

Justice Committee

Limitation (Childhood Abuse) (Scotland) Bill

Written submission from David Johnston QC, Commissioner, Scottish Law Commission

1. I have prepared this note at the request of the Convener of the Justice Committee.
2. At the outset I should note that, although I am currently a commissioner of the Scottish Law Commission, this note is written in a personal capacity and does not represent the view of the Commission. In what follows I have anyway attempted simply to set out factual points and not take any position on them.
3. I understand that one of the issues in which the Justice Committee is interested is the distinction between prescription and limitation, and how this bears on the Bill the committee is currently considering.
4. The principal general statute in Scotland is the Prescription and Limitation (Scotland) Act 1973. As the title indicates, it contains rules about both prescription and limitation.

Prescription

5. Prescription is the legal rule by which rights or obligations are extinguished after a specified time has passed. Prescription therefore has a substantive effect: once the time has expired, the right or obligation ceases to exist.¹
6. The main prescriptive periods in the 1973 Act are:
 - (i) a 5-year prescription (under s 6), which applies only to rights or obligations specified in Schedule 1 paragraph 1 to the 1973 Act. This includes such things as rights arising under contract, and obligations to pay damages in delict.
 - (ii) A 20-year prescription (under s 7), which applies to all obligations, unless they are specifically exempted from prescription. Schedule 3 to the 1973 Act lists all the rights and obligations which are not subject to prescription.

Limitation

7. Limitation, on the other hand, is a procedural rather than a substantive rule. After a limitation period has expired, there is no effect on the existence of the right or obligation. But the expiry of the limitation period means that it will no longer be possible to raise proceedings to seek to enforce the right or obligation.
8. The limitation period in the 1973 Act is 3 years. It applies to actions for damages for 'personal injuries' (ss 17 and 18), as well as to such things as actions for defamation or of harassment (ss 18A and 19B).

¹ In referring to rights and obligations, I am referring to rights in the sense used in s 15(1) of the 1973 Act, namely, the sort of right held by one person which is the counterpart of an obligation owed by another person: so, for example, in a contract of sale, the seller has the right to be paid the price, and the buyer is under an obligation to pay it.

Application of prescription to 'personal injuries'

9. When the 1973 Act was originally enacted, both prescription and limitation applied to cases of personal injuries:

- (i) an action for damages for personal injuries would need to be brought within the 3-year limitation period, or else it would be out of time;²
- (ii) the obligation to pay damages for personal injuries would be extinguished once the 20-year prescriptive period of s 7 had been completed. This was because (a) an obligation of this kind was excluded by Schedule 1 paragraph 2(g) from the list of obligations that prescribe after 5 years but (b) it was not included in the Schedule 3 list of obligations that cannot prescribe.

1984 amendment

10. This changed when the Prescription and Limitation (Scotland) Act 1984 came into force, which was on 26 September 1984. It amended s 7 of the 1973 Act and took obligations to pay damages for personal injuries out of the scope of the 20-year prescription. From 26 September 1984 onwards, actions of damages for personal injuries were therefore subject only to limitation under ss 17 and 18.

11. The 20-year prescription cannot have extinguished obligations to pay damages for personal injuries that arose after 26 September 1964, because the requisite 20-year period would not have been completed before the 1984 Act came into force and removed the possibility of prescription in these cases.

12. It follows, therefore, that the Bill currently before the committee, dealing with the applicability of the limitation period, is capable of addressing all cases that arose after 26 September 1964.

Special considerations applying to cases prior to 26 September 1964

13. The position of obligations to pay damages for personal injuries that arose before 26 September 1964 is different. The reason is that in these cases the 20-year prescriptive period will have been completed before the 1984 Act came into force. The result is that any obligation to pay damages has ceased to exist.

14. To legislate in order to allow recovery of damages in these cases therefore raises an additional issue: it would be necessary to recreate an obligation to pay damages that has ceased to exist.

15. It is that issue which the then Scottish government referred to the Scottish Law Commission. The commission reported in its *Report on Personal Injury Actions: Limitation and Prescribed Claims* (no 207, 2007). Most of the report deals with other matters of limitation, but chapter 5 addresses the present issue.

16. The commission expressed deep sympathy for victims of institutional childhood abuse (para 5.24); and it floated the idea that government might consider setting up a body (such as exists in Ireland) to make awards to victims (para 5.25). But the commission concluded that claims in respect of personal injury which had been

² This is subject to the discretion of the court under s 19A to override any of the limitation time limits, if it seems to it equitable to do so.

extinguished by prescription before 1984 should not be revived; and it also recommended that no special regime should be created for personal injury claims arising from institutional childhood abuse. The main reasons for this conclusion were two.

17. First, the general undesirability of retroactive legislation. Here legislation which revived obligations to pay damages that had ceased to exist would be retroactive (paras 5.8-11). The commission also noted that it was not clear whether the Scottish Parliament had power to enact legislation which had retroactive effect prior to 1999, although no conclusion was reached on this point (para 5.14).

18. Second, the commission thought that retroactive legislation might not be compliant with Convention rights. The particular concern was the right to peaceful enjoyment of possessions under Article 1 of the First Protocol ('A1P1') to ECHR, since legislation which retroactively imposed a liability on a person who was currently not subject to that liability would involve interference in the form of exposing that person's possessions to a liability to pay damages (paras 5.12-13). Whether that interference could be justified would depend (according to ECHR case law) on whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

19. The commission noted that it was not certain that retroactive legislation of the kind being considered would necessarily contravene A1P1. And it also noted that in some cases interference with property rights might be justified. But it expressed the view that legislation of this kind would raise serious human rights issues and might well be incompatible with ECHR (para 5.13).

Conclusion

20. If the committee wishes to pursue the pre-1964 issues further, it would no doubt wish to be satisfied in relation to both of the commission's main points: first, that retroactive legislation is acceptable in these circumstances; and second, that, if there is any interference with Convention rights, it can be justified.

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