

Justice Committee

Limitation (Childhood Abuse) (Scotland) Bill

Written submission from the Forum of Insurance Lawyers

The Forum of Insurance Lawyers (FOIL) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

The consultation was drafted following consultation with the membership in Scotland.

Key Issues

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?*

Whilst FOIL understands the considerations which have led to the presentation of the current Bill, changes to the rules on limitation are not to be undertaken lightly. Any change which affects the pursuer or the defender's ability to bring or defend a claim out of time will have an adverse effect upon the opposing side in litigation. There is significant potential for the necessary balance between the parties to be adversely affected, resulting in injustice.

It should be remembered that the courts have discretion under the current rules, under Section 19A of The Prescription and Limitation (Scotland) Act 1973, to allow claims to proceed beyond the three year limitation period should "*it seem equitable to the court to do so.*"

In the event that the time-bar is removed for historical abuse claims, many of the claims which will come before the courts will arise from events which occurred many years ago: some arising from events fifty years ago. Inevitably, claims brought such a long time after the events on which they are based cause practical difficulties for defenders trying to appropriately investigate and defend claims.

FOIL members' experience of acting in abuse claims confirms these concerns. As Lord Tyre found in *Lesley Jackson v Andrew Murray* [2015], a delay of just eight years can result in a lack of cogent evidence before the court as memories fade and witnesses become unavailable. These difficulties are magnified in cases brought many decades after the events in question and can result in a defender being unable to present a defence and the court having to rely entirely on the evidence put forward by a pursuer. These disadvantages weigh heavily in other types of stale cases such as mesothelioma, but in those cases there may at least be work records and a reasonable number of witnesses who will recall working practices from many years ago: the difficulties are compounded in abuse claims

where, by their nature, the events are likely to have occurred in an environment of secrecy and cover-up.

There is genuine concern that if the defence of limitation is abolished for claims arising from events since the 1960s, many cases will proceed purely on the strength of the pursuer's evidence which, in the majority of cases (and in particular in very old cases) is likely to remain unchallenged due to inherent evidential difficulties, leading to claims being successful where there is in fact no liability. Against that background, and an anticipated increase in the number of claims intimated, identification of genuine claims becomes even more challenging and injustice in the form of dishonest claims, cannot, and should not, be discounted.

2. *What will be the impact of the new exemption on i) victims of 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) Victims

It is important not to simply assume the new legislation will be of overall benefit to the victims. Whilst claims may result in financial compensation, there are undoubtedly significant pressures and strains that will be placed upon victims who choose to proceed with these cases, probably even more so in cases that have been dismissed in the past.

A strong indication of the mental trauma that giving evidence and pursuing these claims is clear from the actions of the largest survivors group in England. The Shirley Oaks Survivors Association (S.O.S.A.), a 600-strong survivors' group, recently withdrew from the independent inquiry into historical child sexual abuse in England & Wales. They told the BBC:

"Our decision to pull out of the Independent Inquiry into Child Sexual Abuse (IICSA) should have come with regret but we are sad to say the only emotion we feel is relief. Now our members do not have to relive their worst nightmares in this stage-managed event."

Serious consideration must be given to the effect complex, contested and lengthy court proceedings will have on the victims, especially when the invariable paucity of evidence will require the victim to give evidence in court.

ii) the individuals, organisations and insurers who might be involved in defending claims.

It is likely that a change of this significance will have a very substantial effect, and, inevitably, unforeseen consequences. Successful claims are likely to have a significant financial effect, not only on insurers but also on central and local government, organisations and individuals. In some cases, with claims of this age, it will not be possible to identify an insurer to stand behind the defender, and in cases involving criminal activity, insurance cover, perhaps under household policies, may be avoided, leaving individuals uninsured and facing stigmatising and potentially financially crippling litigation alone.

The principle of limitation rests on the public policy that defenders should not face open-ended responsibility. McHugh J in the case *Brisbane South Regional Health Authority v Taylor* commented:

“The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time goes by, relevant evidence is likely to be lost. Second, it is oppressive, even ‘cruel’, to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilize their resources on the basis that claims can no longer be made against them. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period.”

Taxpayers will also be affected. Scottish councils published statistics in September 2015 showing they paid out more than £1.5m in compensation to victims of child abuse during the last decade. Police Scotland has also identified that there has been a rise in reported sexual abuse incidents from 66,120 in 2012 to a projected 113,291 in 2015. Further, of the cases identified the number of historic cases has risen by 165%.

iii) *the Scottish courts*

It is likely that there will be a very significant increase in issued claims. This is likely to put the court service under pressure at a time when it is already undergoing radical reform.

It is difficult to predict the likely effect of the proposals, but as the statistics set out above make clear, the number of individuals seeking help following historical sexual abuse is increasing very rapidly. The removal of the limitation period will surely lead to an increase in historic claims. This will increase the calls on the limited court time currently available for civil cases. It is likely to increase delays in cases coming to a full hearing or increase the number of cases adjourned for lack of judicial availability.

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?*

When it issued its initial consultation on the proposed legislation on this issue, the Scottish Government asked whether or not the following types of care should be included within the provisions: residential care, children’s homes, secure care (list D schools) borstals and young offender’s institutions, foster care, ‘boarded out’ children, child migrants, independent boarding schools and health care establishments providing long stay care.

86% of written respondents to that consultation agreed that “*in care settings*” should include the types of care listed above. In addition, the Scottish Government asked whether the exemption from the limitation regime should be extended to cover all children, not just those abused ‘in care’. Proposed additions to the list of settings included children placed in kinship care; children with disabilities and respite care;

former looked after children aged 16-18 years in care leaver's accommodation; church settings; sports clubs; armed forces/MOD, scouts/guides; and youth in community groups. 62% of written respondents to the consultation agreed that the proposed exemption should be extended to cover all children.

The Scottish Government states it has been persuaded by arguments that restricting the exception to the 3 year limitation period to abuse that took place in care settings would create anomalies and potential injustice (though no more information is given) and therefore the exception to limitation should apply to all cases of abuse that took place when the person who sustained the injuries was a child at the time of the abuse.

FOIL recognises that it would be invidious to allow claims by some victims abused as children to proceed while barring others but notes that a significant minority of respondents to the previous consultation did not agree that the regime should be extended to all children. FOIL is concerned that an extension of the Bill's provisions does not in fact put all victims in the same position. FOIL members foresee the following issues arising:

- Absence of insurance cover provision meaning individuals and/or voluntary organisations having to fund compensation claims from their own reserves. For voluntary organisations or groups the financial impact is likely to adversely affect present day service provision.
- In smaller organisations, where record keeping might not be complete, adverse impact on present day members having to answer for the actions of alleged abusers who are no longer part of the organisations or are deceased.
- The unintended consequence of dissuading present day volunteers from engaging in such groups for fear of becoming involved in litigation arising from activities which occurred years earlier.
- The unintended consequence of claimants embarking on a claims process in the hope of obtaining financial recompense only to later discover that none can be made as there is no insurance provision and the defender organisation or individual has no funds to meet a claim.
- The potential dissolution of present day organisations in order to provide funds to meet claims from historic activities.
- The potential bankruptcy of individuals.
- Claims being made by both claimant and defender individuals on the Scottish Legal Aid Fund.

If the purpose of not restricting the right to seek compensation is to avoid anomalies between victims, FOIL is not convinced that including abuse in all settings will prevent such anomalies arising. Unless there are funds to meet every claim, differentiation will persist.

There is a balance of interest here: perhaps the potential adverse impact on present day community services provided by smaller groups and parents should be investigated further before the Bill proceeds in its wider form.

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)?

Definition of child

Section 17A(2) defines ‘child’ as an individual under the age of 18. There is a reasonable argument that the more appropriate age is the age of legal capacity, currently 16. However FOIL recognises that a young person may remain in care until aged 18 and that it is appropriate for the Bill to extend its protection to those aged up to 18 years.

Definition of abuse

FOIL raises two issues regarding the definition of abuse. Firstly, the definition is non-exhaustive. Secondly, the term “*emotional abuse*” is too vague and undefined. Both points run the risk of causing satellite litigation on whether behaviour towards a child falls within the ambit of the Bill.

On the first issue, to provide clarity on the scope of abuse covered, the definition should be altered to replace “*includes*” with “*means*”. The Scottish Government’s policy memorandum recognises the risk of “*inadvertently extending the scope beyond what was intended*” (paragraph 82) and states the change should “*only capture truly abusive behaviour*” (paragraph 83). That is best achieved by an exhaustive definition.

The policy memorandum places significant emphasis on the importance of including physical and emotional as well as sexual abuse. Although psychological abuse, unacceptable practices and neglect are not listed in the proposed definition, nor are they excluded since the definition is non-exhaustive, creating uncertainty. The term “*emotional abuse*” is amorphous. It gives little guidance to pursuers on what may fall within the definition. The Scottish Government recognises that it is challenging to define: it is harder still to differentiate it from emotional neglect or peer to peer bullying, which may lead to the inadvertent extension of the Bill that the policy memorandum warns against.

The lack of precision obfuscates the purpose of the Bill. It risks unnecessary litigation on the scope of behaviour covered by the definition. On the one hand it raises the risk of its application extending beyond that intended by the Scottish Government. On the other, it risks pursuers undergoing the stress of commencing litigation only to learn that the Bill does not assist them.

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?

There is a strong public interest in the certainty of the law. There is the potential for this Bill to undermine that certainty by seeking to overturn decrees of absolutor. FOIL believes a change such as this would be unique to this Bill; it would set a precedent for further infringements of the principle of limitation; and run counter to the legitimate expectations of all parties involved in litigation.

The Scottish Government recognises that in pre-1964 cases the right of action is extinguished. Where there is decree of absolvitor it is equally accurate to say that the right of action is extinguished: the matter is *res judicata* and no further action may be raised. That contrasts with decree of dismissal, where a pursuer may raise a fresh action. The principal of *res judicata* is fundamental to the rule of law.

In addition, there is a real risk that this provision will fall foul of the European Convention on Human Rights. The European Court of Human Rights has upheld the importance of the principle of the finality of judgments. The Bill as drafted may breach Article 6 of the Convention, the right to a fair trial. It may also be in breach of Article 1 of the First Protocol to the Convention (A1P1) in that it is not a proportionate measure to achieve a legitimate aim.

Thirdly, even where previous cases were disposed of by decree of dismissal this Bill would be a marked interference with parties' legitimate expectations. The defenders or their insurers will, in those circumstances, have been exposed to legal and other expenses in the successful defence of claims, little, if any, of which they have recovered from unsuccessful claimants. They would be exposed to incurring further expense in facing these actions afresh, as well as being required to consider and investigate whether the new statutory exceptions would be applicable.

From the pursuer's perspective it means that there is never closure. Even where a case has been litigated unsuccessfully there is always the prospect of a further claim.

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?*

Fair hearing

The specific reference in the Bill to the requirement for a fair hearing introduces no new power for the court to dismiss a case. That power exists anyway as the court must act in a manner compatible with Article 6 of the ECHR. Not only does the reference to a fair hearing add nothing, reliance on this as the backstop for whether a case can proceed will risk further lengthy procedure and satellite litigation in individual cases on whether a fair hearing is indeed possible.

Although the Scottish Government's policy memorandum on the Bill indicated that experience in the criminal courts would suggest that the mere passage of time will not make a hearing impossible, the key difference is that by definition in a criminal trial there is a living accused fit to stand trial. In contrast, the vast majority of civil claims arising from historic abuse are raised not against the alleged abuser but against a defender said to be vicariously liable. The alleged abuser may be dead, missing, or unwilling or unfit to assist. As Lord Hope said in *B v Poor Sisters of Nazareth* [2008]:

“It has been observed repeatedly that where there is delay the quality of justice diminishes. Witnesses may have died, memories may have become dimmed and relevant documents may have been destroyed or lost. As time goes on these effects may become less easy to detect, and this in itself is apt to produce injustice.”

Substantial prejudice

It should be noted that this is not a defence of substantial prejudice caused by the loss of evidence or the passage of time; as the explanatory notes to the Bill state, it applies only where the prejudice comes from the retrospective effect of the Bill. The fact that the defender would suffer substantial prejudice from, for instance, the loss of documentary evidence, the death of the alleged abuser or the lack of witnesses would be irrelevant.

If the intention – contrary to the stated purpose – is to provide a defence where there is substantial prejudice from the lack of evidence, then it is not apparent how this will operate in practice. The Scottish Government seeks to differentiate substantial prejudice from “real possibility of significant prejudice” (2008 S.C. (H.L.) 146 at [25]). This raises the prospect of parties having to give evidence on the question of whether there is substantial prejudice, either before proof on the merits or as part of proof at large.

Finally, the court must weigh this against the interests of the pursuer. Again it is entirely unclear how that would operate in practice. At face value it means that a court could hold that a defender would be substantially prejudiced by an action proceeding but hold that it should proceed nonetheless. It is at least questionable whether that is compatible with the right to a fair trial under Article 6 of the ECHR.

Further, until *Lister v Hesley Hall* [2002] 1AC 215, employers were not vicariously liable for sexual assault committed by an employee. Those employers and their insurers will necessarily be significantly prejudiced if an action is raised now which would have failed if it had been raised in time.

Shirley Denyer
FOIL Knowledge Services (Consultant)
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