

Justice Committee

Limitation (Childhood Abuse) (Scotland) Bill

Written submission from the Forum of Scottish Claims Managers

About the Forum of Scottish Claims Managers (FSCM)

The Forum exists as a lobbying organisation on behalf of its members and to represent their interests in the handling of insurance claims.

1. The Forum aims to promote improvements to the law to enable consumers easier and quicker access to justice.
2. The forum membership covers a number of major insurers, financial institutions together with claims handling companies and Local Authorities.
3. The individual members of FSCM are all senior professionals being Claims Managers or equivalent within their respective organisations with a wealth of experience in Insurance claims matters.
4. To provide some context of the size and scale of our membership:
 - We directly employ approximately 5,550 people in Scotland, solely in insurance
 - We generate over £1.9 billion annually in respect of insurance premiums collected in Scotland (Personal and Commercial business premiums)
 - Solely on claims, we spend £1.257 billion annually in Scotland
 - Glasgow is the largest insurance centre in the UK, outside London and is seen as core pool of talented resources
5. Insurance companies exist to provide financial protection for consumers and businesses in the event that the unforeseen happens.

It is the Forum's desire to be actively engaged, with all interested parties, in discussions and debate relating to Third Party claims** in Scotland including Pre and Post-litigation.

**** Third Party Claims definition:**

Personal Injury or damage to Property arising out of a party's negligence – be it a personal (Consumer) matter or a Commercial (Business) matter, Road Traffic Accidents and accidents in the Workplace

Further information on the Forum of Scottish Claims Managers (FSCM)

Membership:

Allianz Aviva Direct Aviva Insurance AXA Churchill Chubb DLG Esure ERS First Group Halifax LV Markerstudy More Than	NFU Mutual Privilege Prudential PSV Claims Bureau Ltd QBE RAC Insurance RSA UKI Insurance Zurich Municipal Zurich Insurance Plc Glasgow City Council North Lanarkshire Council Motor Insurers Bureau
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The purpose of this response is to provide views on five key issues raised in relation to the Limitation (Childhood Abuse) (Scotland) Bill.

Key issues

The Prescription and Limitation (Scotland) Act 1973 sets out a three year period in which, as a general rule, a civil court action for personal injuries must be raised (under the law relating to “limitation of actions”). The Bill seeks to exempt cases of historical childhood abuse from this three year time bar.

The key issues are set out below. Responses should address all or any of the following points in turn.

- 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 are concerned that removal of cases relating to historical childhood abuse from the limitation regime is not a proportionate or appropriate solution to the issues identified by Scottish Ministers.

We believe there is a danger that the proposals will introduce a lack of legal certainty and a reduction in access to and the quality of justice provided as the quality and availability of relevant and crucial evidence deteriorates with the passage of time.

The existing procedure, which includes a three year limitation period with judicial discretion as set out in s19A of the Prescription and Limitation (Scotland) Act 1973, affords an opportunity for equitable consideration of the facts of each individual case. This supports the previously documented views of the Scottish Law Commission that the existence of limitation periods support and underpin the public policy desire for legal certainty.

We also do not agree with the suggestion that the introduction of the Bill as stated would put Scotland on the same basis as England and Wales where in fact the three-year limitation period and associated judicial discretion are deemed to work in a satisfactory manner with no proposals to change that.

We believe the collaborative creation of an effective pre-action protocol would be a more appropriate and proportionate solution which could afford early exchange of information and earlier resolution without the need for litigation whilst also avoiding the unintended potential for victims being put through the anxiety and upset of a legal trial to then be advised that due to circumstances there is deemed to be “substantial prejudice” or inability to have a “fair trial” thereby leaving them without desired resolution.

The proposals could also interfere with a survivor’s “right to be forgotten” in circumstances where they are either directly or indirectly the victim of abuse but may be forced to revisit a period in care as a result of being called as a witness and asked to recall and go over events they do not wish to revisit.

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 have concerns that the introduction of these proposals may have the real effect of creating undue and incorrect expectations for Pursuers on the basis that actions may be capable of being raised but then may not succeed due to lack of acceptable proof in the eyes of a court and exacerbating anxiety and upset for a victim through that process.
- ii) We anticipate that increased claims volumes will be experienced where minimal or no corroborative information or evidence is presented or available. This, together with the passage of considerable periods of time, means that effective investigation of allegations will be extremely time-consuming and costly or may in fact be impossible. Such events are generally covered by public liability insurance which is not compulsory so there are likely to be a high proportion of cases where insurance is not in existence or cannot be traced. This will result in extensive cost for defending organisations, much of which will not be recoverable through insurance. Where a claim involves allegations of domestic childhood abuse, any personal insurance which will not have been compulsory, even if traceable, will not respond in relation to such allegedly criminal acts.
- iii) It is likely that there will be a substantive increase in court time required to examine such historic evidence to determine whether breach of duty and causation have been established. This will place increased pressure on the courts structure and system and 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.

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 any Bill should cover all children and not differentiate based on whether incidences occurred purely in a care setting. We do not understand how a distinction between children abused by a family member and children abused in care in terms of limitation can be rationalised.

We are however 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 will not cover the criminal actions of the abuser. Similarly, abuse by foster parents is ordinarily beyond the scope of an institution's Public Liability policy. Institutions are not vicariously liable for foster parents as they are not considered employees of the institution.

We are concerned that the Bill runs the risk of giving survivors a false assurance of remedy and compensation when in fact there may be no financial resource available.

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)?

The definition of “child” is not consistent 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.

The definition of “Physical” and “Sexual” abuse can be defined by reference to existing case law however, “emotional abuse” cannot be so easily defined and is too vague in its drafted format. Given that the injury must amount to an actionable harm, frequently in some form of recognised psychiatric disorder, it is not clear what the term “emotional abuse” envisages or seeks to include.

The definition is non-exhaustive and in order to bring clarity it should be expressed as being physical and sexual abuse (and emotional abuse, if considered appropriate), rather than as including them.

As currently presented, there is a real risk of “inadvertently extending the scope beyond what was intended” (paragraph 82 policy memorandum) and doing more than the stated the change of “only capture truly abusive behaviour” (paragraph 83 policy memorandum). We suggest the best way to avoid unnecessary litigation is to provide an exhaustive definition.

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 do not support the retrospective removal of limitation enabling the re-presentation of previously raised claims. Where actions previously raised were abandoned and a decision pronounced in favour of the defender, the defenders in those cases have a legitimate expectation that this position is final and should not be open to a re-examination merely on the basis of a change in limitation rules.

This Bill, if enacted, would amount to an interference with the defenders’ rights and 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.

We refer to the Scottish Law Commission report 2007. Whilst largely in the

context of pre-1964 claims, the position in relation to claims which have already been unsuccessful is at least as strong. The report noted that such legislation has long been considered as highly undesirable in principle “because it tends to disturb previously existing 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.”

Any such retrospective change would have significant financial implications for numerous self-insured and un-indemnified organisations, many of which will understandably 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 a substantial 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 but are concerned that there is a real risk that defenders will only establish that there is no prospect of a fair hearing after significant time and expenditure.

Paragraph 47 of the Policy Memorandum acknowledges the need to build in safeguards which acknowledge the implications of the change in the law. Paragraph 48 draws on the experience in the Criminal Courts suggesting that the “mere passage of time – even considerable time – will not make a fair hearing impossible”. This fails to recognise that in a Criminal Court the Judge and Jury have access to hear personally from the accused. The accused is able to hear the allegations raised and respond in person. In a Civil setting, the accused is often untraced, deceased or unwilling to co-operate. Documentation is often destroyed or missing and witnesses often do not exist. Should limitation be removed, there is a high probability that civil claims will be presented where a fair trial is not possible whereas in a Criminal Setting the prosecution is simply not brought because the accused is deceased or not traced.

The substantial prejudice defence is currently unclear in scope and effect. The Explanatory Notes state that the prejudice must come from the fact that the law on limitation has changed subsequent to the abuse. Accordingly this is not directed to prejudice from the loss of evidence. It is arguable that there will be substantial prejudice from the change in the law in every case which would otherwise have

been covered by a limitation defence.

We believe that Section 1 of the Bill would impose an unreasonably high burden for defenders to demonstrate that a case against them should not proceed which would affect defender's right to a fair trial and is contrary to principals of natural justice.

For understandable reasons, some abuse claims are pursued many years after the events complained of and after the expiry of the primary limitation period. There may be a 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. We consider that it is important to preserve the rights of the defender not to be exposed indefinitely to the threat of litigation. The rights of the pursuer and the defender should be balanced, recognising the particular sympathy for an individual pursuer or, in the case of the Scottish Government's proposal, a class of pursuers.

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.

Please note that many of our member organisations are also members of the ABI and we defer to the ABI should there be a request for further information.

Iain Elliot
Chairman of the Forum of Scottish Claims Managers
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