

# **LIMITATION (CHILDHOOD ABUSE) (SCOTLAND) ACT 2017**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### ***Section 1 – Removal of three year limitation period in certain actions***

##### **Inserted section 17C - Childhood abuse actions: previously litigated rights of action**

11. Section 17C makes specific provision to deal with the position of actions that have already been the subject of litigation and have been disposed of prior to the commencement of section 17A. It allows those actions to be re-raised in certain circumstances.
12. The section only applies to actions in respect of the sort of personal injuries described in paragraphs (b) and (c) of section 17A(1) (that is, they must be actions in respect of injuries arising from abuse which occurred (or, as the case may be, began) when the person who sustained the injuries was under 18). In addition, for the section to apply, an action of damages must have been brought prior to the commencement of section 17A but have been disposed of by the court either by reason of section 17 or in accordance with a relevant settlement.
13. Where the person who sustained the abuse shows that these conditions are met, subsection (3) of section 17C allows that person to bring an action of damages in respect of the right of action despite the initial action previously having been disposed of by the court (including where it was disposed of by way of decree of absolvitor – that is, a final judgement of the court in favour of the defender). If there is no longer a right of action (due to the disposal of the previous case), this subsection revives the right. The subsection also displaces the defences on which a defender could usually rely to prevent the re-raising of an action where an earlier action on the same issue has been disposed of in these ways – for example, *res judicata* (which prevents a matter finally decided by a court being raised again between the same parties) or compromise (where the pursuer had discharged any right to damages as part of a settlement). If a defender pleads such a defence, a pursuer will be able to respond by showing that subsection (3) applies. However, this subsection does not allow a pursuer to raise an action on the same issues again and again. It is only the existence of the initial action raised and disposed of before section 17A comes into force which is no longer to be an impediment to the re-raising of the case. If an action is brought after section 17A comes into force and that action is then disposed of, section 17C(3) will not permit the bringing of yet another action.
14. Section 17C(4)(b) defines “relevant settlement”. A settlement is a relevant settlement if it meets three criteria. The first criterion is that it was agreed by the parties to the initial action. The second criterion is that the pursuer entered into the settlement under the reasonable belief that, had the action proceeded, the court would have been likely to dispose of the initial action by reason of section 17. The third criterion is that any sum of money which the settlement required the defender to pay to the pursuer, or to a

person nominated by the pursuer, did not exceed the pursuer's expenses in connection with bringing and settling the initial action. This means that if the pursuer agreed a financial settlement (other than, at most, having expenses in connection with the initial action reimbursed) the pursuer would not be able to re-raise the action. Section 17C(5) clarifies that if the settlement terms included the payment of sums that were anything other than reimbursement of the pursuer's expenses in connection with bringing and settling the initial action, the action would not meet this criterion. This means that where the terms of the settlement explain the nature of the payment being made, that is taken to be conclusive (avoiding an examination of the expenses actually incurred).

15. Nothing in section 17C revives a right of action which has ceased to be enforceable for any reason other than as a result of the circumstances described in subsection (2) (for example, where the right has prescribed).
16. Obligations to make reparation for personal injuries (and the associated right to receive those reparations) were previously subject to the law on prescription (section 7 of the 1973 Act). Where it applied, prescription had the effect of completely extinguishing an obligation (and the associated right) after a period of 20 years had elapsed without having been interrupted by, for example, an action having been raised to enforce the obligation. The Prescription and Limitation (Scotland) Act 1984 removed personal injuries from the scope of prescription. It did not change the law so as to revive obligations which had already been extinguished before it came into force on 26 September 1984, meaning that obligations which had already prescribed under the previous 20 year prescription period (which must have arisen prior to 26 September 1964) were not resurrected by the 1984 Act.
17. The Act does not alter the position in relation to the law of prescription: obligations to make reparation (and the associated right to receive reparations) which were extinguished under the previously applicable law will remain extinguished by prescription and are not revived by section 17C. Section 17C only applies where an action for damages has been raised and disposed of in the circumstances described in subsection (2) (that is to say, one of the things it hinges on is the existence and operation of section 17 of the 1973 Act). As those circumstances can only have arisen because an action was brought after section 17 came into force (on 25 July 1973), the bringing of that action would have interrupted the 20 year prescriptive period. A further uninterrupted period of 20 years would have had to elapse in order for the obligation to prescribe, but that could not have happened before 26 September 1984 (when the obligation was removed from the scope of prescription). Accordingly, the obligations to which section 17C applies will never be ones which have been extinguished through prescription.