

Justice Committee

Limitation (Childhood Abuse) (Scotland) Bill

Written submission from the Association of British Insurers

Q1. Do you agree with the proposal in the Bill to remove cases relating to historical childhood abuse from the limitation regime set out in the 1973 Act?

We have significant concerns about the implications of some measures proposed in the Bill.

The three-year limitation period or time bar, which only begins when a potential claimant reaches the age of 18, is not an absolute rule. Judges in Scotland have the discretion to set aside limitation if they are persuaded of the merit in hearing a claim of historic abuse, as set out in Section 19A of the Prescription and Limitation (Scotland) Act 1973.

It is said that, in Scotland, judges have been slow to conclude that it is equitable to allow cases for abuse suffered in childhood to proceed after the victim is 21 years old.

This contrasts with the approach of judges in England and Wales where there is a greater exercise of this discretion allowing more historic abuse cases older than three years to proceed.

We do not believe that the Limitation (Childhood Abuse) (Scotland) Bill as drafted addresses the issue of judicial interpretation regarding the application of the time bar. Furthermore we disagree fundamentally with the assertion by Scottish Ministers in Paragraph 49 of the financial memorandum accompanying the Bill that it will bring Scotland in line with other jurisdictions. 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.

The Policy Memorandum notes the Scottish Law Commission's Report on Personal Injury Acts: Limitation and Prescribed Claims published in December 2007 which recommends that claims which have been extinguished by negative prescription before 1984 should not be revived; that personal injury actions, including for childhood abuse, should be subject to a five year limitation period, and that section 19A of the 1973 Act should be amended only to include a non-exhaustive list of matters to which the court may have regard in determining whether to allow an action to be brought. (Such an approach would have the effect of bringing Scottish limitation legislation and judicial practice in line with that in England and Wales.) Scottish Ministers set out their reasons for discarding these recommendations in paragraphs 55 to 58 of the policy memorandum, which include:

“a general consensus that it is in the public interest for disputes between parties to be concluded as quickly as possible, that facts rarely become clearer with the passage of time and that the longer the period, the greater the risk of the quality of evidence reducing.”

The removal of limitation period for child abuse claims is not supported by the Scottish Law Commission for exactly these reasons.

In a discussion paper on limitation and prescription for personal injury claims, the Scottish Law Commission acknowledged that a key justification for limitation periods is that of legal certainty. It went on to say:

“It is appropriate that there should come a point at which businesses, public authorities and insurance companies should be able, in reasonable safety, to ‘close their files’ and dispose of records. People have an important interest in being able, after the lapse of a particular period of time, to arrange their affairs with some confidence that claims can no longer be made against them.”

We endorse that opinion but note that this impact is not just about insurance premiums. Of the organisations providing care services for children who responded to the 2015 consultation, 75% opposed the removal of historic abuse cases from the current limitation regime.

We therefore do not believe the abolition of limitation is a proportionate or correct response to the issue identified by Scottish Ministers.

Q2. What will the impact of the new exemption on i) victims of historical childhood abuse who could bring claims; ii) the individuals, organisations and insurers who might be involved in defending claims; and iii) the Scottish courts?

(i) The impact of the new exemption in victims of historical childhood abuse is likely to be to raise hopes which are later disappointed when the case does not come up to proof – adding to the suffering and anxiety of victims and survivors of childhood abuse.

(ii) The impact of the new exemption for organisations and insurers who might be involved in defending claims could be significant.

Legal costs of pursuing and defending historic claims are much greater than those relating to more recent events. Investigations have to be made into the re-structuring of organisations to identify the current repository of responsibility for historic conduct, documents have to be searched from disparate sources and witnesses have to be traced. This applies to both pursuers and defenders and the paying party will face a significant additional increment to their costs liability as a result of allowing cases to proceed, when it would not have been equitable to allow them to do so under the 1973 Act.

The outcomes of cases pursued on the basis of old evidence are not of the quality that should determine the rights and responsibilities of parties. This position has been supported by Lord Pentland in the case of *Prescott v St Andrews* [2016] who stated in paragraph 42:

The process of attempting to remember events in the distant past is an inherently fallible one; it is a process that is highly susceptible to error and inaccuracy. Our efforts to think back many years to recollect the details of past events are liable to be affected by numerous external influences; involvement in civil litigation can in itself operate as a significant influence.

Limitation periods exist to prevent the potential injustices of this situation and should be preserved in cases for childhood abuse with appropriate guidance for the courts to allow suitable cases to proceed. We are concerned that Judges will find themselves having to determine a factual position based on poor documentation and unreliable accounts.

It is important to note that the impact of this change is not limited to Insurers. Organisations whose insurance policies did not indemnify them against such claims, or who chose not to purchase insurance and self-insured their risks could face significant financial implications. Compensation awards for successful claims against the organisations would have to be met from current financial resources if no provisions have been made for historic abuse claims. These organisations would also need to meet the additional legal fees associated with investigating and defending a case where the evidence is harder or impossible to trace, where relevant witnesses need to be traced involved in defending claims, and the administrative costs of verifying records in order to establish the validity of a claim.

Organisations exposed to an increased volume of historical childhood abuse claims could see their insurance premiums rise in future due to an increased risk of claims against Public Liability or Employer Liability policies. This could increase the overheads for organisations and further reduce their current reserves and their ability to fund the delivery of services for children.

The impact for insurers would be a new liability against policies which were previously considered closed. Financial liabilities would need to be met from current financial reserves where provisions had not been made to anticipate the raising of historic claims, particularly those that have been previously dismissed. Insurers would also face the significant additional legal costs associated with defending claims where the passage of time would previously have meant it was inequitable to allow them to proceed.

The abolition of limitation could change the insurance market in Scotland by increasing the risk of historic claims being raised and the subsequent increase in costs for insurers outlined above. Scotland would likely become a less competitive and therefore more expensive market in which to write and therefore buy insurance.

We have concerns about the quantum of cases and their value as set out by Scottish Ministers in Paragraphs 12 to 23 in the financial memorandum accompanying the Bill. The estimate in Paragraph 20 of 2,200 historic claims likely to be raised in the courts fails to take into account the potential effect of the Bill in encouraging more cases to be brought or of previously heard cases to be resurrected. Scottish Ministers therefore seem at risk of considerably underestimating the total number of cases raised as a result of the Bill and the financial implications for public funds including Legal Aid, and the budgets of local authorities, the Scottish Government and other public bodies.

Scottish Ministers do not appear to have used any independent actuarial estimates in the calculations cited in the financial memorandum. We would ask why Scottish Ministers have not sought actuarial advice on this point and whether they intend to address this before the end of Stage 1.

The Policy Memorandum states in paragraph 107 that Scottish Ministers are satisfied there will be minimal direct impact on local authorities. However, the Convention of Scottish Local Authorities (CoSLA) and the Association of Local Authority Risk Managers (ALARM) have both expressed concerns that the financial impact of the Bill on local authorities could be significant, and in one estimate exceed £300m. We note that under paragraph 29 of the financial memorandum, Scottish Ministers do not intend to make any additional provisions for these unanticipated costs under the “new burden” rules.

We would expect the Committee to explore the analysis supporting the anticipated cost of £616,000 to the Scottish Legal Aid Board.

The financial memorandum estimates the total quantifiable costs to the Scottish Administration and others as £1,017,400 however the accompanying analysis does not anticipate any claims against Scottish Ministers as the ultimate defender in claims of abuse in former approved schools, borstals or other young offenders’ institutions.

(iii) The impact of the Bill on the courts in Scotland will be profound.

The current legislation prevents cases from coming to court which it would be inequitable to allow to proceed. Removing the limitation cases will mean that such cases can and will proceed to be tested in court, subject only to the two exceptions created in clause 17D.

Under the current regime, where the pursuer is time-barred (and the defender has raised this in the defence of the claim) then a court may elect to determine whether to exercise its discretion under section 19A of the 1973 Act at a preliminary hearing or at a rolled up hearing, at the same time as considering the pursuer's substantive claim.

However, the removal of the limitation period will lead to an increase in claims resulting from events which took place years, even decades, before they are heard. This will place considerable pressure on the courts, as well as judges who are likely to be

regularly placed in the unenviable position of having to determine a claim where the quality and availability of evidence has all but disappeared due to the amount of time that has elapsed since the events complained of.

Courts will be trying cases where, though it is possible to have a fair trial, the quality of the evidence simply will not allow the facts to be established on the balance of probabilities. The additional burden on court time and resources of cases historic cases which ultimately do not result in compensation to claimants is likely to be considerable.

Cases where the claim is valued at less than £100,000 would presumably be allocated to the All Scotland Personal Injury Court. We understand this court already faces significant challenges in handling its case load and would question its capacity to take on additional and complex historic abuse claims.

Q3. The Scottish Government consulted on whether the proposed exemption in the Bill should cover all children or be restricted to those abused in a care setting. The Bill takes the wider approach – do you agree with its proposed scope in this regard?

We did not express an opinion on this question in the 2015 consultation. We are not qualified to offer a view on the proposed scope of the Bill in this regard. Our concerns are with the principles of the Bill and the consequences of abolishing limitation.

Q4. Do you agree with the definitions of “child” and “abuse” found in the proposed new section 17A (2) of the 1973 Act (which would be inserted by section 1 of the Bill)?

We agree with the definition of child as an individual under the age of 18.

However, the definition of “abuse” should be amended before the Bill is passed. The definition offered for ‘abuse’ in the revised draft is different from that used in previous Scottish legislation in analogous fields i.e. the Children (Scotland) Act 1995 and the Children and Young Persons (Scotland) Act 1937.

We agree with the removal of “neglect” as a type of abuse from the previous draft Bill as this posed considerable questions about the definition of neglect and its application in this context. However, the current clause 17A (2) states that abuse “*includes* sexual abuse, physical abuse and emotional abuse,” (our emphasis), raising the possibility of unintentionally re-introducing an undefined concept of “neglect” by the back door. The concept of physical injury caused by emotional abuse should be clarified and defined. In addition, the non-exhaustive nature of this list creates scope for further unintended types of claim being included in the extra-ordinary disapplication of the limitation period. Given that the importance of the principle of legal certainty and the decision to treat cases of childhood abuse exceptionally by removing any time bar, the category of claim to which that relates should not be open-ended. We would propose clause 17A (2) is amended by replacing “includes” with “comprises” or “means” to properly confine and provide greater clarity to the definition of abuse.

Q5. *The exemption in the Bill does not just apply to entirely new claims. Section 1 of the Bill (which would insert a new section 17C into the 1973 Act) allows claims previously raised but found to be time-barred to be raised again under the new regime. What are your views on this aspect of the Bill?*

We have expressed our serious concerns about the removal of the limitation period and the erosion of the fundamental rule of law that entitles individuals and organisations to legal certainty. These concerns are multiplied for cases which have previously been dismissed and which section 17C would allow to be resurrected. We consider that resurrecting previously determined cases, offends not just the fundamental principle for legal certainty but also the principle of *res judicata*; namely that matters already judged should not be re-litigated. These principles are central tenets of Scots law and enshrined in the European Convention of Human Rights. It is telling in this regard that the retrospective application of section 19A of the 1973 Act was limited to decrees of dismissal only in recognition by the Westminster law officer of the finality of a decree of absolvitor.

The decision to introduce a right to resurrect claims previously disposed of by decree of absolvitor challenges a fundamental principle of Scots Law - that the pursuer's claim has been rejected by the court. The pursuer cannot raise the same claim against the defender another time. Paragraph 45 of the policy memorandum recognises that "certainty and finality are important legal values" but then proposes that they are discarded in the Bill.

If decree of absolvitor is to be overturned in the case of historic abuse claims then that could set a precedent for further exemptions at a later date. The Scottish Government is unable to give any assurances on this and we would ask the Committee to consider the implications of this proposal in the Bill.

The Rule of Law is referred to in the preamble to the Convention of Human Rights and, while Article 6 is concerned principally with the right to a fair trial, the case of *Ryabykh v Russia* (2005) 40 EHRR 25 is authority for the principle that the protection of Article 6 would be meaningless if a Contracting State's domestic legal system allowed a final binding judicial decision to remain inoperative to the detriment of one party" (at p624).

The erosion of the rule of Law in Scotland could set a damaging precedent for extension to other classes of claim, about which Scottish Ministers are unable to give any reassurance; removing the ability of individuals and organisations to rely on legal certainty in Scotland and thus making it a less attractive place to live and do business.

We note that the 2015 consultation found that less than a third of respondents supported this proposal and so would question the evidence Scottish Ministers have for including it in the Bill.

We agree with Scottish Ministers that in cases where the pursuer previously raised a case and received an award in excess of their legal expenses then the pursuer should

not have a right to raise that action again. We welcome section 17C (4) (iii) and section 17C (5).

Q6. Section 1 of the Bill (which would insert a new section 17D into the 1973 Act) empowers the court to dismiss a case in two specific sets of circumstances. These are where the defender can demonstrate either that i) it would not be possible for a fair hearing to take place; or ii) the defender would be subject to “substantial prejudice” if the case did proceed. What are your views on the proposed new section 17D?

Section 1 of the Bill would set too high a bar for defenders to demonstrate that a case against them should not proceed. We believe this would affect defenders right to a fair trial.

In their response to the 2015 consultation Scottish Ministers stated that “It is important to emphasise that a pursuer would still need sufficient evidence i.e. enough evidence to support and prove their claim in court.” This is true of all claims but limitation periods are a necessary safeguard against historic claims.

In the first version of the draft Bill published in March 2016 and in their response to the 2015 consultation Scottish Ministers acknowledged that the Scottish courts cannot act incompatibly with Convention rights including Article 6, the right to a fair trial. Scottish Ministers proposed an “express filter” that the court may not allow such an action to be brought if it would breach a defender’s Convention rights. The Bill no longer features an express filter but as stated above notwithstanding the legislation affects defenders right to a fair trial.

For understandable reasons, some abuse claims are pursued many years after the events complained of and after the expiry of the primary limitation period. There may be a perceived unfairness where a pursuer is time-barred and the court, having considered the pursuer's reasons for not commencing proceedings earlier, decides not to exercise its discretion pursuant to section 19A of the 1973 Act. But it is also important to preserve the rights of the defender not to be exposed indefinitely to the threat of litigation. The rights of the pursuer and the defender should be balanced, even allowing for the particular sympathy for an individual pursuer or, in the case of the Scottish Government’s proposal, a class of pursuers.

As stated above, there are strong public policy reasons against perpetually exposing persons to litigation for wrongful acts. Whilst there are those who consider the existence of a primary three year time-bar unduly restrictive for pursuers, the Courts currently have the power to exercise their discretion to override the time-bar where it appears ‘equitable to it to do so’. If this discretion has not been exercised sufficiently often, the answer is to issue guidance, in legislative or other form, on the factors which ought to prompt the exercise of the discretion rather than to throw out the limitation period altogether and the fundamental principles of the rule of law that go with it.

Further, a non-exhaustive list of circumstances in which a court may exercise its discretion pursuant to section 19A of the 1973 would mean that its discretion is entirely unfettered, and thus a judge must consider each case on its own merits. There are recent cases such as A v N 2015 CSIH 26, where the courts have exercised their discretion under section 19A.

The carve out provided by section 17D(2) where the defender satisfies the court that “it is not possible for a fair hearing to take place” sets too high a bar and misses in its attempt to comply with Article 6 of the ECHR. Article 6 provides that parties are entitled to a fair and public hearing. Having to prove that such a hearing is impossible is not the same. What does “impossible” mean for these purposes? Requiring proof of a negative is not the same as preserving a positive right. A wording which less closely reflects article 6 but is more specific to the issue in question would be preferable. An example of such wording might be that the defender need show that “a fair hearing of the issues in the action is not possible”.

Further, one of the reasons cited is that criminal trials proceed long after the events and are subject to the same fair hearing requirement. But the difference there is that there is always a live accused fit to stand trial – whereas in these cases that is not always so.

Similarly, the concept of “substantial prejudice” in section 17D(3) sets the bar for discontinuing actions too high. We are not clear what is meant by the addition of “substantial” in this context. Substantial prejudice relates only to prejudice from the change in the law, not prejudice from the loss of evidence. Even then, it has to be balanced with the interests of the pursuer. We are not clear how it can it be right for a case to proceed where a court holds that a defender will be substantially prejudiced, but that it is in the interests of the pursuer for it to proceed. The scope for satellite litigation on that subject is manifest.

In attempting to address a judicial reluctance to exercise the section 19A discretion, instead of issuing guidance to ensure that suitable cases of historic child abuse succeed, the Scottish Parliament is proposing to remove the limitation period and with it principles of the rule of law which ought to be sacrosanct. For this reason we consider the carve approach taken and the restricted nature of the carve outs in section 17D are a disproportionate means of achieving the legitimate aim of the legislation.

In giving consideration to the above questions, we think it would be beneficial to develop a Pre Action Protocol specifically relating to abuse claims, which could also include physical, emotional and sexual abuse. In our experience Pre Action Protocols can help to clearly establish expectations for both claimants and defendants by setting out what will be needed and when with clear timeframes for response. This approach could assist in establishing a transparent approach which would not deter victims and survivors of abuse from bringing claims while ensuring that these sensitive matters are considered fairly by all parties.

Association of British Insurers
13 January 2017