**SUBMISSION**

**by**

**COLIN McEACHRAN, Q.C.**

**in respect of**

**SCOTTISH LAW COMMISSION PAPER ON PRESCRIPTION AND LIMITATION**

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1. I am disappointed by the SLC's response to the problem of institutional child abuse as set out in their Consultation Paper. I would like to propose that the Commission recommend an amendment to the existing Prescription & Limitation Act along the lines :-

> "The provisions of this Act so far as relating to prescription and limitation shall not apply in cases where the claim is of abuse (whether sexual or physical) occurring when the claimant was a child in an institution".

Alternatively I would propose a provision whereby all issues in institutional child abuse cases are heard at one single hearing (relevancy, timebar and the merits) to avoid the claimant prejudice and the very substantial delays which are building up in these cases.

Note : paras 2 & 3 omitted as confidential

4. Child abuse in institutions is something which has come to light relatively recently. It is not confined to Scotland. I have noted reports of its occurrence in England Wales, South Africa, Australia, Germany and in particular in Ireland where the Government set up a special commission.

I note that as long ago as 1996 the European Court on Human Rights in the case of **Stubbings and Others –v- United Kingdom** the Court said this at para. 56:-

> "There has been a developing awareness in recent years of the range of problems caused by child abuse and its psychological effect on victims and it is possible that the rules on limitation of action applying to member states of the Council of Europe may have to be amended to make special provision for this group of claims in the near future".

In my view this is a clear pointer to the Commission to come up with a radical solution to a particular problem.

5. In 2002 a Petition was presented to the Scottish Parliament for an inquiry into Child abuse. I was present in the Scottish Parliament on 1st December 2004 when all political parties responded to the Petition. They accepted there had been significant child abuse in institutions in the past and were anxious to help victims so far as they could.

The problem of time-bar was raised and in particular the twenty year prescription rule and one of the reasons for the Executive's remit to the Commission was to try to deal with this problem.

6. **The problems in Scots Law and Procedure in dealing with Institutional Child Abuse cases.**

6.1 Extreme delays in the courts in dealing with these case.

There are over 600 summons in such cases in the General Department of the Court of Session. Most of these cases have been in the Court since 2000. To the best of my knowledge, there have been debates in less than 10 cases. In 4 cases there has been a preliminary proof on time bar. Only one case has come to trial and in that case liability was admitted and no time bar point was taken.

There is no procedure for class actions in Scots Law. No judge has been put in charge of these cases to provide any judicial case management. It is doubtful if the cases can be conjoined, because each case is "fact sensitive" and a decision in one will not necessarily decide another. The Scottish Legal Aid Board has taken on itself to decide that certain cases should be treated as test cases, when this has not been agreed between the parties and when as pointed out above, one case is not likely to decide another. As a result many cases are still at the summons stage.

At a conjoining hearing in May 2006, counsel, representing Quarriers Homes where there have been a number of criminal convictions, stated that his clients wishes to have a legal debate in all cases. If that was unsuccessful, then they wished a preliminary proof on time bar and if that was unsuccessful, a proof on the merits. Looking to delays in fixing debates and proofs (18 months) and leaving aside all questions of appeal, it seems unlikely that any case will be resolved before 2010 and many cases will spill over into the second decade of this century.

It seems to me that this is a ticking time bomb (Article 6 of the Human Rights Convention) for SLAB and the Scottish Courts System. It is something that the Commission should address urgently in their response. It is the reason for my alternative proposal.

6.2 In cases where claimants have suffered years of abuse, particularly when there have been criminal convictions, it is a form of abuse to suggest that claimants should have to give evidence not once but twice (in a preliminary proof on time bar) In one of the time bar cases heard (AB v Hendron 2005) one of the pursuer's had to be on strong medication to handle the hearing. A single hearing ,where all issues were dealt with, would avoid this.

6.3 Failure of the Scottish courts to follow the English approach in such cases.

As the commission points out, the English legislation is similar in effect but is in different terms. As they say in para 2.13, the English Court of Appeal in ***KR V BRYN ALYN*** 2003 QB 1441, took the view that the test of whether an injury was significant was sufficiently subjective to require the gravity of the injury to be assessed, on achieving legal capacity, in accordance with how a person of that age and viewing matters in accordance with the standards of the time, would regard it. Leave to appeal that case to the House of Lords was refused by an appeal committee. The case is regularly applied in England, with the result that time bar in English cases normally starts to run from when a claimant sees a solicitor or gets a medical report confirming a medical diagnosis of a condition such as PTSD or from when the police contact the claimant in connection with a criminal investigation. There are accordingly few timebar problems.

Conversely, Lord Johnston has held in ***B V MURRAY*** 2004 SLT 967 that this approach was inappropriate for Scotland. In allowing a preliminary proof under section 19A, Lord Johnston clearly had in mind (see para 15 of his judgement) the point made by the Commission (para 3.19) that if section 17 is to be construed objectively, then section 19A must be widely construed. However when the case came to preliminary proof, the trial judge (Lord Drummond Young) proceeded to adopt wholesale the submissions for the defenders. He adopted the very restrictive approach of the Court of Appeal in ***Bryn Alyn supra.*** to their equivalent of section 19A (section 33). He seems to have been much influenced by the Australian case of ***Brisbane Regional Health Authority v Taylor 1996.*** He fails to notice that that case arose out of a single interview on a single day in a hospital. In such cases there may be problems of memory. But child abuse cases involve prolonged ill treatment and there is much evidence still available.

Accordingly the present state of Scots Law is that section 17 is construed objectively and section 19A narrowly. Victims of Child Abuse are accordingly getting the worst of both worlds. This is why I propose the total removal of the defence of time bar . Claimants would still have to prove their claims and no doubt the court in assessing the evidence would take into account the delay.

6.4 ***Prescription.***

6.4.1 The 20 year rule hits child abuse cases very hard. My information is that over 100 of the cases mentioned above are potentially hit by the 20 year rule. The only case to have raised the point was heard by Temporary Judge Coutts in ***Abernethy v Sister Bernard Mary Murray 2004 A119/00.*** He dismissed the action because of the 20 year rule and refused to apply the plea of *non valens agree.*

6.4.2 Against the background of institutional child abuse, I do not find the arguments against change to be very convincing. When Human Rights arguments are deployed, one has to ask –what about the human rights of the victims of child abuse???
The recent case of **McEwan –v- The De La Salle Order, 13th September 2005**, is instructive. This is a decision of Lady Paton which is under appeal but the case arises out of a conviction. Mr McEwan was in an approved school near Stirling in the 1960s. He was abused by a Brother Benedict in 1963 and 1964. Brother Benedic was brought to trial in June 2003 and convicted. He was convicted of offences which had occurred almost forty years before. No limitation applied to the Crown's right to prosecute. It seems odd in that situation, that the actual victim should be prevented by rules of prescription and limitation, from making a civil claim against his abuser and those responsible for them.
The SLC says in para 3.25 that "the primary aim of limitation of action rules is to protect a defending party from stale claims". This approach overlooks the fact that the conduct complained of may have the effect of preventing a victim from coming forward for many years. See para 2 of this submission. This is why I feel that such rules are not appropriate for institutional child abuse cases.

6.4.3 The 20 year rule works particularly hardly in child abuse cases because minority is not taken into account, yet the offences occurred in childhood.

6.4.4 The SLC do not address the fact that the previous law (prior to 1925) had a 40 year rule for hundreds of years. There seems no good reason, as a fall back position, not to go back to a 40 year rule.

6.4.5 I was Junior Counsel in the case of ***McIntyre v Armitage Shanks 1980 SLT 122.*** It was the comments of Lord Chancellor Hailsham about the need for an equitable remedy that led to section 19A. The legislation proceeds on the basis that it applied to any case which had not proceeded to final judgement. Section 19A (2. Mr McIntyre was able to renew his claim and receive a settlement.
A similar provision could be enacted for prescription.

## 7. Comments on SLC questions.

1. "date of knowledge"--- yes
2. "reasonable prospect of success" – yes
3. No. Emergence of additional injury should give rise to a fresh date of knowledge. For common fairness reasons.
4. Yes too late to change this.
6. A constructive awareness test is appropriate, provided that the test is subjective.
7. I agree that this test is not satisfactory.
8. Yes but more that just incline. It should be made explicit.
10 Agreed.
11. Yes, subject to my proposal that prescription and limitation should not apply to institutional child abuse cases.
12. No. Trying to limit a wide discretion is always problematic.
13. There should be no guidelines. See answer 12.
14. option preferred—Option 3
16 There is an urgent need to improve procedures in child abuse cases to promote speed and efficiency. As I propose, either abolish these limitation rules for such cases or legislate (a rule of court would probably be enough) that all issues are dealt with at one hearing so that defenders cannot drag matters out.

17. Prescription should not apply to child abuse cases. Alternatively the rule should be 40 years and not 20, as prior to 1925. If the law is changed, there should be a provision such as section 19A (2) to allow it to apply to cases in the past but which have not come to final judgement.