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Submitted to Limitation law in child sexual abuse cases  
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**Questions**

**1 Should the three-year limitation period for personal injury claims be removed for claims brought by victims and survivors of child sexual abuse in respect of their abuse?**

Yes

1. In the vast majority of cases, individuals commence civil claims regarding childhood abuse after the limitation period has lapsed. It takes survivors of abuse a long period of time, on average 26 years, to be able to disclose abuse that they have suffered. The reasons for this are well-established and have not been rehearsed in detail here, but broadly clients have cited shame, embarrassment, fear of not being believed and mental health difficulties as reasons for not disclosing sooner. In over 7 years of practicing in this area of law, I have acted for just three claimants who were commencing claims before the expiry of the limitation period on their 21st birthdays. In all other cases regarding child sexual abuse, I have been instructed by claimants well after the limitation period has expired.

2. The burden of discharging the limitation period falls to the claimant and is a defence routinely deployed by defendants during the course of a civil claim. The present position regarding limitation means that defendants (either abusers themselves or organisations responsible for the abuse) benefit from survivors' inability or fear of speaking out and disclosing the abuse, and the inevitable delay and lapse of the limitation period regarding a civil claim. Further, requiring a claimant to justify the reasons for their delay and explain why they were not in a position to commence their claim earlier implies blame, and that fault lies with the claimant.

3. Due to the litigation risks associated with bringing claims outside of the limitation period, claimants are often required to settle their claims for a significantly reduced amount to take into account the "litigation risk" that they may be unsuccessful in convincing the court to waive the limitation period and apply s33. The level of damages awarded to claimants in abuse cases is already in our view, and this appears to be largely accepted by claimant lawyers, low. For claimants to have to then compromise their claims, on the basis of the risks associated with limitation and defendants routinely deploying this argument, feels unjust - they are being put at a disadvantage for something namely, not being able to disclose, that is directly caused by the abuse itself.

4. Those bringing claims for damages arising out of sexual assault and abuse have suffered often life-changing psychiatric injuries and been exposed to horrifying experiences by adults often entrusted to look after and care for them. Often the damages sought are required to pay for therapy and treatment to improve their circumstances or reflect their lost earnings (rather than solely claims for general damages) and having to discount these amounts based on a litigation risk therefore rarely reflects a fair level of damages. Paradoxically, the amount of time that passes before a claimant is able to commence a civil claim means that the court is better able to understand the impact of the abuse on that claimant and how they have been adversely affected as the injuries have crystallised, and claims for psychiatric injuries and loss of earnings can be more easily quantified.

5. Claims tend to be funded by way of CFA, and the risks associated with claims being out of time mean that it is not always possible to act for a client under a CFA. The current law on limitation can therefore act as a barrier to survivors securing legal representation and being able to commence their claims. Survivors or victims of abuse are often vulnerable, have sustained psychiatric injuries as a consequence of the abuse and cannot face commencing and navigating litigation unrepresented.

6. In light of the above, we are of the view that the three year limitation period for personal injury claims ought to be removed in claims commenced by victims and survivors of child abuse (sexual, emotional and physical) and adult survivors of rape and serious sexual assault, and that the burden should instead shift to the defendant to demonstrate that a fair trial is not possible in cases where there has been delay.

**2 Should the burden of proof be reversed in child sexual abuse cases so that an action can proceed unless the defendant can satisfy the court that it is not possible for a fair hearing to take place or that he/she (the defendant) would be substantially prejudiced were the action to proceed?**

Yes

1. We are of the view that the burden of proof ought to be reversed so that the defendant is required to demonstrate to the court that it is not possible for a fair hearing to take place. Therefore, the position would be that the claimant is able to proceed with their claim unless the defendant successfully argues that it is not possible for a fair hearing to take place or that they would be substantially prejudiced.

2. By reversing the burden of proof, many of the issues faced by claimants (as outlined at Q1) would fall away. The parties would stand on a more equal footing - the limitation period is removed, save for in those cases where the defendant seeks to demonstrate that a fair trial is not possible.

3. Further, the reversal of the burden of proof should (hopefully) mean that limitation arguments are not routinely raised by way of defence and the matter of limitation is raised only in cases where it is appropriate and just to do so. We accept that there will, of course, be some cases where it is right for the defendant to raise limitation and there is a risk that it is no longer possible for a fair trial to take place, but reversing the burden should remove this blanket argument where it is not strictly necessary, and for the litigation to be more streamlined.

4. In our experience, defendants often refuse to admit liability or to enter into settlement negotiations during the pre-action protocol solely on the basis that a claim is out of time, only to then engage in ADR at a much later stage. By placing the onus on the defendant and it being for them to demonstrate that a fair trial is not possible, we anticipate that this would focus defendants' minds and encourage earlier settlement negotiations as the distraction of limitation (by way of a blanket defence) would be removed.

**3 Should existing judicial guidance (as set out by the Court of Appeal in Chief Constable of Greater Manchester Police v Carroll) be codified in statute?**

No

1. We would not support this in the event this proposal is by way of alternative to (1) the removal of the limitation period in child sexual abuse claims and/or (2) the reversal of the burden of proof. Codifying the existing judicial guidance would have virtually no impact or very little impact on the present landscape and on addressing the issues faced by claimants as outlined above.

2. This approach, if adopted, would simply mean the existing law is changed, rather than taking a root and branch approach to the matter of limitation in child abuse cases. There is much wider scope for the interpretation of judicial guidance, and the case of Carroll is not one involving child sexual abuse.

**4 What additional factors, if any, should be included in judicial guidance about s33? Please refer to relevant cases when suggesting additional factors.**

As noted, we are in favour of the removal of time limits in child abuse cases and the rewriting of legislation.

**5 If there were to be changes to limitation law or judicial guidance for child sexual abuse cases, should claims that have already been adjudicated or settled be allowed to be reopened?**

Yes

We believe that there may be circumstances in which changes to limitation law ought to apply retrospectively, specifically that survivors and victims of sexual abuse who have previously sought to commence civil claims against their abusers and/or organisations responsible and failed on limitation alone, should be given the opportunity to re-litigate those claims.

**6 Should any change to limitation law or judicial guidance apply where the limitation period has expired but claims have not yet been settled or dismissed by a court?**

Yes

1. Yes. The changes in limitation law or judicial guidance should apply to cases where the limitation period has expired and are subject to ongoing litigation or court proceedings. The law is constantly evolving and parties generally have to adapt to a changing legal landscape - particularly regarding key judgments and decisions by the Court of Appeal and Supreme Court; those relevant judgments need to be applied to ongoing litigation and court proceedings. In the same way, changes to the law or judicial guidance require practitioners to adapt and apply those changes in their practice and during the lifespan of a case. We can see no reason why this should not be the case in relation to claims regarding child abuse in the event the law on limitation or judicial guidance changes.

2. In the event the law does change, then claimant solicitors in ongoing cases may have spent time (and therefore incurred costs) considering s33 criteria and limitation issues specific to particular cases and how best to navigate those issues. In the event the burden of proof is reversed and the onus is on

the defendant to demonstrate they are significantly prejudiced by the delay and a fair trial cannot happen, then the work undertaken by claimant lawyers will most likely be relevant in countering those arguments - it will not be wasted work.

**7 Do you agree that any change to limitation law or judicial guidance should cover child sexual abuse claims only?**

No

The issues faced by victims and survivors of child abuse in bringing civil claims for damages are unique insofar as there are significant barriers to disclosure and commencing a civil claim, namely the fact of the abuse itself. This also applies to physical, sexual and emotional abuse, as well as survivors/victims of adult sexual abuse and/or assault.

The Scottish legislation includes all types of childhood abuse and does not identify between sexual, emotional or physical. The impact of child abuse affects individuals differently, and someone subjected to childhood physical abuse may be as significantly impacted as someone subjected to childhood sexual abuse. By differentiating between different types of abuse, it would cause significant difficulties for claimant lawyers who are instructed by individuals who have experienced emotional, physical and sexual abuse - would the claimant be required to strip away the impact of the emotional and/or physical abuse and only proceed with a claim for sexual abuse? There are a number of issues and difficulties envisaged if sexual abuse is carved out and dealt with separately to emotional and/or physical child abuse.

We would note that those cases regarding the serious sexual assault of adults should also be considered in this context. Similarly, the impact of sexual assault and abuse (of adults) has a similarly detrimental impact on the victim/survivor's mental health. The intrusiveness and close physical proximity of the abuse /assault itself, the feelings of shame, embarrassment and self-blame are all overlapping features of sexual assault and abuse - regardless of the age of the victim. We have acted for many victims/survivors who were assaulted as adults and only able to disclose long after the limitation period in their case had expired. The barriers to disclosure, and to being able to report to the police or commence civil litigation, also exist.

We are therefore of the view that any changes to limitation in child sexual abuse cases are extended to include physical and emotional child abuse and all sexual abuse/assault (suffered by adults). This is in view of the particular vulnerabilities of the claimants in these cases, the significant impact on mental health and barriers to disclosure (and therefore being able to report to the police or commence civil litigation also exist).

**8 Do you agree that the factors in Section 33 should be adjusted to recognise the particular circumstances around child sexual abuse claims?**

No

We would favour the approach set out at Q1 & Q2 rather than seeking to amend existing legislation.

**9 Should there be a different limitation period for child sexual abuse claims?**

No

We largely echo the proposals by IICSA and are of the view that the limitation period should be abolished altogether in claims for child abuse and adult sexual abuse/assault, with the burden falling on the defendant to demonstrate that a fair trial is not possible. To set an arbitrary time-frame for survivors of abuse to commence a claim would inevitably result in some individuals falling on the wrong side of that limitation window and unable to proceed with a claim, in all likelihood they would be those that are most significantly affected and prevented from disclosing at an earlier date. An arbitrary deadline or firm date would not resolve the problem and "kick the can" further down the road.

**10 Should there be a specific Pre-Action Protocol for child sexual abuse claims?**

If the approach of removing limitation altogether is adopted and the burden regarding limitation is reversed and it falls on the defendant to demonstrate a fair trial is no longer possible, then we would suggest that in those cases (where the defendant intends to raise limitation), there should be a duty on defendants to confirm, at a relatively early stage and as part of the Pre-Action Protocol, whether they have settled or faced any other claims regarding child sexual abuse (if an organisation, by the same abuser).

This would achieve three things (1) inform the claimant whether the defendant is genuine in their intention to raise limitation and has good grounds to do so (2) allow the claimant know they are not the only survivor of abuse by that abuser, which can be empowering and strengthen their resolve to continue with the claim and (3) promote transparency between the parties at an early stage.

Of particular importance would be the requirement for defendants to agree to a limitation moratorium in order to allow for compliance with the Pre-Action Protocol generally and to ensure that the claimant's position regarding limitation is protected without the need for court proceedings to be issued protectively.

**11 What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform?**

A significant proportion of the survivors of child abuse (and sexual abuse as adults) have mental health diagnoses, many severe, which affect every aspect of their lives. This presents an additional hurdle to reporting the abuse and initiating a claim and makes the litigation process even more exhausting and obstacles encountered feel insurmountable.

Limitation defences and the litigation risks associated with these for claimants these give rise to add further to the pressure on them, and can have an

adverse impact on their mental health. The changes proposed, particularly removing limitation altogether, would have a significant positive impact on those litigants with mental health difficulties. The status quo will continue to have an adverse impact. There is no obvious equalities impact on defendants.

**12 Do you agree that we have correctly identified the range and extent of the equalities impacts under each of the proposals set out in this consultation?**

See above.