

Justice Committee

Limitation (Childhood Abuse) Scotland Bill

Written submission from the Convention of Scottish Local Authorities

Introduction

1. The Convention of Scottish Local Authorities (COSLA) welcomes the opportunity to provide the Justice Committee with evidence towards the development of the Limitation (Childhood Abuse) Scotland Bill. 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.
2. However, despite our strong support for the legislation, we recognise that there will be a potentially significant impact on Local Authorities – both financial and practical. COSLA has previously submitted written evidence in response to the Finance Committee's call for evidence on the Financial Memorandum of the Bill. While we touch on financial implications in the present submission, the previous written evidence should be looked to for fullest account of financial issues.

Key Points

- Removing any barrier to justice for survivors of historical child abuse is a positive move and COSLA strongly support the intent of the legislation.
 - While impossible to quantify the potential volume of claims, the overall impact of the legislation on Local Authorities is likely to be extensive, complex and not limited to successful claims.
 - The method of implementation will have a significant impact on achieving the aims of this legislation - there is an assumption that the claims will be brought within the current framework for Personal Injury claims, but other approaches to implementation could achieve the same end.
 - The process of hearing and deciding claims should be clear, accessible and transparent for all parties involved.
3. The COSLA position has been considered and supported by the Society of Local Authority Lawyers & Administrators in Scotland (SOLAR).

Volume of Claims

4. 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. The Scottish Government has indicated that approximately 1000 cases awaited the outcome of a recent test case which ultimately failed on the issue of time bar. The Financial Memorandum accompanying this Bill estimated the number of claims over 2,000, while Police Scotland have indicated that the figure could be upwards of 5,000.
5. There is also uncertainty as to who these cases will be raised against. While we know there will be some impact on the voluntary sector or religious organisations, Local Government is likely to experience a higher percentage of claims raised against them than other organisations given the prevalence of children's services run by Local Authorities.

6. With no definitive information, it is very difficult to make any meaningful estimate of the potential impact (both financial and practical) for Local Government. What is clear is that any impact will not be limited to successful claims.

Impact on Local Authorities

7. The legislation will certainly create an administrative and financial burden for Local Authorities. 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. This indicates a similarly narrow view of the overall implications of this legislation on Local Authorities which are considerably more complex: including the cost of successful compensation claims, the cost of unsuccessful claims, and the processes which will be required to administrate all queries and claims within the extended limitation period.

Iterations of Local Government

8. A difficulty which the extended period of limitation brings is that since 1964, there have been several reformations of Local Government. This has implications for the records held within current structures. Some of the records required for an action raised against the Local Authority may well be destroyed or lost. Those records that are available are unlikely to be in digital format. It is quite possible that institutions involved either no longer exist or have changed form, location, and staff many times since potential alleged abuse.
9. We are aware that there have been some discussions with the Scottish Child Abuse Inquiry 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 claims.

Information Requests

10. In order to establish whether a claimant has grounds for an action of damages against a Local Authority 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.
11. While estimates have attempted to predict the number of claims, 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. It is also foreseeable that information requests could be used to gain clarity if there is confusion about who the respondent organisation is – for example, where a school hall was let to an organisation independent of the Local Authority during school holidays. The event may have taken place on Local Authority premises but where the third party would rightly be the respondent.

12. We anticipate that publicity around the Bill and subsequent cases (especially successful ones) will be likely to lead to a significant increase in information requests.

Processing Claims

13. As well as information teams, there are also potential resource impacts on legal teams and insurance teams within Councils. 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. These issues are explored fully in the COSLA submission to the financial memorandum, but it is relevant to this submission that these issues are complex and will require each claim to be individually and fully analysed from an insurance perspective. Most councils have only small insurance teams able to process any claims and so the impact on insurance teams could be significant.
14. Similarly, most Councils do not have legal teams of the size and specialism which might be required to process the volume of claims. The time involved by legal staff in dealing with those challenges to investigate claims and prepare for cases is near impossible to quantify at this stage because of the variables: as above, documentation is not likely to be digitally accessible and many potential witnesses will have retired; moved to new employers; or even have passed away.
15. Local Authorities are concerned about both lack of capacity within Local Government to deal with this anticipated increase in legal work and cost. Local Authority lawyers have indicated that in many cases, compensation could only amount to a minimum of a third of the cost, with back-room and legal costs and expenses often amounting to considerably more than the compensation itself. In particular, legal expenses for claimants are likely to surpass actual compensation costs. Local Authority lawyers submit that this would neither be in the best interest of the claimant nor the public purse.

Implementation

16. COSLA are fully committed to the principle of removing barriers which survivors of historical child abuse face in accessing to justice. The implementation of this Bill will have a significant impact on achieving that aim. While it is understood that the process of implementation is not in the ultimate gift of the Committee, COSLA do not think that the impact of the Bill can fully be considered in isolation from implementation.
17. The assumption appears to be that cases will be heard within the current Personal Injury framework but, as has been highlighted by the submissions of others, this will have a significant impact on the civil court system. The volume of cases anticipated, the unprecedented limitation period, and the sensitive issues which will be unique to survivors of historical child abuse will all bring challenges to bear.
18. The overriding principle should be that the process of hearing and deciding claims is clear, accessible and transparent for all parties involved. There are

alternative models which could ensure access to justice for survivors while improving the ability of Local Authorities as well as other organisations to respond.

The Jersey Model

19. An investigation which began in Jersey in 2008 uncovered widespread and systemic historical child abuse. In response, the Historic Abuse Redress Scheme was established; designed to deal with applications for compensation for historic sexual or unlawful physical abuse suffered by those who had been in residential care between 1945 and 1994.
20. Lawyers were appointed to the Scheme and were independent of pursuer or respondent. The Scheme Lawyers were responsible for assessing the Claims: recommending whether it was appropriate for a claim to be admitted under the scheme and then the amount of financial compensation to be paid to a claimant against the scale developed. In undertaking their role, they worked closely with Health and Social Services Departments on applications.
21. A similar scheme has been considered in depth in Northern Ireland, with survivors of historical abuse leading the argument that such a scheme is “not only less traumatic...but more cost-effective than litigation.”¹ An Independently commissioned report² explored the cost analysis of a redress scheme favourably to litigation, while the increased accessibility for parties has also been lauded. In relation to Scotland, such a scheme or panel would not be a wholly new introduction as the Criminal Injuries Compensation fulfils a similar function.
22. While any similar Scottish Scheme would have to be developed specifically for Scotland, there are undoubtedly lessons which could be learned from the Jersey Scheme to refine into a possible scheme for survivors of historical child abuse in Scotland. The potential benefits of such a model are worthy of exploration: victims would be safeguarded from the potential ‘no win, no fee’ culture which it is foreseeable might develop around these claims; organisations, including Local Authorities, would still face an undoubted administrative burden, but not the same level of legal costs involved in court proceedings.

Specialist Historical Abuse Sheriffs

23. Another potential method for implementation if cases are to go through the civil court system would be to establish a hub for historical abuse cases within the Personal Injury Court. Structuring business within specialist hubs is not new to the Scottish Civil Court system. Commercial actions within the Court of Session have been organised in this style for some time “to enable specialist judges to handle commercial cases quickly and flexibly”³. Similar arrangements exist in

¹ Official Report of Northern Ireland Assembly Committee For The Executive Office, *Historical Institutional Abuse: Panel Of Experts On Redress* (28 September 2016) available at <http://data.niassembly.gov.uk/HansardXml/committee-19129.pdf>

² Cost Analysis of Proposed Redress Scheme for Historical Residential Abuses, available at <http://www.socsci.ulster.ac.uk/irss/pdfs/20161017-redress-full-report-3.pdf>

³ Scottish Courts and Tribunals website, <https://www.scotcourts.gov.uk/the-courts/supreme-courts/commercial-actions>

larger courts for the administration of family business, and cases involving domestic violence.

24. If these cases are to be heard within the civil court system there will be unique elements – the psychological impact over the course of victims’ lives and the preparation and presentation of evidence which is backdated so far to name a few. The possibility of having designated judiciary within the Personal Injury court to hear the cases could mean the development of a degree of consistency in case management and the ability for lessons learned from the experience of hearing the cases to be reflected upon and applied quickly to assist future actions. Training for the speciality Sheriffs could help to ease the process for victims. Overall, it could mean agile development in what will be a new challenge to the Scottish legal system.

Conclusion

25. While COSLA are committed to the aim of improving access to justice for survivors of childhood abuse, the legislation raises many questions which make the impact of this Bill almost impossible to quantify. It is clear that the impact will not be limited to claims: information requests must be thought of as part of the overall impact alongside draws on the time of both insurance and legal teams. There are also significant financial implications in terms of overall administration, legal costs, and the cost of claims (please see the COSLA submission to the financial memorandum for fullest account).

26. Further clarity is also needed around the process of implementation. The method by which claims are raised will have significant implications for the processes developed to respond and we would encourage that alternative models to traditional court-administered justice are explored.

COSLA

21 February 2017

Evidence to the Finance Committee

Limitation (Childhood Abuse) (Scotland) Bill – Financial Memorandum

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.