

**Scottish Parliament Finance and Constitution Committee**  
**Call for Evidence on Limitation (Childhood Abuse) (Scotland) Bill**

1. Association of British Insurers
2. COSLA | Convention of Scottish Local Authorities
3. Orkney Islands Council
4. SLAB | Scottish Legal Aid Board
5. South Lanarkshire Council

**Scottish Parliament Finance and Constitution Committee**  
**Call for Evidence on Limitation (Childhood Abuse) (Scotland) Bill**  
**Response from the Association of British Insurers**

A submission to the Finance and Constitution Committee from the Association of British Insurers

1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?

Yes. The Association of British Insurers (ABI) made a written submission to the Scottish Government consultation in 2015. The Scottish Government subsequently organised workshops to discuss the consultation but neither the ABI or any other representative of the insurance industry was invited to take part. We did not comment on financial assumptions in the 2015 consultation as it did not contain any and acknowledged at section 6.13 that “It is not possible, at this stage, to provide any precise costings for the proposed change in the law.”

In our response to the 2015 consultation we did cite the Australian case of Brisbane South Regional Health Authority v Taylor and the opinion of Judge McHugh who concluded, “The need for certainty can be justified... For example, manufacturers need to be able to 'close their books' and calculate the potential liability of their business enterprise with some degree of certainty... [An] award of damages compensation may be so large as to jeopardise the financial viability of a business. The threat of open-ended liability from unforeseen claims may be an unreasonable burden on business.” Judge McHugh went on to say, "...it will be often just as unfair to make the shareholders, ratepayers or taxpayers of today ultimately liable for a wrong of the distant past, as it is to refuse a plaintiff the right to reinstate a spent action arising from that wrong.”

In 2016 we met with Scottish Government officials to express our concerns about the draft Bill including the potential cost of this legislation to organisations which may be self-insured (including public bodies) and to charities and good causes with public liability insurance policies.

2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?

Paragraph 47 notes the engagement Scottish Government has had with the ABI and describes it as constructive. The Financial Memorandum acknowledges the difficulties insurers have in sharing customers' data and goes on to say that it was considered impractical and unrealistic to quantify the costs involved for insurers.

Paragraph 49 of the Financial Memorandum states that “this legislation is likely to bring Scotland in line with other jurisdictions who have either implemented similar legislation or where a number of child abuse actions have been successful within the existing legal framework, such as in England and Wales.” We consider that this statement is misleading. The position in England and Wales for example is achieved

with the continued existence of a three-year limitation period and its disapplication remains at the discretion of the judiciary. The Bill as drafted does not reflect that position – it removes the time bar altogether and importantly the ability of the Scottish judiciary to allow suitable cases to proceed.

3. Did you have sufficient time to contribute to the consultation exercise?

While we were given sufficient time to draft a response to the consultation we note that to date there has been no comprehensive data collection on abuse claims and the perceived and actual barriers to claim progression. In our view this analysis would be very instructive in terms of informing the financial impact of the Bill.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.

No. As the Financial Memorandum acknowledges in Paragraph 49 it is difficult to estimate the financial implications for insurers and other parties which may be defenders in historic child abuse claims due to the lack of data available on cases previously raised and settlements agreed at our outside court. In addition to compensation awards, insurers also face high legal costs incurred in defending legal actions and the possibility that a court may instruct an insurer to meet the costs of the pursuer.

The Forum of Scottish Claims Managers researched litigated cases settled by its members throughout 2012. The sample comprised 3,482 road traffic accident and accident-at-work cases. The analysis revealed that in 52.4 per cent of cases with a compensation value to the pursuer of up to £15,000, the payment to the pursuer's solicitors was greater than the award to the pursuer. We would expect a similar trend to be reflected in the ratio of compensation award to legal costs for pursuers in historic child abuse cases.

5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?

No. We do not consider the estimated costs and savings are reasonable and accurate. It would be very useful to see an independent actuarial analysis of the estimated costs and savings but the Scottish Government does not appear to have commissioned this and we would ask why this is the case. If the Scottish Government has commissioned such an analysis then it would be useful for this to be published.

The methodology used by the Scottish Government as set out in Paragraphs 12 to 23 to estimate the number of potential pursuers which might come forward does not acknowledge Claims Management Companies or personal injury lawyers as factors which could increase the number of claims. We would anticipate both these groups would seek to identify and market their services to potential victims of historic abuse as they do in other classes of personal injury such as asbestos conditions or road traffic injuries.

If the estimated mid-point of 2,200 actions which the Scottish Government has based its calculations upon is an underestimate then this will obviously have implications for the anticipated costs to public bodies, insurers and other defenders.

6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?

Insurers write their policies based on estimates of the value of business against the potential costs that would be incurred by a claim. When that book of business is closed at the end of the life of the policy the insurer will evaluate the performance of that book for a profit or a loss. They will also consider the performance of that book when writing new business in a particular sector or for a customer. This Bill would expose insurers and their customers to claims dating back to 1964 and so would cover policies which have been written and books which have been closed. This would mean historic liabilities dating back six decades would need to be paid from current reserves which would have an impact on insurers' profitability in the Scottish marketplace. There is a risk that an increased volume of abuse related claims could push up the cost of public liability insurance premiums.

7. Does the FM accurately reflect the margins of uncertainty associated with the Bill's estimated costs and with the timescales over which they would be expected to arise?

No. We do not believe the Financial Memorandum accurately reflects the margins of uncertainty for the reasons set out above.

#### Wider Issues

8. Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?

No. In addition to the cost of compensation awarded by the court, defenders including the Scottish Government and other public bodies would face legal costs for their own lawyers and the possibility of being instructed by the court to meet pursuers' legal costs. Public bodies may also incur costs associated with the researching and verification of information related to pursuers claims.

Paragraph 45 states that "There will be additional costs to other organisations who find themselves as defenders in these cases. As in the case of local authorities, it may most likely be insurance providers that pay out in these cases." It is worth noting that in cases where a public body has an insurance policy which covers its liability in relation to historic child abuse, that this policy may have feature an excess sum and so claims under that sum would need to be met by the public body from current reserves rather than from its insurer. We would expect the Scottish Government to have carried out research into the excess levels on the insurance policies of public bodies and would welcome publication of analysis of that research.

9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

We have concerns that the special provisions the Bill makes for historic child abuse cases may in time be applied to other classes of personal injury such as industrial disease or noise induced hearing loss. It is not possible to quantify the costs if this was to happen but we would anticipate they would be on a scale greater than that for historic abuse cases.

**Scottish Parliament Finance and Constitution Committee**

**Call for Evidence on Limitation (Childhood Abuse) (Scotland) Bill**

**Response from COSLA, the Convention of Scottish Local Authorities**



**Introduction**

COSLA welcomes the opportunity to provide written evidence to the Finance Committee on the Financial Memorandum attached to the Limitation (Childhood Abuse) (Scotland) Bill. COSLA's submission does not follow specifically the questionnaire attached to the Committee's call for evidence, but instead focuses on a number of key concerns we wish to draw to the Committee's attention. In presenting these concerns the Committee will hopefully be satisfied that COSLA has also sought to cover the areas of interest set out in the call for evidence.

**Key Points;**

- **COSLA support the intent of the legislation and agree that removing any barrier to justice for survivors of historical childhood abuse is a positive move.**
- **Given the retrospective nature of the legislation and the current fiscal environment of cuts to Local Government, this legislation will potentially prove to be a considerable financial burden for councils.**
- **The cost of the legislation lies not only in the compensation sought by claims brought against Local Authorities, but also more significantly in the back-room costs associated with both successful and unsuccessful claims.**
- **While public liability insurance would normally be expected to cover a significant proportion of costs, an issue with the Local Government insurer for the year 1975-1992, means that it is unlikely any claims by councils for this period will be able to recover any costs.**
- **COSLA would welcome a discussion with Scottish Government over how these costs can be managed.**

**Detailed Comments:**

1. COSLA supports the intent of the legislation and is clear that removing any barrier to justice for survivors of historical childhood abuse is a positive move. However, despite our strong support for the legislation, we recognise that it will have a potentially significant financial impact on Local Government. Please find more detail on the different elements of financial impact below.

## **Compensation Claims**

2. A key question raised by this legislation is the potential volume of cases that could be brought. This is a very difficult to quantify, particularly due to the sensitive nature of the claims. In terms of number of cases, Scottish Government has indicated that there are approximately 1000 cases that were waiting on the outcome of a recent test case, which failed due to the current time-bar. It may be that these cases will seek to be advanced upon the change to the legislation. We have no definitive information that cases such as these could be raised exclusively in relation to Local Government or could impact on the voluntary sector, charities or religious organisations. However, proportionately, given the children's services run by Local Authorities, Local Government is likely to experience a higher percentage of claims raised against them than other organisations.
3. We also accept that it is difficult to estimate the value of any claims that could be brought. While there is a scale of compensation for Personal Injury claims in existence in Scotland, this does not cover abuse in any form. Currently it is unclear what value such claims might be. Without having a clear understanding of the number of claims and the potential value associated with claims, it is really very difficult to make any meaningful estimate of the potential costs for Local Government that successful compensation claims will bring.
4. While we appreciate the constraints Scottish Government are under in being able to estimate the number of potential claims and/or quantify potential claims, the Financial Memorandum takes a very narrow view of the potential costs to Local Authorities- focused exclusively on the costs of defending actions and insurance claims. However, what is clear is that the cost of this legislation on Local Authorities is not limited to the cost of any claim that they may have to pay out. Indeed, the financial implications of this legislation are considerably more complex. Given the fiscal difficulties that Local Government in Scotland is currently experiencing, this is a significant issue.
5. It is worth noting that even unsuccessful claims will have cost implications for organisations defending a claim. Even if an award of expenses is made against a Pursuer in relation to an unsuccessful claim there is unlikely to be a recovery if the Pursuer is legally aided and even if not legally aided, any recovered expenses are likely to fall short of the costs incurred in defending a claim by a half to two thirds.
6. COSLA is also aware of the recent decision by Lambeth Council to pay compensation to former residents at their Shirley Oaks children's homes, whether or not they were victims of abuse and we are conscious that this may have a wider impact. This would lead to significant additional costs to Local Government over and above those highlighted in this document.

## **Information Requests**

7. In order to establish whether a claimant has grounds for an action of damages it is likely that a high proportion will seek to obtain records from the Local Authority - either through a Subject Access Request (SARs) for personal

records or potentially through Freedom of Information request for other institutional records. There are significant costs to Local Authorities in responding to these requests, particularly relating to the issue of redaction of records. The Financial Memorandum attempts to estimate the number of actions likely to actually be taken, however there will be a higher number of individuals who will consider taking action and seek evidence to support this, with some ultimately deciding (sometimes of the advice of a legal representative) not to do so. Furthermore, we would also anticipate that publicity around the Bill and subsequent cases (especially successful ones) will be likely to lead to an increase in SARs.

### **Legal Costs**

8. It is clear that compensation awards will only account for a proportion of the overall cost to the Local authority. Local Authority lawyers have indicated that in many cases, compensation only amounts to approximately a third of the cost, with back-room and legal costs often amounting to considerably more than the compensation itself.
9. In addition to this, Local Authorities are concerned that there is a lack of capacity within Local Government to deal with the anticipated increase in legal work that will flow from the legislation. The ability of councils to respond will vary across Scotland as few councils have in-house personal injury specialists.

### **Administration Costs**

10. The legislation will certainly create an administrative burden on councils. Claims can be brought from as far back as 1964. Since then there have been several reformations of Local Government. Some of the records required for an action raised against the Local Authority may well be destroyed or lost. Those records that are available will unlikely be in digital format. It is likely that institutions involved either no longer exist, or have changed form, location, and staff many times since potential alleged abuse. Many potential witnesses will have retired; moved to new employers; or even have passed away. The time involved by legal staff in dealing with those challenges to prepare a defence is near impossible to quantify at this stage because of the variables.
11. We are aware that there have been some discussions with the Historic Abuse Enquiry team relating to access to records held by Local Authorities, but this does not discount the amount of work and staff resources that will be required to scrutinise such records in relation to compensation claims.

### **Insurance**

12. Often the cost of claims brought against a Local authority would be covered by their public liability insurance. However, there are a number of issues which mean that councils are unlikely to recover the costs for this legislation through insurance. The first issue is the date range for claims. Not all Local Authorities will be able to easily identify or establish their insurance policy covering the period pre-1975. There appears to be variation in the records held. Even for those authorities who can identify an insurer, given the period of time that has

passed and developments within the insurance industry, there may not be a clear cut insurer to claim against.

13. There is also a potential resource impact on the insurance teams with Councils. If there is a large influx of claims, from an insurance perspective, most councils have only small insurance teams able to process any claims. It is also worth noting that information contained within the claim forms themselves could be distressing, which could have potential Human Resource implications on staff.
14. Secondly, the Committee may wish to note that there is an issue with the main insurance provider that provided the majority of all Local Authorities in Scotland with Public liability insurance between 1975-1992. The company in question, Municipal Mutual, ceased to exist in the 1990s. While a fund was set up to deal with any potential claims for the period of time Municipal Mutual provided insurance, within the agreement there is a clause stating that any future claims could be subject to a levy. The levy is expressed as a percentage of councils total claims settled by the company, with the percentage being anywhere between 0-100%, to be determined on a case by case basis. The funding set aside has dwindled in past years and the levy clause has been invoked twice in recent years. The first time in 2014 at 15% and then in 2016 at 10%. It is clear that the Municipal Mutual fund will not be in a position to cope with the potential number of claims that this legislation could bring. While councils may be able to recover some of their costs, it is almost certain that the insurance cover from 1975-1992 will not cover all claims.
15. Local Authorities also have to consider whether, even after identifying an insurer, whether they will be able to make a claim. High insurance excess charges are common, with one authority quoting their previous Regional Council's insurance policy excess for the period 1975-1996 being £500k for each and every claim. As a result should a claim or claims be pursued it may not be possible to rely on any future award of damages or agreed settlement including legal expenses being funded by an insurer.
16. Post 1992 Local Authorities should have less issues around claiming against their insurance, however COSLA is aware that there is a varied landscape across authorities as to how councils are insured, with a mixture of companies and self-insurance used. That said, may councils run their insurance funds in a way that budgets for uninsured losses over a policy year, not to fund new losses without budgetary assistance, and we would not be able to cover an additional costs from this source. Furthermore, the Bill is retrospective and as such Local Government has not had the opportunity to set aside any funds in anticipation of potential costs, which is exacerbated by the swift nature of the proposed changes.
17. Going forward, there could be other unintended financial consequences linked to insurance. In particular, councils may find that their insurance premiums increase to account for the change in legislation. Indeed one Local Authority has reported that they incurred a 20% increase in their Public Liability Insurance Premium renewal for 2016/17 as a direct result of potential historic claims. Furthermore, with the potential for delays in cases coming to Court, any

claim could take some years to come to a conclusion. This could further impact on renewal premiums and future tenders for the insurance policies.

### **Support Services**

18. The Bill is likely to contribute to an increased demand for support services for survivors of abuse. This will relate to those considering an action, those actively pursuing an action and those who are affected by publicity which prompts them to seek more general support in relation to their own circumstances. The type of support being sought could be wide ranging, from specialist interventions (trauma and recovery specific services, support to engage with legal processes and attend court) to more general support with issues such as homelessness etc. Some of the cost of this provision ultimately falls on the Local Authority either directly, for example our homelessness provision, or through commissioning of third sector services, such as Rape Crisis and other abuse focused services. Demand for services is likely to increase across both children's services (current victims) and adult services (past victims).

### **Funding**

19. While COSLA is supportive of the legislation and understands the difficulty in quantifying the levels of claims and likely exposure for Local Authorities, this legislation is going to carry a substantial cost. Given the financial environment that Local Authorities are operating in, Local Government will struggle to meet the financial implications of the legislation, in particular in light of the fact that it is unlikely that few of these costs are capable of being fully met from the identified insurance policies. Therefore COSLA would welcome a discussion with Scottish Government around how these costs can be managed.

### **Conclusion**

20. COSLA welcomes the opportunity to respond to the Committees request for evidence on the Financial Memorandum to the Limitation (Childhood Abuse) (Scotland) Bill. We are strongly supportive of the intention of the bill although we are acutely aware that the legislation will come with potentially significant financial implications for Local Authorities. In particular, COSLA wishes to emphasise to the Committee that the cost of the legislation lies not only in the compensation sought by claims brought against Local Authorities, but also more significantly in the back-room costs associated with both successful and unsuccessful claims. Given the retrospective nature of the legislation and the current fiscal environment of cuts to Local Government, this legislation will potentially prove to be a considerable financial burden for councils.

## Scottish Parliament Finance and Constitution Committee

### Call for Evidence on Limitation (Childhood Abuse) (Scotland) Bill

#### Response from Orkney Islands Council

This questionnaire is being sent to those organisations that have an interest in, or which may be affected by, the Limitation (Childhood Abuse) (Scotland) Bill's—Financial Memorandum (FM).

In addition to the questions below, please add any other comments you may have which would assist the Committee's scrutiny of the FM.

#### Consultation

1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made? As far as can be ascertained, Orkney Islands Council did not take part in any consultation exercise preceding the Bill.
2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM? N/A
3. Did you have sufficient time to contribute to the consultation exercise? N/A

#### Costs

4. If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details. In our experience the Financial Memorandum provided here is unprecedented in its frank admission that "for a number of reasons it has not been possible to estimate costs to local authorities". A factor that does not appear to have been addressed, but which might be taken into account in a more quantifiable way, relates to increased current premiums being charged by insurers to local authorities.
5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate? N/A – although the FM provides an accurate and comprehensive overview of the combination of factors rendering even the most tentative estimate of the costs to local authorities impossible to put forward.
6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met? Given the profound uncertainties about costs to local authorities, it is not possible to state with complete confidence that Orkney Islands Council can meet any costs resulting from the Bill, There are, however, some local factors, such as a history of zero-level public liability insurance policy excesses, that might assist Orkney Islands Council in comparison with other areas.

7. Does the FM accurately reflect the margins of uncertainty associated with the Bill's estimated costs and with the timescales over which they would be expected to arise? In that the margins of uncertainty for local authorities are very wide indeed, yes.

### **Wider Issues**

8. Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom? None known

9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs? Not known.

**Scottish Parliament Finance and Constitution Committee**  
**Call for Evidence on Limitation (Childhood Abuse) (Scotland) Bill**  
**Response from SLAB, Scottish Legal Aid Board**

**Finance and Constitution Committee Questionnaire**

This questionnaire is being sent to those organisations that have an interest in, or which may be affected by, the [Limitation \(Childhood Abuse\) \(Scotland\) Bill's—Financial Memorandum](#) (FM).

In addition to the questions below, please add any other comments you may have which would assist the Committee's scrutiny of the FM.

**Consultation**

1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?

**Yes. SLAB was asked to provide input to the financial assessment of the potential impact of this legislation on the Legal Aid Fund.**

2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?

**Although the overall expenditure figure presented by the Scottish Government reflects the cost model that SLAB provided, we should point out the following clarifications to the text that is in the FM:**

**At paragraph 26 this should state that, based on one scenario, SLAB's model provides that 50% of the 2,200 actions would receive advice and assistance. Of those 1,100, 20% would then result in applications for legal aid. Of those applications, 50% would be granted (i.e. 110 actions).**

**This same clarification is also relevant to paragraph 42 of the FM.**

3. Did you have sufficient time to contribute to the consultation exercise?

**Yes.**

**Costs**

4. If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.

**Yes, the financial implications are based on a cost model that we developed.**

5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?

**Yes, we consider the estimated costs to be accurate. There are no estimated savings for legal aid.**

6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?

**As stated in paragraph 43, costs will covered as part of the overall budget allocation by the Scottish Government to SLAB.**

7. Does the FM accurately reflect the margins of uncertainty associated with the Bill's estimated costs and with the timescales over which they would be expected to arise?

**Due to the margin of uncertainty on the impacts on legal aid, the model that SLAB developed and provided covered a range of assumptions and scenarios. Although the FM presents a figure based on a single scenario and a single set of assumptions, additional expenditure as a result of this Bill could in fact be higher, or lower, than the figure in the FM.**

#### **Wider Issues**

8. Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?

**We have no comment to make on costs outwith legal aid.**

9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

**We have no comments on this.**

**Scottish Parliament Finance Committee**  
**Limitation (Childhood Abuse) (Scotland) Bill Call for Evidence**  
**Response from South Lanarkshire Council**

**Limitation (Childhood Abuse) (Scotland) Bill – Proposed Response to Financial Memorandum**

1. Did you take part in any consultation exercise preceding the Bill, and, if so, did you comment on the financial assumptions made?

**No**

2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?

**Not applicable**

3. Did you have sufficient time to contribute to the consultation exercise?

**Not applicable**

4. If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.

**The Financial Memorandum does not accurately reflect the financial implications for local authorities. It is acknowledged that this is due to the difficulty associated with calculating reasonable cost estimates in the circumstances. However, there is potential that the financial implications for local authorities could be significant.**

5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?

**No, however it is acknowledged that this is due to the lack of information upon which to build reasonable and accurate cost estimates. That said, there is potential that the financial implications for local authorities could be significant.**

6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?

**Due to ongoing financial pressures faced by local authorities there is no capacity to meet financial implications arising as a result of the Bill. If the financial impact is the direct result of the Bill, it would be reasonable for local authorities to expect that these costs are considered by the Scottish Government.**

7. Does the FM accurately reflect the margins of uncertainty associated with the Bill's estimated costs and with the timescales over which they would be expected to arise?

**The Financial Memorandum does stress the various elements of uncertainty associated with the impact of the Bill.**

8. Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?

**No, however it is acknowledged that this is due to the lack of information upon which to build reasonable and accurate cost estimates. That said, there is potential that the financial implications for local authorities could be significant.**

9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

**Without knowledge of the content of any potential future subordinate legislation it is not possible to estimate the associated costs.**

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