

Justice Committee

Limitation (Childhood Abuse) (Scotland) Bill

Written submission from Zurich Insurance plc

Zurich has been involved in the handling of child abuse claims on behalf of its customers for many years. Zurich agrees with the Scottish Government's aim "to improve access to justice for survivors of childhood abuse" and to create a fair civil justice system for all. The ability to have a fair trial is of fundamental importance. Limitation grounds should not be an artificial and restrictive time limit, which presents a technical barrier to claims which can be fairly evaluated. However, we urge caution that the removal of the current three year limitation period may lead to considerable unintended consequences. We therefore welcome the opportunity to assist the Scottish Government and provide our comments on the proposed Bill.

1. 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 appreciate that there are victims and survivors who, where defenders explore a limitation defence, see the exploration itself as casting doubt upon the credibility of the allegations made. What we wish to draw out in the responses below is that, although in many cases limitation may be explored by defenders and their representatives, limitation grounds are used at trial in only a very small proportion of cases where it is considered that the lapse of time and lack of evidence would be prejudicial to a fair trial. We would like to point out at the outset that limitation grounds are generally explored in cases more to assess whether the lapse of time and potential evidence may prejudice any party rather than to take a view on the credibility of the allegation made.

We are aware that there are understandable reasons why it may take many years before victims and survivors of abuse bring claims in the civil justice system. We are also aware of the 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. However, we consider that it is also important to preserve the rights of the defender not to be exposed indefinitely to the threat of litigation or to a trial where they may not be able to defend themselves because of the lapse of time. The rights of the pursuer and the defender should be balanced, whilst remaining sympathetic to the pursuers' claim. Consequently, our current practice is to examine each claim on its merits and we frequently agree extensions to limitation periods with pursuers and their representatives.

Limitation periods do play an important role in the civil claims process generally. The timely lodging of claims is in the best interests of all parties in order to secure evidence, witnesses, and potentially to learn promptly from what has been established. We consider that with the removal of cases relating to historical childhood abuse from the current limitation regime there is considerable potential for unintended consequences, which would affect wider public interests in relation to limitation periods and existing judicial discretion. Furthermore, we are not aware of

widespread instances where the existing use of judicial discretion has been insufficient to afford appropriate access to justice and the blanket lifting of limitation controls appears to be disproportionate.

The Courts currently have the power to exercise their discretion to extend time limits where it appears 'equitable to it to do so'. We consider that this discretion has not been exercised as often in Scotland as it is applied in the courts of England and Wales. We therefore advocate greater guidance on the judicial exercise of this discretion in place of the removal of limitation from historical child abuse cases. Should the Scottish Government proceed with the proposed legislation, we recommend that the Government should also introduce a pre-action protocol to encourage and ensure the swift resolution of claims.

If there is to be legislation, it should be coupled with a pre-action protocol to ensure that there is a procedure for early disclosure of the basis of a claim, sufficient evidence of causation of injury and information on the quantification of a claim. That will allow defenders to reach an early view on breach of duty, causation and quantum and to maximise the prospects of a swift resolution without the need for protracted, distressing litigation. It is important to avoid the position where the legislation introduces a separate set of preliminary issues on whether a fair trial is possible, which could have an impact on victims and survivors.

Our primary concerns with the proposed Bill are as follows:

- Where there is a lapse of time in bringing a claim the Bill will introduce challenges in conducting a fair and equitable trial. If a claim is not submitted for an extended period of time after an alleged event then it becomes ever more likely that any reasonable opportunity to properly investigate the allegations will be lost and documents, record and witness recollection may not be available. In the absence of corroborative evidence for both sides, there is potential prejudice to the defender and the judge may have difficulty finding for the pursuer.
- The impact of being falsely accused of child sexual abuse must not be understated. The Scottish Government may wish to consider the recent paper published by the University of Oxford Centre for Criminology entitled "The impact of Being Wrongly Accused of Abuse in Occupations of Trust: Victims Voices". This can be found at the following address:

https://www.law.ox.ac.uk/sites/files/oxlaw/the_impact_of_being_wrongly_accused_of_abuse_hoyle_et_al_2016_15_may.pdf

- The Bill will create a significant practical and financial burden upon the resources of the court system, defenders and the insurance industry. Those defending these cases would need to divert considerable time, resources and funds from meeting current needs in order to investigate and respond to these claims. This may impact on the future availability and cost of liability insurance cover for organisations both large and small, and as a consequence their ability to continue to provide their important services on an ongoing basis.

- Paragraph 29 of the Financial Memorandum, states that “the Bill does not include a policy or initiative which increases the cost of providing local authority services, nor does it impose any new administrative duties or obligations on local authorities and so there are no direct costs to local authorities as a result of the Bill”. Our view is that the Bill would have a considerable impact on local authority, charitable and sports organisations in terms of potentially having to consider allegations relating to incidents over 50 years ago. There would be a requirement for the maintenance of records for an indefinite period of time, particularly in the absence of national guidance of the issue of document retention.
- It is possible that in the absence of national guidance on document retention policies, satellite litigation will be generated as seen in the English case of *R(C) v Northumberland CC & Anor [2015]*. The council were challenged over the validity of a 35 year retention policy.
- The removal of limitation will have a significant impact on the child’s “right to be forgotten”. Even if not directly involved in the abuse, for an indefinite period of time, the child could still be called as a witness on future claims. Many children do not wish to revisit their period in care, having moved on with their lives.
- As stated previously, Zurich favours greater judicial guidance on the exercise of discretion rather than the removal of limitation. This can be done by either legislation and/or guidance from the Scottish Civil Justice Council. Lessons can be learnt from the judicial interpretation in England and Wales. It is important to state that 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 in Scotland.
- If the changes are made as proposed then the legislative position in Scotland will differ from that in England and Wales. The position in England and Wales where the judiciary exercise their discretion to extend time in our view works well. This position is heavily influenced by the House of Lords decision in *A v Hoare [2008]* (issued after the *Sisters of Nazareth*). Since *Hoare*, a more collaborative approach has been adopted between claimant and defendant in England and Wales and this could be replicated in Scotland, particularly with the introduction of a bespoke Pre-action Protocol.
- The absence of limitation may prompt delay in raising claims, which in turn may have an impact on justice. Delay often leads to witnesses no longer being available to give evidence and documentary evidence being lost. The current limitation provisions encourage the resolution of cases within a reasonable time period, which is in the interests of the pursuer, defender and wider public. The impact of delay can be seen in the England & Wales case of *RE v GE [2015]*. Judge Harris, when considering the claimants lack of proactively prosecuting her claim stated:

“One cannot put a cause of action onto a shelf with a view to taking it down again sometime later in the indeterminate future when you feel like using it.”

- The exemption of some abuse cases from the current limitation provisions will create inconsistency, injustice and invites challenge for exemption of other types of claim. In particular we anticipate that parliament will be invited to consider removing limitation for other categories of claim including those involving the abuse of adults, other forms of injury to children, and other categories of claim such as industrial diseases.
- Pre 2001, an employer was not held vicariously liable for the criminal actions of employees abusing children in their care. The Bill will create both confusion and prejudice on the basis that the employer would not have otherwise been held responsible if the claim had been raised at the time. Removing the limitation period would significantly prejudice such employers, often local authorities & charities, who would not have been held liable had the claims been brought in good time. Frequently, these institutions had taken all reasonable and practicable safeguarding measures.
- There are very few experts specialising in this area of work. Consequently, any increase in the number of child abuse claims being brought will impose significant pressure on an already limited resource.

2. *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) We consider that the pursuers will be better placed to respond to this question. However, we believe that there is considerable potential for associated unintended consequences.

We refer again to our concerns raised in the previous question. Following implementation of the Bill, there is likely to be a significant period of satellite litigation to establish the judicial interpretation of a number of key terms within the bill e.g. “fair trial”, “substantial prejudice”, and importantly how the judiciary will interpret the case in the absence of any cogent evidence, e.g. witnesses, records etc.

One real concern is that for some pursuers, their experience of the judicial process as applied to their claim may be more distressing and more lengthy. There is a significant risk that pursuers will fail at trial due to the paucity of evidence, an issue that may have been addressed earlier under the current system.

ii) Defenders will have to defend cases where they are significantly prejudiced in making their defence through the passage of time. The resultant growth in litigation will use up time and resources to the detriment of current needs in organisations which bear little or no resemblance to those which existed when abuse occurred.

There are many practical challenges that arise from cases proceeding so long after the events complained of, which may effectively result in incorrect determinations including:

- Lost records and evidence

- Inaccurate recollection
- Increased litigation and court time / cost
- Difficulties in identifying insurance cover and reserving accurately

It is inevitable that more claims will be made should the limitation defence be removed. This is acknowledged at paragraph 25 of the Financial Memorandum.

Currently there is no pre-action protocol to deal with claims for childhood abuse. Such protocols usually promote the exchange of information at an early stage and may encourage early resolution without the need for litigation. Without these procedures in place, more actions will be raised.

Public liability Insurance is not compulsory. Many organisations may have been uninsured, self-insured or unable to trace cover for periods of alleged abuse. Some insurers are no longer in existence and, in the absence of insurance arrangements, the organisations and charities will be required to meet the costs of defending the claims.

It is important to understand that many organisations, particularly Local Authorities, will carry significant deductibles (excess) on their Public Liability Insurance Policies. Accordingly, the majority of these claims will fall within the deductibles and for the organisations to meet financially. It is only once a claim exceeds this deductible that the Insurers funds will be called upon. These deductibles usually include own costs, pursuers costs and damages. Therefore this financial burden will exist even where claims are successfully defended. It is anticipated that the majority of claims will be legally aided and it is highly unlikely that the defenders will be able to recover their expenses from the other parties.

Some organisations may experience increasing challenges in securing ongoing insurance cover at a sustainable cost.

iii) It is likely that there will be a marked increase in court time required to examine such historic evidence to determine whether breach of duty and causation have been established. The judiciary is likely to be placed in the unenviable position of having to determine the veracity of the pursuers' claims in the absence of any cogent evidence to support their allegations.

Furthermore, there is likely that increased court time will be devoted to hearing cases where the two exceptions created by clause 17D applies.

3. *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 agree that the Bill should cover all children. A distinction between children abused by a family member and children abused in care in terms of limitation is hard to justify.

Zurich is concerned that in this wider scenario many claims may be uninsured. That is likely to be the case for domestic abuse in particular. In a domestic setting, the child may have been abused by the family member or by the foster parent. Domestic Insurance policies will not cover the criminal actions of the abuser. Similarly, abuse by foster parents is usually beyond the scope of the Institutions' Public Liability policy. In accordance with case law, institutions are not vicariously liable for foster parents as they are not considered employees of the Institution.

Zurich is concerned that the Bill runs the risk of giving victims a false expectation of reparation when in fact there may be no financial resource available to the defender due to the lack of insurance cover.

4. 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)?

Child

Zurich has no objection to the definition of "child" as set out within the Bill.

We do however wish to highlight that this definition is at odds with existing Scottish Legislation. The age of majority under the Age of Legal Capacity (Scotland) Act 1991 is 16, which is also the age from which time starts to run under section 17 of the Prescription and Limitation (Scotland) Act 1973. It may be considered inconsistent to adopt a different age for the purposes of a revised limitation regime.

Abuse

The Bill provides for a non-exhaustive definition of "Abuse". In order to avoid "inadvertently extending the scope beyond what was intended" (paragraph 82 policy memorandum) and any unnecessary litigation revolving around the definition of "Abuse", we consider that "Abuse" should be strictly defined as "Physical", "Sexual" and, if appropriate, "Emotional" abuse. "Physical" and "Sexual" abuse can be defined through reference to existing case law. Emotional abuse cannot be so easily defined and is simply too vague in its current draft. Given that the injury must amount to an actionable harm, usually a type of recognised psychiatric disorder, it is not clear what the term emotional abuse envisages.

5. 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 understand that many pursuers feel let down where claims made in the past have been time-barred and we appreciate that the Government is looking at whether this issue can be revisited. There are a number of wider considerations to the issue that we outline below.

Where previously submitted claims were abandoned and a decree of absolvitor was pronounced, the defenders in those cases have a legitimate expectation that this

position was final and should not be open to re-examination on the basis of a change in limitation rules. It would also be understandable that those defenders may have destroyed their own evidence regarding any claim as having been investigated and closed. They may then face a greater degree of prejudice at any second hearing of the same claim, years later.

The Scottish Law Commission report in 2007 noted that retrospective legislation has always been regarded as undesirable in principle: “Retrospective legislation is undesirable because it tends to disturb previously existing legal relationships; people have, naturally, conducted their affairs on the basis of the law in form at the time, and altering this retrospectively is unfair and destructive of legal certainty.”

Furthermore, if the Scottish Government chooses to include this aspect of the Bill, pursuers who entered into an early settlement due to the limitation issues that their claim faced may be unfairly prejudiced for this decision relative to pursuers whose claims were struck out by the court.

The Supreme Court has also recently held that whilst a retrospective amendment of existing law does not necessarily make it incompatible with Article 1 Protocol 1 of the European Convention on Human Rights, there does need to be some form of special justification, which does not exist in this instance.

The Bill, if enacted, would amount to an interference with the defenders’ rights. In particular, we are concerned that allowing actions to be re-raised in the circumstance where there is decree of absolvitor (i.e. where the case has been determined against the pursuer at trial) is a fundamental interference with the rule of law and the principle of certainty.

This retrospective change will have significant financial implications for many self-insured and un-indemnified organisations. Many organisations will not have set aside funds to deal with this new financial risk.

It will create practical issues for institutions. Insurance cover history during this historic period may be difficult for Institutions to identify. This has been shown for other classes of claim where knowledge of injury has not been evident for many years after a harmful event, e.g. the exposure to asbestos.

Local Authorities will have particular challenges over insurance cover, records retention, staffing records due to local government reorganisations over the historic period. Again this will have an administrative and financial impact for these organisations.

6. 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?

We welcome the inclusion of a fair hearing defence. However there is a substantial risk that defenders will only establish that there is no prospect of a fair hearing after significant time and expenditure.

The substantial prejudice defence is currently unclear in scope and effect. The Explanatory Notes state that this defence will only apply where the prejudice arises from the application of the new law to cases about abuse, which occurred prior to commencement of the Bill. It does not state that it will apply in cases where a party has been prejudiced due to the lack and availability of evidence. Arguably any defender who would have previously been able to rely on a limitation defence will be prejudiced from the proposed change in law.

Importantly, it is our view that Section 1 of the Bill would impose an unreasonably high burden for defenders to demonstrate that a case against them should not proceed. We believe this would affect a defenders right to a fair trial and is contrary to principles of natural justice.

In *Sayers v Lord Chelwood (deceased) & Lady Chelwood [2012] EWCA Civ 1715* Para 55, Lord Justice Jackson summarises the courts discretion:

“In *Horton v Sadler* and *A v Hoare* the House of Lords stressed that the court’s discretion under section 33 of the Limitation Act is broad and unfettered. In my view these comments make it difficult to maintain that the claimant’s burden under section 33 is necessarily a heavy one”.

In the House of Lords case of *Horton v Sadler [2006] UKHL*, Lord Bingham, when considering prejudice states:

“In choosing between these outcomes the court must be guided by what appears to it to be equitable, which I take to mean no more (but also no less) than fair, and it must have regard to all the circumstances of the case and in particular the six matters listed in subsection (3)”.

The principle of “substantial prejudice” appears to go far beyond equity between the respective parties.

It is acknowledged that there are strong public policy reasons against perpetually exposing persons to litigation for wrongful acts. The Courts currently have the power to exercise their discretion to override the time-bar where it appears ‘equitable to it to do so’. We consider that where discretion has not been exercised sufficiently often, guidance in legislative or other form, on the factors which ought to prompt the exercise of the discretion should be provided to the judiciary. We do not consider that the removal of the limitation period altogether and the fundamental principles of the rule of law that go with it is a just and proportionate response.

Zurich Insurance plc
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