Justice Committee

Limitation (Childhood Abuse) (Scotland) Bill

Written submission from the Faculty of Advocates

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?

In our previous response, we took the view that such cases should not be removed from the limitation regime. Given that the Bill adopts a different policy approach, we confine our views in the present response to specific points in relation to the mechanics of the proposed change. We hope that these observations will be of assistance.

2. What will be 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?

It is likely that there will be an increase in the number of court actions. These actions are likely to be complicated and to involve evidential difficulties. These features generate resource implications for the courts. As far as individuals involved in such cases are concerned, we reiterate the point made in our previous response that litigation is inherently stressful, with this subject-matter being particularly so. Significant emotional impact on those raising actions, and on any surviving individuals against whom allegations are made, appears inevitable.

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?

Yes. In our previous response, in answer to question 6, we said that, if the regime was to be changed as proposed, it:
'…should be extended to cover all children. Insofar as the "silencing effect" is regarded as a justification for such an exemption, it seems to us to be likely that it would have as least as significant an effect where the abuser was a close family member as where they were a professional carer, and possibly more so. Further, if abuse by a professional carer is regarded as a sufficiently egregious breach of trust to justify the waiving of the time bar, then it seems to us that this applies with greater force to abuse by a family member'.

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)?

Whether a child should be someone under the age of 18 is a policy matter and we have no comment to make on the choice made in that respect.

The definition of abuse includes physical abuse, sexual abuse and emotional abuse so is not exhaustive. Emotional abuse is not restricted to intentional or deliberate abuse. It is a vague concept, particularly when combined with historical events. "Emotional abuse" is not a term of art. See *VN, SN v London Borough of Brent VK, AK* [2016] EWHC 936 (QB). It seems to us that there would be merit in seeking to define more clearly what is meant by "emotional abuse."

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?

The proposed change is contrary to the general principle against retroactivity, particularly in relation to claims in which decree of absolvitor has been granted. The provision will also introduce procedural complexities in terms of deciding which cases should or should not be reopened.

The Faculty also notes the wording of section 17C(5), in relation to payments made at the time of resolution of the earlier litigation. Reference to situations where 'the terms of the settlement indicate that the sum payable under it is or includes something other than reimbursement of the pursuer's expenses' raises two issues. Firstly, what is the position if the sum payable did include something other than reimbursement of expenses, but this is not indicated in the terms of the settlement? Is extrinsic evidence of how the figure was arrived at to be admissible? Secondly, it might be better to clarify what is to be included in the notion of 'expenses', as this can have more than one meaning.

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 think this an important safeguard and assume that it is intended to work along the same lines as section 19A but with the onus on the defender instead of the pursuer. There appears to be a requirement on the court to determine whether the defender would be prejudiced to an extent that is sufficient to outweigh the pursuer's interest in the action proceeding. We would suggest that there might be clarification as to whether the foregoing assumptions are correct, and which factors it is intended should be taken into account in determining whether subsections (2) or (3) of 17D are satisfied.

Faculty of Advocates
13 January 2017