

Justice Committee

Limitation (Childhood Abuse) (Scotland) Bill

Written submission from the Law Society of Scotland

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Law Society's Civil Justice Committee welcomes the opportunity to consider and respond to the call for written evidence from the Justice Committee of the Scottish Parliament on the Limitation (Childhood Abuse) (Scotland) Bill.

Principles

The Law Society's Civil Justice Committee has previously considered the issues around limitation periods and victims of childhood abuse, responding in October 2015 to the *Scottish Government Consultation on the Removal of the 3 Year Limitation Period From Civil Actions for Damages For Personal Injury for in Care Survivors of Historical Child Abuse*.¹ In the Committee's response to this consultation, we supported the principle of removing the three year limitation period for these cases.²

Questions

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?

¹ <http://www.gov.scot/Resource/0048/00480345.pdf>

² <http://www.lawscot.org.uk/media/595794/cjc-removal-of-3-year-limitation-period-from-civil-actions.pdf>

We support the proposal in the Bill to remove such cases from the limitation regime. With the age of majority in Scotland being 16 and with the current limitation period, a victim of childhood abuse would normally have to commence litigation prior to their 19th birthday. As we outlined in our response to the Scottish Government consultation, survivors of childhood abuse often do not seek legal advice until much later in their lives, in part because of the ‘silencing effect’ that the abuser instils into the victim at a young and vulnerable age. We believe that the current limitation period prevents access to justice for victims who will either be unaware or unable to exercise their rights.

We do note that there is an equitable discretion to disapply limitation periods (s19A of the Prescription and Limitation (Scotland) Act 1973). In practice, however, this discretion is not exercised frequently in historical abuse cases. There has been previous consideration, for instance, by the Scottish Law Commission, around including factors for consideration by the courts in exercising this discretion, to provide greater certainty for pursuers. However, we believe that the proposal in the Bill is required to ensure certainty and access to justice for victims of childhood abuse.

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?

The likely impact of the new exemption has been adequately captured in the Financial Memorandum to the Bill. We also note that the development of a multi-party action regime in Scotland, the provisions of which may be included in the forthcoming Expenses and Funding of Civil Litigation Bill, may have a significant effect on the number of claims brought forward.

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 believe that the wider approach is appropriate, as restricting the category of victims of childhood abuse to those in a care setting only would create an artificial distinction and restrict the wider access to justice that is the Bill’s purpose. Recent news events, for instance, have highlighted instances of historical childhood abuse in a number of other contexts, such as sports coaching.

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)?

We agree with the definitions included in the Bill. With a number of definitions of “child” in legislation, ensuring a statutory definition for victims of childhood abuse that is at the upper limit of the age range of these various definitions is important to avoid any artificial barrier to action (we also noted in our consultation response that abuse could continue following the 18th birthday of the victim). We also believe that the definition of abuse, including sexual, physical and emotional abuse, is appropriate.

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 believe that this provision is appropriate. For pursuers whose cases have failed at a preliminary stage due to time-bar, it would be unfair to prevent such cases from being raised again where time-bar would no longer be an issue as a result of this legislation. As we stated in our previous consultation response, this would, in effect, penalise those that have tried to access justice but failed due to rules that are now under scrutiny.

The Bill also permits the bringing of action where the initial claim had been disposed of by way of settlement. Though the definition of settlement according to the Bill is narrow – particularly that it must have been entered into by the pursuer in the belief that the action would be time-barred by the court, and that any sum of money paid by the defender must relate to the reimbursement of the pursuer's costs of bringing action – there may be issues around the requirement for finality in the justice system.

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 believe that it is important to include a power for the court to dismiss a case in the event that it would not be possible for a fair hearing to take place or where substantial prejudice to the defender would occur.

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