**

11. Section 17B provides that the removal of the three year limitation period by section 17A applies to rights of action that accrued before commencement of section 17A as well as those that accrue afterwards. This means that, where section 17A applies, the limitation period will no longer apply, regardless of the date on which the abuse in question occurred. However, the removal of the limitation period does not alter the effect which the law of prescription will have had on some rights of action which accrued before 26 September 1964 (see paragraphs 16 to 18 below).

### **Inserted section 17C - Childhood abuse actions: previously litigated rights of action**

12. Section 17C makes specific provision to deal with the position of actions that have already been the subject of litigation and have been disposed of prior to the commencement of section 17A. It allows those actions to be re-raised in certain circumstances.

13. The section only applies to actions in respect of the sort of personal injuries described in paragraphs (b) and (c) of section 17A(1) (that is, they must be actions in respect of injuries arising from abuse which occurred (or, as the case may be, began) when the person who sustained the injuries was under 18). In addition, for the section to apply, an action of damages must have been brought prior to the commencement of section 17A but have been disposed of by the court either by reason of section 17 or in accordance with a relevant settlement.

14. **Where the person who sustained the abuse shows that these conditions are met, subsection (3) of section 17C allows that person to** bring an action of damages in respect of the right of action despite the initial action previously having been disposed of by the court (including where it was disposed of by way of decree of absolvitor – that is, a final judgement of the court in favour of the defender). If there is no longer a right of action (due to the disposal of the previous case), this subsection revives the right. The subsection also displaces the defences on which a defender could usually rely to prevent the re-raising of an action where an earlier action on the same issue has been disposed of in these ways – for example, res judicata (which prevents a matter finally decided by a court

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being raised again between the same parties) or compromise (where the pursuer had discharged any right to damages as part of a settlement). **If a defender pleads such a defence, a pursuer will be able to respond by showing that subsection (3) applies.** However, this subsection does not allow a pursuer to raise an action on the same issues again and again. It is only the existence of the initial action raised and disposed of before section 17A comes into force which is no longer to be an impediment to the re-raising of the case. If an action is brought after section 17A comes into force and that action is then disposed of, section 17C(3) will not permit the bringing of yet another action.

15. Section 17C(4)(b) defines “relevant settlement”. A settlement is a relevant settlement if it meets three criteria. The first criterion is that it was agreed by the parties to the initial action. The second criterion is that the pursuer entered into the settlement under the reasonable belief that, had the action proceeded, the court would have been likely to dispose of the initial action by reason of section 17. The third criterion is that any sum of money which the settlement required the defender to pay to the pursuer, or to a person nominated by the pursuer, did not exceed the pursuer’s expenses in connection with bringing and settling the initial action. This means that if the pursuer agreed a financial settlement (other than, at most, having expenses in connection with the initial action reimbursed) the pursuer would not be able to re-raise the action. Section 17C(5) clarifies that if the settlement terms included the payment of sums that were anything other than reimbursement of the pursuer’s expenses in connection with bringing and settling the initial action, the action would not meet this criterion. This means that where the terms of the settlement explain the nature of the payment being made, that is taken to be conclusive (avoiding an examination of the expenses actually incurred).

16. Nothing in section 17C revives a right of action which has ceased to be enforceable for any reason other than as a result of the circumstances described in subsection (2) (for example, where the right has prescribed).

17. Obligations to make reparation for personal injuries (and the associated right to receive those reparations) were previously subject to the law on prescription (section 7 of the 1973 Act). Where it applied, prescription had the effect of completely extinguishing an obligation (and the associated right) after a period of 20 years had elapsed without having been interrupted by, for example, an action having been raised to enforce

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the obligation. The Prescription and Limitation (Scotland) Act 1984 removed personal injuries from the scope of prescription. It did not change the law so as to revive obligations which had already been extinguished before it came into force on 26 September 1984, meaning that obligations which had already prescribed under the previous 20 year prescription period (which must have arisen prior to 26 September 1964) were not resurrected by the 1984 Act.

18. The Bill does not alter the position in relation to the law of prescription: obligations to make reparation (and the associated right to receive reparations) which were extinguished under the previously applicable law will remain extinguished by prescription and are not revived by section 17C. Section 17C only applies where an action for damages has been raised and disposed of in the circumstances described in subsection (2) (that is to say, one of the things it hinges on is the existence and operation of section 17 of the 1973 Act). As those circumstances can only have arisen because an action was brought after section 17 came into force (on 25 July 1973), the bringing of that action would have interrupted the 20 year prescriptive period. A further uninterrupted period of 20 years would have had to elapse in order for the obligation to prescribe, but that could not have happened before 26 September 1984 (when the obligation was removed from the scope of prescription). Accordingly, the obligations to which section 17C applies will never be ones which have been extinguished through prescription.

### **Inserted section 17D - Childhood abuse actions: circumstances in which an action may not proceed**

19. A court considering an action will, as a public authority under the Human Rights Act 1998, require to consider whether it would infringe a defender's Convention rights to allow the case to proceed. Section 17D reflects this by requiring the court to dismiss an action which is brought in reliance on section 17A if the defender demonstrates either that it would not be possible for a fair hearing to take place (see section 17D(2)) or that the defender would be subject to substantial prejudice if the action were to proceed (see section 17D(3)). In the latter case the court is required to balance the interests of the pursuer in the case proceeding and the prejudice to the defender which would result from the case proceeding. The substantial prejudice test in subsection (3) applies only where the prejudice arises from the application of the new law to cases about abuse which occurred prior to commencement of the Bill (i.e. where the fact that

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the law on limitation has changed subsequent to the abuse taking place is the cause of the prejudice).

## **Section 2– Commencement**

20. Section 2 provides that it and section 3 come into force on the day after Royal Assent. The Scottish Ministers may make commencement regulations bringing the substantive provision, section 1, into force on a day or days they specify in the regulations. Commencement regulations may include transitional, transitory or saving provision. They may also appoint different days for different purposes.

## **Section 3 – Short title**

21. This section sets out the short title of the Bill.

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