

**Rigby B (Brian)**

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**From:** Phillips R (Ria)  
**Sent:** 17 August 2015 10:47  
**To:** Phillips R (Ria)  
**Subject:** FW: DAMAGES BILL – Response to Mr Russell's points on SCANCE Note from 29 October 2014 on time-bar and Damages Bill

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**From:** Dewar AM (Alison)  
**Sent:** 07 November 2013 12:22  
**To:** Phillips R (Ria)  
**Subject:** FW: DAMAGES BILL – Response to Mr Russell's points on SCANCE Note

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**From:** Dewar AM (Alison) **On Behalf Of** Minister for Community Safety and Legal Affairs  
**Sent:** 07 November 2013 12:16  
**To:** Cabinet Secretary for Education and Lifelong Learning  
**Cc:** MacQueen F (Frances); Marshall J (Jan); McFarlane J (John); Minister for Community Safety and Legal Affairs; Cabinet Secretary for Justice; McAllister C (Colin); DG Learning & Justice; Clark J (Jill) (Justice)  
**Subject:** DAMAGES BILL – Response to Mr Russell's points on SCANCE Note

PS/Cabinet Secretary,

Please see the attached advice to the Cabinet Secretary in response to points he raised at Cabinet on 29<sup>th</sup> October.

Thanks to the officials who provided this.

Regards,

Alison



Limitation - lines  
for Mr Russ...

Alison Dewar - Private Secretary to Minister for Community Safety and Legal Affairs - [REDACTED] or [REDACTED]

## RESTRICTED – ADVICE TO MINISTERS

### DAMAGES BILL – Response to Mr Russell’s points on SCANCE Note

The present law is that claims cannot be raised after the specified period of 3 years unless the court exercises a discretion to the contrary. This recognises the overall policy of not allowing claims to subsist indefinitely whilst giving a reasonable period for a person who knows that they have a claim to make that claim. The principle also reflects the fact that where there is delay the quality of justice deteriorates [This underlying principle is recognised in nearly all of the developed legal systems in the world]

It would, in theory, be possible to carve out a special regime for categories of pursuers such as survivors of historic child abuse. Deciding who should fall within the special category and then defining that category as clearly as possible would, however, be very problematic. For example, should the category cover survivors of physical and sexual abuse; survivors of sexual abuse only; persons who were in a children’s home or institution, persons who were in foster care, or persons in the care of their parents/family?

Carving out one category would lead to calls firstly, to explain why those covered by the category are considered more deserving of special treatment than those pursuers who are not. Secondly, there would be calls by other pursuers to receive similar special treatment eg. those with long term conditions.

The Scottish Law Commission, in making its recommendations, recognised that it would be difficult to distinguish the consequences of sexual abuse during childhood with the consequences of being raped during adulthood; or suffering mental harm as a result of injury through negligence at work; or being an adult victim of abuse at the hands of the military.

Providing a special time-bar regime for survivors of historic abuse would not guarantee success in their claim for damages. A pursuer in this type of case may have substantial evidential barriers to overcome – witnesses may have died or have difficulty recalling what happened a long time ago; documentary evidence may no longer be available and it might be difficult to identify a suitable defender. Moreover, the adversarial nature of litigation means that the process of raising proceedings and giving evidence can be traumatic to survivors, particularly if their claim is not ultimately successful.

Making special provision for one category of pursuers would also go against the underlying principles in Scots law that all classes of pursuers should be treated the same and that the ability to raise a claim against a person should not exist endlessly.

What the Damages Bill will do is support those principles, but also, enhance the flexibility that the court has to take account of the personal circumstances of pursuers which it is hoped will be of benefit in hard and difficult cases. The changes being made by the Bill are intended to increase the chances of pursuers (including survivors) getting over the time-bar hurdle.

## RESTRICTED – ADVICE TO MINISTERS

Other jurisdictions have carved out a special regime for survivors but it is often difficult to draw meaningful comparison with the position in other countries because the wider law on limitation of actions and/or reparation may be different. In other countries where a special regime has been created the law does not also provide the wide and unfettered discretion available to the Scottish courts to over-ride the time-bar, that is why we have placed emphasis on strengthening the provisions relating to the courts discretion in our Bill.

We are aware of a recent case which demonstrates how the current law can be used to provide justice for survivors of historic child abuse case. The case involved a pursuer who alleged that she suffered sexual abuse by her uncle, the defender. The abuse took place in the family home, where the uncle resided. The defender sought to argue that the pursuer's case was time-barred. The pursuer was successful in persuading the court to exercise its discretion to allow the case to proceed outwith the limitation period. Counsel for the pursuer argued their case on the basis of the list of discretionary factors recommended by the Scottish Law Commission. The court eventually awarded damages to the pursuer for her pain and suffering.

The Bill will go further, in respect of discretionary factors, than those recommended by the Scottish Law Commission because we believe that even more guidance can be given to the courts and solicitors for pursuers about how to set out arguments on time-bar.