I am writing in response to the Justice Committee’s Stage 1 Report on the Limitation (Childhood Abuse) (Scotland) Bill. I would like to thank the Committee for its careful and detailed consideration of the Bill. I am pleased that the Committee supports the removal of the three year limitation period for civil actions resulting from childhood abuse. As the Committee has noted, the current limitation regime has created an insurmountable barrier to access to justice for survivors. I welcome the fact that Committee has recommended that the general principles of the Bill should be agreed to by the Parliament.

I would like to respond in more detail to the specific issues raised and the recommendations made in the Report. My comments below follow the main headings in the Report.

**Removal of the three year limitation period for childhood abuse cases**

I welcome both the Committee’s support for the proposal to remove the limitation period in childhood abuse cases and its conclusions in relation to concerns about interference with legal certainty. I note that the Committee has drawn similar conclusions to the Scottish Government in this regard. I also agree with the Committee about the importance of appropriate support being available to survivors. Our vision is that all survivors should be supported to have equal access to integrated care, support and treatment resources, and services which can reduce the impact of the inequalities and disadvantage experienced as a result of abuse.

Decisions regarding civil actions are complex and anyone faced with such a decision needs quality, impartial advice and guidance. We are currently in active discussions with the Law Society of Scotland on how we can best raise awareness among solicitors about the very particular issues involved in these cases and how they can become better equipped to support survivors. We are also currently planning an event, with the Law Society, which brings together the legal profession with professionals in survivor support organisations to ensure there is mutual understanding and sharing of knowledge.

I recognise that some survivors and witnesses may find it difficult to give evidence. They may be particularly vulnerable because of their circumstances or the nature of their evidence. Special measures are available to help vulnerable witnesses give the best evidence they can: these include a screen in the courtroom, use of a TV link to somewhere outside the courtroom, and access to a supporter. An application can be made to the court for such special measures to be used in particular cases.

As the Committee notes, the removal of the limitation period will not assist survivors whose right to claim compensation has been extinguished through the law of prescription, which is relevant to abuse that took place before September 1964. That
is because the significant legal issues and the human rights legislation made it impossible to establish a sustainable way forward in relation to such cases. I regret that it is not possible to legislate to revive the prescribed rights of the survivors of pre-1964 abuse. I have immense sympathy for survivors who will still be unable to raise an action. This is a very difficult issue and I was heartened to hear that the survivors who gave evidence to the Justice Committee understood these difficulties.

As the Committee will be aware, we have committed to a formal process of consultation and engagement, led by CELCIS (Centre for Excellence for Looked After Children in Scotland), with survivors and other relevant parties on the question of financial redress for in-care survivors. This includes redress for survivors abused prior to 1964. This process will fully explore the issues and gather a wide range of views.

**Key definitions in the Bill**

The Scottish Government welcomes the Committee’s support for the Bill’s definition of a child and for the removal of the limitation period for cases of childhood abuse regardless of the setting where abuse took place.

I also welcome the Committee’s support for the Bill’s use of a non-exhaustive definition of abuse. I found the evidence in the Committee on the definition of abuse to be of great interest; in particular I was struck by the account of what was described as spiritual abuse. It is important that we recognise that survivors have suffered a range of forms of abuse and that survivors should be able to pursue claims where they have a right to damages. Leaving the definition of abuse non-exhaustive, as we have, will allow the courts to make the necessary judgement.

I note concerns about the uncertainty around the term “emotional abuse”. As we set out in the Policy Memorandum, we acknowledge that it can be challenging to define and prove emotional abuse. What we are concerned with is abuse that seriously damages a child’s emotional health and development. As an example of what it can include, the NSPCC\(^1\) describes emotional abuse as:

> “the on-going emotional maltreatment or emotional neglect of a child. It’s sometimes called psychological abuse and can seriously damage a child’s emotional health and development. Emotional abuse can involve deliberately trying to scare or humiliate a child or isolating or ignoring them”.

It will ultimately be for the court to decide whether a case presented to them involves emotional abuse. We agree with the Scottish Human Rights Commission (SHRC) which stated in its written submission\(^2\) that the Scottish courts are well placed to make assessments on a case by case basis about whether a case meets the relevant threshold to constitute ‘abuse’.

I am grateful to the Committee for raising the question of whether to explicitly include neglect within the definition of abuse in the Bill. I have listened carefully to the

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\(^2\) [http://www.parliament.scot/S5_JusticeCommittee/Inquiries/SHRC.pdf](http://www.parliament.scot/S5_JusticeCommittee/Inquiries/SHRC.pdf)
evidence presented to the Committee on this issue and I recognise the importance of being clear about the intentions behind the Bill. It is important to keep in mind, when looking at other definitions of abuse in other contexts, that each definition is designed for its own purpose. Decision about definitions made in a criminal context may not automatically translate to a civil context. Nonetheless, I will continue to reflect carefully on this issue.

Retrospective application of the Bill

Existing rights of action

With regard to the question of whether the Bill would allow claims to be brought in respect of conduct which would not (according to the law applicable at the time) have constituted an actionable harm, it is important to remember that all the Bill does is remove the limitation period for a certain category of actions. It does not change the ordinary rules of delictual liability, evidence and procedure.

If, for example, a pursuer claims damages based on physical abuse then the pursuer would have to show that the abuse gave rise to delictual liability when the injury took place. This would be judged against the standards relevant to that time, such as what was considered as “reasonable chastisement” at that point, not what is considered unacceptable according to today’s standards. I am of the view that the courts are well placed to make assessments according to the standards of the time. This may involve parties leading evidence to demonstrate what could be considered standard practice at the time or what should be considered cruel, inhumane and degrading treatment within the prism of the standards of the time.

It is worth noting the SHRC’s evidence to the Justice Committee:\textsuperscript{3} “for the cases that we are talking about here, the ones that would lead to damages for personal injury would generally relate to standards that have not changed, particularly the abuse that has always been covered, in particular under article 3 of the ECHR”.

I note the question about claims brought against employers on the basis of vicarious liability given the expectation that such claims would have been unsuccessful if they had been brought in time. Whether or not such claims should proceed will be for the courts to determine. Nonetheless, it is interesting to note that there are cases proceeding in England and Wales where the abuse took place before 2001 – before the law was reinterpreted – and the court uses its discretion to allow these cases to proceed. Section 33 of the Limitation Act 1980 (which applies in England and Wales) requires the court to consider whether it is ‘equitable’ for cases to proceed after the three year limitation period has passed. There is therefore evidence of cases in England and Wales where judges have considered it fair – or, in the language of the statute, equitable – for these cases to proceed.

It will be for the parties to an action, and ultimately for the Scottish courts, to consider these issues within the framework of the 1973 Act as it will be amended by the Bill.

\textsuperscript{3} Oral evidence in the Justice Committee on the 28\textsuperscript{th} of April
The courts must ensure that the legislation is applied in a Convention-compatible manner.

Previously raised cases

I can clarify that section 17C will allow previously raised actions to be re-raised even if the court previously heard some evidence as to the merits of the case, as long as the court did not go on to make a decision on the merits and as long as the reason the initial action was unsuccessful was the limitation period.

With regard to the question of whether section 17C is restricted to those actions disposed of by reason of section 17 of the 1973 Act, I can confirm that the Bill allows for the re-raising of actions only where the case failed under section 17 of the 1973 Act, either by being disposed of by the court or by being disposed of by means of a relevant settlement.

Before the 1973 Act, there was the Law Reform (Limitation of Actions, etc.) Act 1954 which introduced the first general limitation provision to Scots law for personal injuries actions (section 6 of that Act). However, we came to the conclusion for the reasons stated below that it would be inappropriate for section 17C to refer to actions previously raised but then disposed of by reason of section 6 of the 1954 Act.

Firstly, it is considered unlikely that there would be any cases to which this might be relevant. We understand from experts in this field that it was only in the early to mid-1990s that allegations of child abuse really started to emerge, so they would have been raised under the 1973 Act. Before the 1990s, child abuse was much less well recognised and very few actions would have been raised before then.

Secondly, even if there were such cases, we do not consider that it would be compatible with the Convention rights of defenders for such cases to be re-litigated after the Bill is commenced. Cases disposed of by reason of section 6 of the 1954 Act would, as a class, necessarily involve circumstances which occurred before 25 July 1970. This is because, for an action to have been disposed of by reason of section 6 of the 1954 Act, the action must have been raised prior to 25 July 1973 (when the 1973 Act came into force and replaced the 1954 Act) and the three year limitation period must have elapsed before the action was commenced. As any such action would have been raised before 25 July 1973, it is also reasonable to assume that any disposal resulting from the application of the 1954 Act would have occurred in the 1970s.

Additionally, section 6 of the 1954 Act operated as a complete bar to proceedings being brought after the three year limitation period had elapsed. This is in contrast to section 17 of the 1973 Act which, since the insertion of section 19A into that Act by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (which also had retrospective effect) has been subject to the possibility of the court allowing an action to be brought outside the three year limitation period if the court considers it equitable to do so.

The Scottish Government considers that if there were any cases that had been disposed of under section 6 of the 1954 Act, it would not be appropriate for them to
be re-litigated now given the combination of the time which has elapsed since the circumstances upon which any such case would be based and the absolute nature of the limitation defence which would have led to the disposal of the earlier case. If section 17C were to refer to section 6 of the 1954 Act alongside section 17 of the 1973 Act, this would not respect the careful balance which the Bill aims to achieve in terms of ensuring that any interference with the Convention rights of potential defenders is proportionate.

**Decree of absolvitor**

I have noted concerns about allowing cases that were disposed of by decree of absolvitor to be re-raised and the request for further explanation as to the justification for doing so.

Given the retrospective application of the new law, it would be unfair that a survivor of historical abuse who has already litigated, but who has been prevented from pursuing the claim by reason of the current law on limitation, should be deprived of the benefit of the new regime. There are two ways in which these actions could have been disposed of – by decree of dismissal or by decree of absolvitor. Decrees of dismissal are generally appropriate where the court finds in favour of a defender and brings an action to an end otherwise than by ruling on the merits of an action. It brings the action to an end, but does not prevent a further action being raised (for example, if any deficiencies in pleadings can be cured). Decrees of absolvitor are generally appropriate where an action has been determined on its merits, or, as in the cases relevant to section 17C of the Bill, where there has been a settlement which resulted in absolvitor. These decrees “absolve” or assolzie the defender from responsibility for the matters claimed in the action and can found the basis of a plea of res judicata (which prevents an unsuccessful pursuer having a further attempt at taking the defender to court for the same matter).

It is clear that the cases with which the Bill is concerned fall into both these categories. Some would have been dismissed by the court by a decree of dismissal – for example, a case which ended up being a ‘lead case’ which was determined by the court. Others would have been sisted behind the ‘lead case’, awaiting its outcome, and then settled in the expectation that, if they were to be pursued further, they would be dismissed by reason of the law on limitation as it had been explained in the “lead” case. We understand that many of these latter cases would have settled on the basis of decree of absolvitor. It would be grossly unfair to give the benefit of the new law to pursuers in “lead” cases but not to pursuers in the sisted cases who settled in the expectation that they too would be ‘time-barred’. This latter category is likely to be much larger in number. Without including decree of absolvitor in section 17C, a large number of the cases that were unsuccessful because of limitation would not be able to benefit from the Bill.

The context of historical childhood abuse, the particular impact that childhood abuse has on survivors, and the fact that limitation periods have, in the past, operated so as to frustrate access to justice for survivors, provides the necessary special justification for allowing these actions to be re-raised. Given the uniqueness of this category, it will not set a precedent for future categories of claims.
I am satisfied that the provisions of the Bill are Convention-compatible. We have sought to ensure that defenders' Convention rights are protected in two ways. First, it is only cases which were disposed of by reason of the current law on limitation which may be re-raised. And, secondly, the Bill requires the court to dismiss the action if the defender satisfies the court that a fair hearing is not possible or that, by reason of its retrospective effect, the defender will suffer substantial prejudice such as to outweigh the pursuer's interest in pursuing the action.

**Settled cases**

I have noted concerns about the definition of “relevant settlement” in the Bill, which prevents a pursuer from re-raising an action if the pursuer previously received any compensation. The provision is based on the policy that only survivors who have failed on limitation grounds should be allowed to re-raise their action. If they have benefitted financially from the previous action, the link to failure due to time bar is absent.

As the Committee has noted, the Bill’s provision in relation to previously litigated cases is unique. The appropriateness of these provisions, in particular the retrospective application of the law and interference with Article 1 of Protocol 1, relies on there being a special justification. The context of historical childhood abuse, the particular impact that childhood abuse has on survivors and the fact that limitation periods have, in the past, operated so as to frustrate access to justice for survivors, provides the necessary special justification. However, the interference with A1P1 has to be proportionate. Allowing actions to be re-raised in cases where the pursuer received financial compensation does not share the special justification that exists for cases that failed on limitation grounds and so is likely to be considered not to be proportionate.

In contrast, if the settlement involved the defender paying only the pursuer’s expenses, or part of their expenses, we do not consider that the pursuer has benefitted financially - the pursuer would only be back to where they would have been had they not raised the action.

It is clear from evidence presented to the Justice Committee that cases where ‘nominal amounts’ were paid are likely to be very rare. In oral evidence to the Committee⁴, Graeme Watson (Forum of Insurance Lawyers) said “I am trying to think of a situation in which an insurer would have said, “We’ll pay your expenses plus a nominal sum for damages.” There would have been little or no incentive for an insurer to do that. I have dealt with approximately 400 to 500 cases, and none has been in that situation.”

With regard to the question of burden of proof, where there is a burden of proof to be met, the court will determine where this lies in accordance with the established law of evidence. The Bill does not change that law. In the present context, the Scottish Government considers that a pursuer seeking to rely on section 17C would have the burden of proving that the circumstances of their case fell within its terms. This is

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⁴ Oral evidence to the Justice Committee on the 21st of February:
because section 17C represents an exception to the general rules which would ordinarily prevent an action from being raised where a previous action had been disposed of in a particular way. Those general rules allow defenders to plead defences such as res judicata, waiver or compromise. We anticipate that it would be in the context of a defender pleading such a defence (or a pursuer anticipating that such a defence may be pled) that a pursuer would seek to rely upon section 17C so as to counter the defence. We will look at what could be done to amend the explanatory notes, as the Committee has recommended.

I note the Committee’s concerns about difficulties in establishing the terms of the settlement. We envisage that where the existence of a previously raised case is a live issue, the pursuer would have to demonstrate that their action falls within the criteria set out in section 17C. This will involve them leading evidence to this effect, which could involve a statement of their own understanding of what previously took place. It could also include records that the court holds, or the pursuer could call on the defender to disclose any formal documentation to which the defender has access. Whilst it will be a matter for the courts to consider in individual cases, it would be open to a court to be satisfied based on only a statement from the pursuer if that evidence was accepted by the court.

Safeguards for defenders

I have noted concerns regarding the impact of section 17D, specifically the concern that it may ‘reintroduce time bar’. We have considered these issues very carefully and have concluded that the current drafting strikes the most appropriate balance, reflecting the position of the European Convention on Human Rights.

It is true that even without a specific provision to this effect, the court could not permit an action to proceed if it was not possible for a fair hearing to take place or if Convention rights would otherwise be breached. However, the Bill ensures there is a mechanism for these issues to be dealt with and it sets out the tests that the court is to apply. Without such a mechanism expressed on the face of the legislation, the legislation would appear to allow cases to be raised even where Convention rights would be breached. That cannot legally be the case and the courts could be forced to hold that the Act resulting from the present Bill is (or provisions of it are) outwith the competence of the Parliament. That could result in challenge to the whole scheme of the Bill, rather than just a finding that a particular action should not be allowed to proceed. Such a challenge would have an impact on all potential cases, with the result that survivors would be deprived of the benefit of the Bill whilst that challenge was resolved. Including an express mechanism as a focus for the courts’ consideration of the parties’ convention rights also demonstrates to the courts that the Parliament has considered the relevant Convention rights issues and is taking responsibility for legislating “in accordance with the law” (in the sense of ensuring the law is accessible to those affected and foreseeable as to its effects), whilst maintaining an appropriate role for the judiciary in examining the facts and circumstances of individual cases.
We therefore consider it appropriate in the context of the unusual steps being taken by this Bill to provide a mechanism through which the courts can secure a Convention-compatible application of the legislation.

With regard to uncertainty about the factors that would be relevant to an assessment of ‘substantial prejudice’, it will be a matter for the court to assess and determine whether or not there is substantial prejudice, on a case by case basis, based on the evidence presented to it. Every case is different and each will be considered on its own merits. While it is impossible to predict what will be important in each case, the factors that the courts might consider to be prejudicial to the defender include:

- diminution of the quality and availability of evidence;
- a change in the law (or understanding of the law) which would determine liability against the defender;
- the defender’s affairs having been arranged in reliance of the limitation period having expired, or an earlier case having been disposed of;
- the defender’s resources having been used in a way which placed reliance upon the limitation period having expired, or an earlier case having been disposed of;
- the cost of defending the action having increased as a result of difficulties in investigating the circumstances of the case.

The existence of one or more of these will not be conclusive of there being substantial prejudice: it must remain a task of the court to assess whether or not these, or other, factors would give rise to the defender being substantially prejudiced in all the circumstances of the case, and whether, having had regard to the pursuer’s interest, the prejudice is such that the action cannot proceed.

I have carefully considered whether more can be said on the face of the Bill; for instance, the addition of factors for the court to consider. However, a list of factors raises a range of difficulties: Which factors should be listed? Is the list comprehensive? What weight should be given to each factor? Is it clear that what is relevant in one case could be completely irrelevant in another? The Scottish Government considers there is merit in avoiding a ‘checklist’ approach to these very complex issues. It is not clear what could meaningfully be added that the court is not very familiar with already. My concern is that a list of factors would unnecessarily constrain the court’s considerations.

Financial and resource implications of the Bill

I have noted the Committee’s concerns that the mid-point figure of 2,200 cases is an underestimation. The task of estimating the number of actions that will be raised as a result of the Bill has been a challenging one. As we made clear in the Financial Memorandum, our approach was to arrive at an estimated range based on available information. It is clear that there is no right or wrong answer here as to how best to estimate the impact. It is possible that this is an underestimation; it is also possible that it is an overestimation. All witnesses in the Justice Committee evidence sessions have recognised that the number of cases that will be brought is very difficult to predict. Nothing that has been provided either in written or in oral evidence has caused us to depart from our estimate.
To take one example, the Committee report refers to Police Scotland data of 4,400 victims which they explain represents a very small proportion of all child protection files. However, it is important to keep in mind that not every case of child abuse translates into a civil action. In fact, as we have heard from the SHRC, the vast majority don’t. Therefore, only a proportion of the victims identified in the files estimated by Police Scotland will go on to raise a civil action. So whilst the range we have identified may or may not be correct, any change from it would only be to substitute another figure or range which also may or may not be correct. We are satisfied that we have reached our estimate in as rigorous a way as possible but, importantly, we absolutely recognise that we are dealing with many unknowns and we accept that the estimated range may not prove to be right.

In terms of the impact on defenders, we decided, as set out in the Financial Memorandum, not to provide estimated costs for this category as the margins of uncertainty are simply too great for meaningful information to be provided.

As witnesses have noted in the Justice Committee evidence sessions, there is a great deal of uncertainty around how many actions will be raised and the impact this will have on local authorities and other organisations. While I recognise local authorities’ and COSLA’s concerns, I understand they have not been able to come up with an estimate of impact. It is also clear, as was previously pointed out, that the impact will not be identical across all local authorities.

I absolutely recognise that the costs of dealing with civil actions go beyond the cost of damages and legal costs and I can understand concerns regarding increases in ‘backroom’ costs, such as responding to Subject Access Requests. However, it is clear that no-one can put a figure on what these costs will be.

With such great uncertainty, it is hard to see how any meaningful conclusions can be drawn about impact at this time. We will continue our discussions with COSLA – I recently met with Cllr Stephanie Primrose, Education, Children and Young People Spokesperson in COSLA, on 29th March – and we will continue to keep the situation under review.

The Bill is about widening access to justice and it is clear that in order to achieve its aim, it follows that more actions will be raised. We absolutely recognise that this could have financial and resource implications for some organisations. At the same time, we are keen to address injustices where survivors who have suffered serious harm as a result of the abuse are currently facing significant barriers to seeking redress.

Efforts were made to scope the numbers of organisations which may be impacted should they find themselves in the position of defending a historical childhood abuse case. But the conclusion was reached that the practicality of surveying organisations to establish their past children services provision would place a disproportionate burden on these organisations. The length of the applicable time-span (over 50 years), and the number of children’s services involved over that time, means it would be extremely time and resource intensive and it is still not clear how useful this information would be. The relevant services would not be limited to children’s homes but would also include foster care arrangements, day care centres, community
centres, and youth clubs, to name a few. Many of these are likely to no longer be in existence. The impact may depend on the extent of historical service provision for children within organisations, but it is also possible that the impact is unrelated to this. For example, a repeat offender in some organisations could have caused an uneven distribution of the prevalence of abuse.

With such great uncertainty, it is hard to see how any meaningful conclusions can be drawn about impact at this time. I have noted that neither local authorities nor defender organisations have been able to estimate the impact on their own organisations, which perhaps speaks for the very real difficulties around this issue.

With regard to the impact on the Scottish Courts and Tribunal Service (SCTS), we would expect that the actions raised as a result of the Bill will be spread over a number of years and there will be variation in the length of time the court process takes. Depending on the actions raised, it would be possible for the court to ease pressures through case management. My officials are in regular contact with the SCTS and the situation will be reviewed on an on-going basis.

I found the discussions in the Justice Committee in relation to implementation very interesting. While it would be for the Lord President to designate categories of specialisms among judges and sheriffs, I see merit in any suggestion which would build familiarity and experience as well as encourage confidence and bring about improvements in the system. I would be happy to raise this with the Lord President.

With regard to a pre-action protocol, any process which has the potential for reducing the trauma of raising an action for survivors of historical child abuse would be a positive development. We see merit in encouraging early resolutions which could reduce the emotional impact on survivors as well as court time and costs. It is in everyone’s interest to reduce the time and cost involved in litigation. It is important to note there is nothing in the current legislation or rules stopping a defender from settling early and thereby saving time and legal costs.

The Court of Session now has powers under the Courts Reform (Scotland) Act 2014 to regulate procedure about pre-action matters, and the functions of the Scottish Civil Justice Council (SCJC) include reviewing the practice and procedure of Scotland’s civil courts and preparing and submitting draft civil procedure rules to be made by the Court of Session. The use of a mandatory pre-action protocol is a very new development in Scotland and we are yet to see the impact of this development.

Conclusion

I would like to thank the Committee again for its detailed scrutiny of the Bill and for raising a number of important issues in its Stage 1 Report. I hope that my remarks address the issues raised to the Committee’s satisfaction and are helpful in the Committee’s further consideration of the Bill. This Bill is important in removing a barrier to access to justice and I am keen for its benefits to be realised, not the least for the survivors of childhood abuse who have long campaigned for this change. I very much look forward to a constructive Stage 1 debate and I am hopeful that the Bill’s general principles will receive support across the Chamber.