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Submitted to Limitation law in child sexual abuse cases
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About you

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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

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a. The existing time limit of 3 years from the age of majority ie one's 21st birthday is unrealistic for victims of child abuse when the evidence shows that claimants take an average of 26 years to come forward and make disclosure.

b. IICSA (Independent Inquiry into Child Sexual Abuse), after considering extensive evidence over several years, recommended that the existing time limit be abolished in child sexual abuse cases. We argue that the law should not be limited to sexual abuse. The only reason IISCA so limited it was because that was the extent of their remit. Scotland, and other jurisdictions such as several states of Australia, and provinces of Canada include physical and emotional abuse within their abolition legislation.

c. Victims/Survivors of abuse are universally affected by the abuse itself in a similar way. The traumatic memory of what happened disables them mentally to such an extent that they are psychologically unable to make disclosure for many years. Should they attempt to do so, a nervous breakdown, and exacerbation of their mental health is often the outcome. The Law of Limitation should not punish victims for their mental disorder.

d. The effect of child abuse on the mind means that the painful memories are locked away in a part of the brain, so as to avoid them becoming overwhelming. Where that process is ineffective severe consequences such as self-harming, and suicide can be the result. A condition known as dissociative amnesia can sometimes mean that this causes psychological harm, and/or the memory is almost wiped. Psychologically, therefore, mental disorder contributes to the delay in coming forward.

e. Abusers commonly make threats to their victims of dire consequences including threats of violence, even murder should they ever make a disclosure to anyone. They also weave a web of deceit and shame around the acts such that the victim is rendered silent. Abusers are sometimes employed by public bodies who are vicariously to blame for their actions. The Law of Limitation acts as a double silencer when it prevents the victim of abuse from seeking justice many years later. The Limitation restriction itself can cause harm to their mental health and reinforce anti-authoritarian attitudes.

f. The existing law, brought into force in1980 was designed against the background of industrial disease cases and is unsuitable for the needs of child abuse cases, hence, the higher courts have twisted it into a state where it does not necessarily provide justice for victims, and excludes some types of case where it is accepted that the abuse took place.

g. The Law presently makes it very difficult to pursue allegations of physical and emotional abuse and is thus discriminatory. Evidence shows that physical and emotional abuse can have as severe effects as sexual abuse, indeed sometimes greater sequelae. The objective test for date of knowledge, arising from the case of A. v. Hoare, constructed by the House of Lords as a way round the strictures of the Limitation Act mean that there is not a level playing field for abuse which is not sexual. Many other jurisdictions, such as Scotland, which have already abolished the Limitation rule include other types of abuse.

h. The present Limitation rule means that lawyers who specialise in abuse cases turn down between 25% and 33% of cases, according to the evidence given to IICSA due to the risks associated with the law, and thus deny victims/survivors their right to justice and truth. The restrictive nature of the rule almost means that damage values are artificially discounted because of risks associated.

i. The British Association of Insurers and their legal representatives in evidence to IICSA have accepted that in their view the law is restrictive and should change. They have issued a code of practice that tries to address some of the worst aspects of the law, as recommended by IICSA. There is thus a

recognition by Defendants and their insurers that the law is unsatisfactory and should change.

j. The Law of England and Wales is out of step with much of the legislation in other common law based jurisdictions around the world. Examples given of Scotland, New Brunswick, and Victoria Australia by the Ministry of Justice in their accompanying paper minimise the way in which many other jurisdictions have removed the law of Limitation in child abuse cases. Most states of Australia have removed it, as have most provinces in Canada.

k. When asked to review the same issue in Australia, The Royal Commission confirmed that time limitation periods were particularly problematic for abuse survivors and operate against their interests, as many survivors repress their painful memories or don't recognise the link between their profound emotional injuries and the abuse until many years later. This URL reviews the Australian position as at December 2022 - https://www.shine.com.au/resources/survivors-of-abuse/child-sex-abuse-statute-limitations

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

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a. Yes. We accept that a claim should not proceed in circumstances where a fair trial is not possible, but we agree with IICSA's conclusion that the burden to prove that a fair trial is not possible should fall on the defendant.

b. If the 3 year time limit is removed, as we advocate, then the default position must then be that the claim proceeds unless any objection is raised by the defendant against it proceeding. The removal of the 3 year time limit by definition means that there is nothing for the claimant to 'prove' in terms of his/her right to bring the claim and take it to trial. It makes no sense in that context to say that the claimant then has the burden of proof in proving that a fair trial is possible. This would lead to a situation where there is no time limit for the claim, but the claimant still has to satisfy a court that they have an entitlement in principle to bring it. This makes no logical sense. By definition, in the absence of a time limit for bringing the claim it is for the defendant to persuade the court that a fair trial is impossible, and accordingly the burden of proof should rest on the defendant in this situation.

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

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Rather than trying to amend the existing law, which is not fit for purpose we are in favour of staring again with the Limitation Act. The case quoted is one of many interpretations of the existing law by judges over the years. There are other examples of judicial interpretation which should also be taken into account rather than just the chosen judgment.

If the abolition of time limits is introduced, then it will not be necessary to codify this particular judgment into law. Whilst we think that the existing Section33 needs reform it does already state that " the court shall have regard to all the circumstances of the case," so the existing law would not be improved necessarily by codifying existing guidance.

In essence one would have to include all the guidance from all the Section 33 cases over the years. Carroll is not a child abuse case but arises from the alleged negligence of the police force in connection with undercover police work. It concerns the Trial Judge's interpretation of Section 14 Limitation Act and "Date of Knowledge" as well as Section 33.

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

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As stated above we are in favour of complete abolition of time limits in child abuse cases and the rewriting of the law. If the law were not to be rewritten and guidance added to Section 33 then an exemption for case of all types of child abuse, not just sexual would be our favoured result. Whether such additional guidance could be included as Section 33 guidance is a matter for the legislative draftsmen.

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?

Not Answered

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We believe that the Law of England and Wales should be brought into line with the law in Scotland and that any new legislation should not discriminate against survivors who have tried to pursue their cases in the past and failed due to the way in which the legislation was phrased. To quote the Scottish booklet on the subject:

"The law usually prevents claims being taken to court more than once. The Act makes a limited change to this for childhood abuse claims. If you took a claim to court before the Act became law, but lost because of the time bar, the Act means that you should not be prevented from taking another claim to

court."

There was a very good example of the injustice of the previous law and the way in which it can severely prejudice past cases when one considers one of the witnesses to the IICSA Inquiry in the Accountability and Reparations Module when it dealt with the St. Vincent's and St. Aidan's Group Action.

AR-A87 is a good example of a case that deserves to be reopened. He was a victim of serious sexual abuse at St. Aidan's. His case took 12 to 13 years. He went to the High Court twice, the Court of Appeal 3 times, had his life put on hold whilst he battled the litigation, and lost on Limitation alone. Mr. Justice Irwin said he believed that the abuse had occurred as he described. All he ended up with at the end of it was £10 for his bus fare to Chester High Court. His evidence to the enquiry can be read here - AR-A87 5 December 2018 101/19-102/8 - https://www.iicsa.org.uk/key-documents/8362/view/preliminary-hearing-transcript-5-december-2018.pdf His closing address is particularly worthy of reading. He sums up very succinctly why the law on Limitation needs to change. It runs from page 120/10 to 121/25

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

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In several papers on the subject in different jurisdictions any change in the law of Limitation has to be made retrospectively, as it has been in Scotland because the abuse took place so long ago. The limitation set out in the law of Prescription in Scotland, and to a date in September 1964 does not apply to England and Wales.

The position was debated as long ago as 2015 in New South Wales Australia. There is a whole chapter on Retrospectivity, and to quote from page 18

"The general position is that the law looks forward, not backward. However, there are strong policy reasons to consider applying any amendments retrospectively, as these will only assist historical child abuse victims to pursue their claims if they are retrospective. The fact that there is often a substantial delay between the abuse and disclosure means that there are likely to be many potential plaintiffs whose cases would be statute barred unless any amendments have retrospective application."

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

No

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a. The only reason IICSA limited its recommendation to child sexual abuse claims only was because its remit was so limited. It did not consider other types of abuse within the inquiry, so the debate was never considered.

b. Scotland in its legislation includes all type of abuse. Such an approach does not discriminate unfairly between different types of victim. To so limit the law to sexual abuse would be discriminatory between victims.

c. In the experience of members of ACAL one cannot equate the effects of the abuse to the type of abuse suffered. Some victims of serious sexual abuse can recover quite well with minimal symptoms whereas the victims of prolonged emotional abuse, for example within the family at home, or at school, can demonstrate very serious symptoms. The law should therefore treat all type of abuse equally, otherwise the law would be unfair.

d. At the moment, the law of Limitation is discriminatory in that it indirectly excludes any type of abuse other than sexual due to the objective interpretation of "Date of Knowledge" under Section 14, as set out above. This arises from the case of A v. Hoare. ACAL solicitors will only consider sexual and the most serious physical abuse cases such as torture at the hands of criminal gangs which cause severe and disabling psychiatric symptoms such as dissociative amnesia.

e. Because of the objective nature of the test for date of knowledge the wishes, views, and feelings of the victim are wrongfully disregarded

f. If one limits the change to sexual abuse claims only, how should one deal with cases where there is a mix of physical, sexual, and emotional abuse. In theory, one would have to artificially dissect the types of abuse to exclude all non-sexual elements, which would be produce a nonsensical result.

g. Some foreign jurisdictions such as the State of Victoria in Australia have included physical and sexual abuse, and psychological abuse which arises from the physical and sexual so as to avoid problems arising from mixed claims.

h. Thus the law needs to consider all types of abuse, using the Scottish precedent.

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

Yes

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Our answer to this question is prefaced by repeating our previous answers, namely that the IICSA recommendation for the abolition of the time limit should be the way forwards rather than tinkering with existing legislation, which is not fit for purpose.

If it was decided that a simple amendment to Section 33 would achieve that result, then we would be in favour of such a change as long as it is not limited only to child sexual abuse cases for the reasons already argued.

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

No

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The idea that a different period of 20 or 30 years was debated by IICSA and rejected because it would produce yet another arbitrary unfairness for those that fell the wrong side of the fixed time period. The statistics show that it takes an average of 26 years for a victim of abuse to be able to come forward and deal with their past abuse, whereas the period can be as much as 50 to 60 years. So what period would one choose? ACAL practitioners will tell you that they still get inquiries about abuse that took place in the 1960's Reference should be made to the Australian case of GLJ, which was allowed to proceed after 55 years. GLJ v the Trustees of the Roman Catholic Church for the Diocese of Lismore (2023) HCA 32 can be ready in summary here - https://kennedyslaw.com/en/thought-leadership/case-review/2023/permanent-stays-in-historical-sexual-abuse-cases/ The full judgment can be read here - https://www.hcourt.gov.au/cases/case_s150-2022

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

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A lot of work has already been done on the creation of a child abuse Pre-Action Protocol which is still with the Civil Rules Committee, and has not progressed to a conclusion. Endemic within the Protocol was a compulsion for Defendant Solicitors to agree to a Limitation Moratorium, so as to allow cases to proceed in an orderly way without criticism by them of the speed of progress during the process of negotiations and problems arising from the existing Section 33 requirement for expedition on the part of the Plaintiff.

The Defendants are very much in favour of the protocol which would require early disclosure of records by the Claimant Solicitor, which is not controversial from the Claimant side.

The initiative should come from the rules committee which seems to have become dormant in the process after an initial surge hosted by Master Victoria McLoud who has very recently retired.

In Australia, codes of good practice in child abuse law have been introduced, which are similar to the existing codes introduced to the Association of British Insurers already referred to and the Ecclesiastical Insurance Company. It would be possible to replicate these codes, but put them on a statutory footing with costs consequences if Defendants failed to adhere, rather being applicable to a limited number of cases with different standards in some cases rather than others.

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

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Apart from the discriminatory effect of limiting change to sexual abuse victims only, we have no further comment to make

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?

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We agree with the approach set out in the consultation paper.

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