

Justice Committee

Limitation (Childhood Abuse) (Scotland) Bill

Written submission from the Glasgow Bar Association

The Committee has identified 6 key issues and asked that Responses address all or any of them. We would propose to deal with all 6, and to do so as follows:

- 1) No, we do not agree that cases be removed from the limitation regime set out in the 1973 Act. This is because it is unnecessary to do so, due to there being a provision already within the Act that should have the effect of stopping such cases from being time barred. Ordinarily, any claim for personal injuries is subject to time bar by limitation after 3 years (under Section 17 of the 1973 Act). But this is subject to Section 19A of the same Act, which empowers the court to allow an otherwise time barred claim to be brought where it is equitable to do so. A good example of the exercise of this power (and of why this Bill is unnecessary) is *EA v GN* [2013] CSOH 161 in which “The defender subjected a 7 or 8 year old child, a member of his own family, to reprehensible sexual conduct.” The victim’s uncle (the defender) moved into her home and abused the pursuer until September 1997, when she was almost 30 years old. Her action against him was not raised until 2004. The Lord Ordinary, Lord Kinclaven, considered that the uncle had “produced a state akin to dependency and used controlling behaviour which was liable to confuse and perplex.” He considered that in all the circumstances it was equitable to allow the claim to proceed late in terms of S19A and he awarded large damages.
- 2) Victims of historical childhood abuse already have a means of bringing claims, as the case above demonstrates. Equally, defenders, and their insurers already face the risk of such claims being raised. Regarding the courts, the likely impact may be to increase the number of such claims being raised, because whereas the onus lies on the pursuer under S19A (ie to show that a late claim should proceed) it lies on the defender under the proposed S17D; a defender would have to show that a fair hearing would be impossible or that he or she would be subject to “substantial prejudice” if the case were to proceed. Also, the Bill enables claimants to re-raise cases, and to overturn the finality of court decisions that have already been taken. This may also increase the number of claims brought.
- 3) We do not see the need for an exemption at all, whether abuse occurred in a care setting at all. The setting would seem to us to be irrelevant. The victim in *EA v GN* was not in care.
- 4) We do not agree with the definition of child found in the proposed S17A(2). The definition there is that of anyone under 18. The standard definition of child in Scots law (*The Age of Legal Capacity (Scotland) Act 1991*) is anyone under 16. We cannot see any good reason to depart from that definition in this Bill. Regarding the definition of “abuse”, this is fraught with uncertainty. Interestingly, the Bill does not attempt to give an exhaustive definition.

- 5) We are opposed to the re-opening of claims previously found to have been time barred. This kind of legislation, having retrospective effect, is not desirable in any legal system. There should be certainty and finality. Also, we are opposed to the re-opening of claims that have already been settled. Parties were entitled to assume that a contract of settlement would stand. Allowing them to be overturned now undermines confidence in our system of negotiating and concluding agreements.

- 6) Section 17D is necessary if the Scottish Parliament decides to enact the rest of the Bill, because there needs to be a safeguard against a defender facing a claim in circumstances where that defender cannot obtain a fair hearing. That is particularly so where the claim concerns events alleged to have taken place decades before, where alleged perpetrators or witnesses have died or become incapax or where evidence is lost through the passage of time.

The Glasgow Bar Association
8 January 2017