



LIMITATION (CHILDHOOD ABUSE) BILL 2019 EXPLANATORY NOTES

These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, Mr Thomas MHK.

Introduction

1. These explanatory notes relate to the Limitation (Childhood Abuse) Bill 2019. They have been prepared by the Attorney General's Chambers in order to assist readers of the Bill. They do not form part of the Bill and have not been endorsed by the House of Keys.
2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill.

Background

3. Under the current law, claims for child abuse, like claims in other personal injury cases, have to be brought within the time periods specified in the Limitation Act 1984 (the "1984 Act"), and the burden is on the claimant¹ to show it would be equitable to permit an extension to the statutory limitation periods under the 1984 Act.
4. It is considered that the current law on limitation is not suitable in cases of child abuse, given the nature of such claims. It can take many years, even decades, for survivors of child abuse to reach the point where they are able, practically, to bring an action for damages. Many survivors of child abuse have a troubled background, and may experience psychological difficulties or addiction to alcohol or other substances in adulthood as a result of their childhood experiences. Child abuse may cause deep inhibitions in the abused, making it difficult or impossible for them to describe what has happened to them, sometimes until well after they reach adulthood. Abusers commonly use manipulation to ensure the abused does not disclose the abuse, and the abused can be left with a fear and mistrust of authority, given that abusers can be figures of authority in their victim's lives. In addition to the difficulties faced by the abused in bringing a claim at all, they face the additional hurdle, when bringing a claim out of the normal limitation period, of satisfying the court that the claim may be brought out of time.
5. The purpose of the Bill is to facilitate access to justice by removing the limitation period for these specific childhood abuse cases, removing from the claimant the burden of persuading the court to extend the limitation period. It is proposed that the burden would be on the defendant to show why a case should not proceed.

¹ The term "plaintiff" is used in the Bill to be consistent with the language of the Limitation Act 1984. The Rules of the High Court of Justice 2009 use the term "claimant", which is used here to explain the Bill in modern language.

The current law on limitation period

6. Under section 11 of the 1984 Act, a claimant who wishes to bring a personal injury claim must do so within 3 years from when the cause of action accrued or (if later) 3 years from the date of knowledge of the person injured. The date of knowledge is defined in section 15 of the 1984 Act, and in general terms it is the date that the claimant becomes aware of the defendant's identity and that the injury is significant and is attributable (wholly or partly) to the negligent acts or omissions, or breach of duty, of the defendant. If the injury is suffered by a minor, by virtue of section 26 the 3 year period does not start to run until the injured person is 18 years old (or 21 years old in the case of a cause of action arising before 1 April 1972).
7. Section 31 of the 1984 Act gives the court a discretion to allow a personal injury claim (to which section 11 applies) to be brought even if the limitation period has expired. In exercising its discretion, the court must have regard to all the circumstances of the case, and in particular to the list of factors set out in section 31(3), which include the length of delay by the claimant in bringing the claim and the reasons for the delay. Having identified the reasons for the delay in bringing an action, the court must consider if it would be equitable to allow the claim to proceed outside the normal limitation period. The burden is on the claimant to satisfy the court that the claim should proceed.
8. Following the decision in *A v Hoare [2008] UKHL 6*, it is accepted in England that actions for personal injury deriving from intentional injury (including abuse) fall within section 11 of the Limitation Act 1980 (of Parliament) (equivalent to section 11 of the 1984 Act), and in consequence the courts have a discretion to extend the time limit under section 33 of that Act (equivalent to section 31 of the 1984 Act). There is persuasive authority that the courts do have discretion under section 31 to extend the time limit in the claimant's favour in cases where abuse is alleged.
9. However, the exercise by the courts of the discretion provided by section 31 in childhood abuse cases is not certain and the burden remains on the claimant to persuade the court that it would be equitable to allow an action to proceed after the usual time limit provided in section 11.
10. The Scottish Parliament considered it appropriate to legislate to remove the limitation period for claims for damages in respect of personal injuries resulting from childhood abuse. Under the revised legislation, the previous time bar is removed and the burden is no longer on the pursuer (claimant) to persuade the court to permit the action to proceed outside the normal limitation period in cases of childhood abuse, but on a defender (defendant) to show why an action should not proceed. The Bill closely follows the Scottish legislation on this issue.

The Bill

11. The Bill amends the 1984 Act by removing the current 3 year time limit in actions for damages in respect of personal injuries where the action is in respect of abuse and where the person who sustained the injuries and is bringing the action was a child at the time of the abuse. It is based on similar provisions inserted into the Prescription

and Limitation (Scotland) Act 1973 (an Act of Parliament) by the Limitation (Childhood Abuse) (Scotland) Act 2017 (an Act of the Scottish Parliament).

12. The removal of the 3 year time limit in childhood abuse actions includes such rights of action accruing before the commencement of the Bill and certain previously litigated rights of action.
13. The Bill makes these changes by inserting new sections 11ZA to 11ZD into the 1984 Act.

Commentary on Clauses

PART 1 – INTRODUCTORY

14. **Clause 1** gives the short title of the resulting Act of Tynwald. **Clause 2** provides for the Act to be brought into operation by one or more orders made by the Council of Ministers. The power includes provision to make consequential, incidental, supplemental, transitional, transitory or savings provisions in connection with its commencement.

PART 2 – AMENDMENT OF THE LIMITATION ACT 1984

15. **Clause 3** is the substantive clause of the Bill. It inserts sections 11ZA to 11ZD into the 1984 Act.

Section 11ZA

16. Section 11ZA removes the time limits in the 1984 Act for an action for damages if the 4 criteria specified in that section apply:
 - 16.1 the damages must be damages in respect of personal injuries;
 - 16.2 the person must have been a minor on the date the act or omission causing the injuries occurred (or began, where the act or omission was a continuing one);
 - 16.3 the injuries which give rise to the action for damages must constitute abuse; and
 - 16.4 the claimant bringing the action must be the person who sustained the injuries, not a third party.
17. "Abuse" is defined in section 11ZA. The definition is non-exhaustive and covers a wide range of abusive behaviour – sexual abuse, physical abuse, emotional abuse and abuse taking the form of neglect.
18. A "minor" under section 11ZA is a person under the age of 18 (as provided by section 1 of the Family Law Reform (Isle of Man) Act 1971); but under paragraph 5 of Schedule 2 to the 1984 Act individuals do not cease to be a minor until the age of 21 in relation to a cause of action arising before 1 April 1972.
19. For the limitation period to be removed, it is the abuse that must have taken place when the claimant was a minor, regardless of the timing of the resulting injury. Although the abuse and the injury may occur simultaneously, section 11ZA allows for

a situation where the abuse occurred when the claimant was a child, but the injury manifests itself at a later date, when the claimant is an adult.

20. The Bill does not alter what would be a cause of action and a successful action depends on the person bringing the action being able to show that the behaviour falling under the definition of abuse has caused an actionable injury. Liability of a defendant would still have to be established.
21. Section 11ZA applies to an action meeting the specific conditions of the section, and would apply to a case where an appeal has been brought and has yet to be decided, or there is still a right of appeal, against a judgment made under section 11 or section 31 of the 1984 Act.

Section 11ZB

22. Section 11ZB provides that the removal of the limitation period under section 11ZA applies to rights of action that accrued before section 11ZA comes into operation, as well as to those accruing afterwards. So, regardless of when the abuse took place, the limitation period will be removed for actions relating to childhood abuse. The removal of the limitation period in abuse cases therefore clearly has retrospective application.

Section 11ZC

23. Section 11ZC makes specific provision concerning actions that have already been the subject of litigation and have been disposed of prior to the coming into operation of section 11ZA. The section permits those actions to be re-litigated in certain circumstances.
24. Section 11ZC only applies to actions in respect of the sort of personal injuries described in section 11ZA(1)(b) and (c) (that is, actions arising from abuse which occurred (or began) when the person sustaining the injuries was a minor).
25. In addition, for the section to apply, an action for damages must have been brought prior to the coming into operation of section 11ZA and have been disposed of by the court either by reason of section 11 or in accordance with a relevant settlement. Nothing in section 11ZC revives a right of action which has ceased to be enforceable for any reason other than as a result of the circumstances described in section 11ZC(2).
26. Where those conditions are met, section 11ZC(3) permits a person who sustained abuse to bring an action for damages in respect of the cause of action despite the initial action previously having been disposed of by the court. The provision also displaces defences on which a defendant may otherwise rely to prevent re-litigating of an action which has been previously disposed of on the same issue, such as *res judicata* (which prevents a party from re-litigating a claim already litigated).
27. However, section 11ZC(3) does not permit a claimant to make repeated claims on the same issue. It is only the existence of the initial action brought and disposed of before section 11ZA comes into operation which is no longer an impediment to the re-litigation of the case. If an action is brought after section 11ZA comes into

operation and that action is disposed of, section 11ZC(3) will not permit the bringing of another action.

28. Section 11ZC(4)(b) defines a "relevant settlement". A relevant settlement has to meet 3 criteria:
 - 28.1 it was agreed by the parties to the initial action;
 - 28.2 the claimant entered into it under the reasonable belief that, had the action proceeded, the court would have been likely to dispose of the action under section 11; and
 - 28.3 any sum which the defendant was required to pay to the claimant under it did not exceed the claimant's costs in connection with bringing and settling the initial action.
29. The definition of "relevant settlement" means that, if the claimant had agreed a financial settlement, other than having costs in connection with the initial action reimbursed, the claimant would not be able to re-litigate the action under section 11ZC.
30. Section 11ZC(5) clarifies that if the settlement terms included the payment of sums that were anything other than reimbursement of the claimant's costs in bringing and settling the initial action, the action would not meet the third criterion in section 11ZC(4).

Section 11ZD

31. A court, as a public authority under the Human Rights Act 2001, is required to act in a way that is compatible with rights under the European Convention on Human Rights (within the meaning in that Act) (the "Convention"). It would therefore be required to consider, when hearing an action, whether it would infringe a defendant's Convention rights to allow the action to proceed. Section 11ZD reflects this position by providing that a court must dismiss an action which is brought in reliance on section 11ZA if the defendant can show that a fair trial is not possible.
32. In addition, the section provides that if, as a result of section 11ZB or 11ZC, the defendant can show that the defendant would be substantially prejudiced if the action were to proceed, the court must dismiss an action brought in reliance on section 11ZA. The substantial prejudice test in section 11ZD(3) applies only where the prejudice arises as a result of the application of the new law to abuse cases which occurred prior to the commencement of the Bill. Therefore the test only applies where the fact that the law on limitation has changed subsequent to the abuse taking place is the cause of the prejudice.
33. The effect of the Bill, if enacted, would be to remove the burden from a claimant in the specified abuse cases to justify or explain the time which has elapsed before an action is brought and place the burden on the defendant to satisfy the court that a fair hearing was not possible or that, as a result of the retrospective application of the law, the defendant would be substantially prejudiced were the action to proceed. In the latter case the court would need to be further satisfied that, having regard to the claimant's interest in the case proceeding, the prejudice to the defendant is such that the case should not proceed.

34. **Clause 4** provides for certain consequential amendments. Section 14 of the 1984 Act is excluded in relation to actions to which the new provisions apply. The amendments to paragraph 6 of Schedule 2 to the 1984 Act are to ensure that childhood abuse claims are not time-barred by any provision of the (repealed) *Statute of Limitations 1891*, which may otherwise have applied.

Financial effects of the Bill

35. The Bill is expected to have financial implications. Please refer to paragraphs 16 and 17 of the explanatory memorandum for the Bill for commentary on those implications.

Retrospective application

36. Section 11ZB clearly provides for retrospective application. As mentioned earlier in these notes, it can take a long time for childhood abuse survivors to reach the point where they are able to make a claim in practical terms. If the Bill did not apply to existing rights of action, the survivors who are at the point of considering a civil action would not benefit and the benefits of the change in the law could take years to have any practical effect. This would not satisfy the aim of removing a barrier to access to justice in respect of abuse.
37. The retrospective application is regarded as proportionate for achieving that aim. The retrospective application is limited to the time bar element, permitting an action that may otherwise have been time-barred to proceed. The claim itself would have to be judged on the law as it was when the abuse occurred.
38. In addition, section 11ZA applies to survivors of child abuse. Only the person who sustained the injuries may bring an action to which the section applies (section 11ZA(1)(d)). It does not permit anyone else to make a claim in respect of childhood abuse actions.
39. Section 11ZC permits re-litigation of abuse claims in specific circumstances, and therefore also has retrospective application. The fundamental principles of certainty and finality in litigation are important legal values. Where a court has made a final determination, the ruling should not be subsequently interfered with, and a defendant in such a case has a legitimate expectation that the matter is at an end. Any departure from such principles requires special justification. However, there are special circumstances justifying the application of the Bill to cases that have previously been litigated and decided by the court or settled on the basis of time bar. Given that the policy underpinning the Bill is to facilitate access to justice for the very special case of childhood abuse and to apply the new law to survivors with existing rights of action who have never sought to make a claim, it would be unfair to exclude those who had litigated but who had never had their claim heard by a court because of the current law on limitation.
40. The Bill does provide safeguards to strike a balance between the public interest it seeks to further and the rights of defendants, as provided in section 11ZD. The court cannot permit an action to proceed if it is not possible for a fair hearing to take place – a defendant is entitled to a fair hearing under Article 6 of the Convention (right to a fair trial).

41. In addition, where the claimant's right of action accrued before the coming into operation of the new law, the court cannot allow the action to proceed if the defendant establishes that, as a result of the retrospective application of the law, the defendant would be substantially prejudiced if the action were to proceed and the court is satisfied, having had regard to the claimant's interest in the action proceeding, that the prejudice is such that the action should not proceed. This provision reflects the recognition that retrospective application of the new law may engage a defendant's rights under Article 1 Protocol 1 of the Convention ("A1P1" – the right to peaceful enjoyment of possessions, which includes intangible possessions) and enables the court, having regard to the circumstances in each case, to strike a fair balance between the protection of those rights and the aim of the legislation.

European Convention on Human Rights

42. In the opinion of the member moving the Bill, the provisions of the draft Bill are compatible with the Convention rights (within the meaning of the Human Rights Act 2001). The Bill does engage Convention rights, notably those in Article 6 and A1P1. There are, however, safeguards in the Bill to protect a defendant's Article 6 rights and the interference with the rights in A1P1 is in pursuit of a legitimate aim in the public interest and proportionate. The Bill seeks to facilitate access to justice for victims of child abuse while having due regard to the rights of any defendant.
43. Removal of the limitation period for the specific cases in the Bill does remove an interference with a claimant's ability to access justice. It could, however, adversely affect the defendant's ability to defend a claim and in some cases a fair trial may not be possible. The Bill therefore includes the safeguards in section 11ZD to protect a defendant's Article 6 rights.
44. Under A1P1, there is a right to peaceful enjoyment of property, and "property" includes possession of a legal right. Removing a limitation defence currently available to a defendant is therefore capable of engaging A1P1. Enabling a claimant to re-litigate in the circumstances in the Bill also engages A1P1. Any measure interfering with A1P1 rights must be pursuant to a legitimate aim in the public or general interest, according to law and proportionate, balancing the rights of the individual with the public interest. The legitimate aim of the legislation is to facilitate access to justice for survivors of child abuse. This group is a special case, given the impact of abuse on the ability to bring claims and given the need to convince a court that a time-barred claim should proceed acting as an additional hurdle to vulnerable victims. The aim is balanced by the safeguards for a defendant in section 11ZD of the Bill.