

Justice Committee

Limitation (Childhood Abuse) (Scotland) Bill

Written submission from Police Scotland

With reference to the above and Bill, which was introduced in the Scottish Parliament on 16 November 201, and recent request from the Justice Committee for written evidence from Police Scotland, I forward the following comments in response to the specific questions posed for the Justice Committee's consideration.

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?

Police Scotland supports the broad policy intentions of the Limitation (Childhood Abuse) (Scotland) Bill. The effect of childhood abuse can manifest in a number of ways and it can take a considerable period of time before an individual feels able to make any form of disclosure. Lord Justice Sedley, in considering a civil claim arising from child sexual abuse highlighted the recent difficulties, explaining that '*Inevitably there is a problem with limitation in these proceedings. I say 'inevitably' because it is in the nature of abuse of children by adults that it creates shame, fear and confusion and these in turn produce silence. Silence is known to be one of the most pernicious fruits of abuse. It means that allegations commonly surface, if they do, only many years after the abuse has ceased*'.

Police Scotland has considerable engagement with persons who have reported non-recent sexual crimes and, in recent years, there has been a statistical rise in the recording of such crimes. A broad view of this could be attributed to increased public confidence in reporting.

What will the impact of the new exemption on:

Victims of non-recent childhood abuse

The impact of the proposed exemption on pursuers is significant in terms of their ability to find acknowledgement of abuse suffered and financial recompense.

Notwithstanding, the potential impact that financial recompense could have on the safety and wellbeing of a person bringing an action in respect of relevant personal injuries who is experiencing some form of adversity or situational vulnerability may be worthy of further discussion. An initial review of websites of private legal practices in other countries emphasises the need for some form of safety and wellbeing assessment. The Justice Committee may wish to further consider whether individual legal practices would have a 'duty of care' for persons they were acting for to ensure consideration was given to health and wellbeing support. It is suggested that any assessment of risk should consider whether the pursuer was likely to be at risk of financial exploitation following a compensation pay out and how this could be mitigated.

While the question is posed around impact of the new exemption, the ability to pursue recompense may only be available to those who have the financial means to do so unless support is provided by legal aid.

The individuals, organisations and insurers who might be involved in defending claims

In terms of those defending claims, the impact could be financial and, given the significant media interest of non-recent child abuse reports, reputational. As highlighted in previous consultation, organisations could be held financially responsible for events occurring prior to the employment of any current employees. In addition, insurance may not be traceable or valid for the period relating to the action.

The legislation is likely to cause difficulties to a number of defenders and their insurers and governing bodies because they may well no longer have documentation to assist their defence whereupon the proposed Section 17 (D) could be applied in terms of persuading the argument of substantial prejudice.

Depending on how the law is applied and developed judicially, it is possible that parties, other than the “abuser”, are found to have caused or contributed to the injuries/abuse sustained by a child as a consequence of acts or omissions.

The Scottish courts

Whilst the detail here will be for the Scottish Court Service to answer, Police Scotland acknowledges the challenges involved in estimating the financial implications of the Bill. We believe there may be value in further scoping the methodology used, which has resulted in the reference point of 2,200 actions, to more robustly predict the impact. Since the announcement of the Scottish Child Abuse Inquiry, Police Scotland has been locating all retained files relating to child abuse and neglect and, as a priority, cataloging those files which meet the terms of reference of the Inquiry and Operation HYDRANT. This is an ongoing process, however, we estimate that at the conclusion of this task at least 5,000 child abuse and neglect files, dating back to 1964, will relate to information and reports of child abuse and neglect within an institution or care setting or involving a person of public prominence. It should, however, be noted that these files represent a very small proportion of all child protection files located.

As such Police Scotland is of the opinion that the reference point is a conservative estimate and the impact on the Scottish courts may be more significant than suggested in the Financial Memorandum.

Police Scotland would suggest that there is opportunity to further scope the Bill’s financial impact. It is assessed that supporting the claims process that might result from the introduction of the legislation in terms of searching for, locating and reviewing any information held by Police Scotland and thereafter preparing a response would have significant resource (human and financial) implications. In addition, it is assessed that if the abuse had previously been reported to the police,

there is likely to be an increase in police officers cited to give evidence in any proceedings.

It is of note that the provision of police held information to solicitors and insurers for civil claims, including personal injuries from road accidents and property damage, is on a cost recovery basis with sums payable to the Scottish Police Authority on a fixed scale dependent on the format of information requested. Similarly, a fixed fee is applied for all Precognitions required for civil proceedings.

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?

Police Scotland agrees with the proposed wider scope. To introduce legislation which exempts those who have suffered childhood abuse and neglect out with a 'care setting' could be challenged as being discriminatory. The wider scope allows any person who has suffered childhood abuse to apply for personal injuries, regardless of the location or status of the alleged abuser.

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)?

Police Scotland agrees that the definition of a child, as outlined in the UN Convention of the Rights of the Child, should be applied. However, the difference between the age of majority and the age of capacity/licence could result in the inclusion of survivors of domestic abuse if a union was entered into shortly after the pursers 16th birthday, given such circumstances would meet the definition of a child and abuse.

Section 17A 2 defines 'abuse' as including sexual abuse, physical abuse and emotional abuse. It is suggested that the Bill would benefit from defining what sexual, physical and emotional abuse is.

Police Scotland notes that the Scottish Government has removed neglect from the definition. In the absence of an exhaustive statutory definition, it may be that pursuers would have to await a judicial interpretation of 'abuse'. It is difficult to envisage whether a judge would interpret 'abuse' to mean neglect, particularly in circumstances where an initial draft of the Bill was amended and reference removed.

The Scottish Government's National Guidance for Child Protection in Scotland clearly documents that abuse AND neglect are forms of maltreatment, citing that, in the context of child protection, *'neglect is the persistent failure to meet a child's basic physical and/or psychological needs, likely to result in the serious impairment of the child's health or development. This can lead to serious long-term effects such as greater susceptibility to serious childhood illnesses and reduction in potential stature. With young children in particular, the consequences may be life-threatening within a relatively short period of time'*.

Legislation dating back to 1937 evidences that, even then, 'neglect' was recognised as a different type of 'cruelty' but just as serious as any act of commission i.e. wilful assault.

Over the last fifteen years there has been an upward trend in Child Protection Registrations; for example, between 2000 and 2015 there has been a 34% increase of the number of children on a Child Protection Register (Scottish Government, 2016).

In 2011 neglect remained the most common reason for registration or initial category of those made subject to a child protection plan (when a child is assessed at being at risk of significant harm). The figure of 1,098 (registrations for neglect in 2010) represented 0.12% of the 0-15 population in Scotland. For every thousand children living in Scotland, one child had been formally identified as being at risk of significant harm as a result of neglect and required services because of neglect.

By 2016 the two most common concerns identified at Child Protection Case Conferences for children who were subsequently placed on the Child Protection Register were emotional abuse (39%) and neglect (37%). It is of note that emotional abuse and neglect can be considered separately.

The inclusion of neglect as a form of abuse is likely to widen the scope of parties against whom claims may be made. For the purposes of substantiating a claim of 'abuse' whether sexual, physical or emotional the injuries sustained have to be attributable to an act or omission, both of which could involve negligence, although not necessarily neglect.

Our understanding of the potential harm to children caused by neglect has increased as a result of academic research within Scotland, particularly the University of Stirling. It is of note that the ongoing Scottish Government's Child Protection Improvement Plan has a work stream devoted to the issues around the scale, causes and response to chronic neglect therefore, it is suggested, the conclusions of that work stream may be of interest to the Justice Committee.

In conclusion, Police Scotland is of the view that survivors childhood emotional or physical neglect in many cases have experienced maltreatment that can be as equally harrowing as the maltreatment experienced by survivors of all forms of abuse. The Bill may wish to reflect the full scale of both abuse and neglect which can, separately, severely damage the wellbeing of children. This would provide a legislative framework to support the personal injury application process. It is recognised that this may result in an increase in the number of complex applications for personal injury, however a provision would thereby exist which would be open to all survivors of childhood maltreatment.

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?

This aspect of the Bill appears to have been inserted to allow for fairness to those who were excluded purely on the time bar and thus will allow for a parity amongst those who are eligible to make a claim. Should 17C be inserted then those who have tried, failed due to time bar and campaigned as a result, would be enabled to have their voices heard.

Notwithstanding, where previously there had been settlement of a personal injury claim, perhaps with the knowledge that the time bar could prevent a successful outcome, then except where any “financial “settlement involved only a sum equating to an individual claimant’s expenses in connection with bringing and settling the action, such claimant will not have the benefit of the legislation and be allowed to seek any further compensation.

In effect any sum (nominal or otherwise) paid out in excess of what might reasonably be regarded as expenses will prevent a further action.

It is noted that the Bill appears to be silent in respect of what impact, if any, previous compensation awards would have on applications for personal injury compensation, for example compensation made through Criminal Injuries Compensation Authority application.

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?

The proposed section 17D is an attempt to balance the ability to pursue damages claims in respect of non-recent abuse against the need to ensure both a fair hearing and no substantial prejudice to a defender. While this would be a matter for a court to consider, it would appear the insert is attempting to balance the Human Rights of both pursuer and defender.

While not specifically mentioned within the Bill or policy memorandum, Police Scotland suggests that the Justice Committee may wish to consider circumstances when a civil action is raised when there is a live criminal investigation or prosecution. Similar circumstances have been raised during the planning for the Scottish Child Abuse Inquiry and, while not legal proceedings, are considered when a child protection or a MAPPA Significant Case Review is commissioned.

In conclusion Police Scotland recognises that this Bill will have far reaching impact on individuals, groups and organisations, including Police Scotland, for different reasons. That said, Police Scotland welcomes and supports the intention of the Bill as a potential means of providing some form of acknowledgment and recompense for those who have suffered child maltreatment.

Police Scotland and our partners are committed to working together to prevent all forms of child abuse and neglect. Any information which suggests a child has, is or is likely to be abused or neglected and may be at risk of significant harm will be multi-agency assessed and progressed in line with National Guidance, local child protection procedures and Police Scotland’s Standard Operating Procedure followed. We fully recognise that disclosing childhood abuse and neglect, for a whole range of reasons, can be particularly difficult. Police Scotland continues to engage with survivors and survivors groups to ensure that Police Scotland, in

collaboration, meet the individual needs of adult survivors of childhood abuse and neglect.

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