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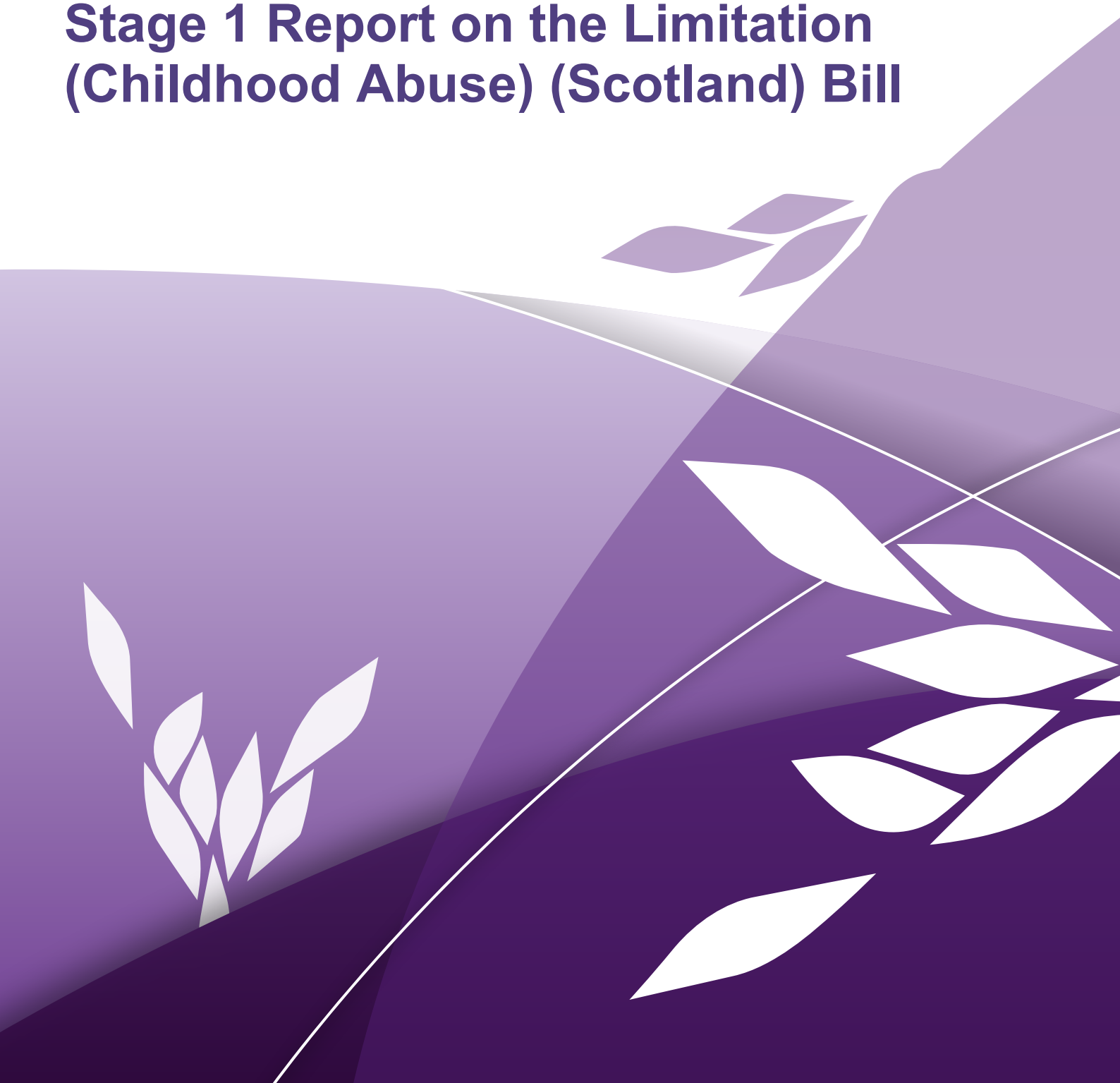
Justice Committee
Comataidh a' Cheartais

Stage 1 Report on the Limitation (Childhood Abuse) (Scotland) Bill



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To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice.

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Executive Summary

1. This report sets out the Justice Committee's consideration of the Limitation (Childhood Abuse) (Scotland) Bill at Stage 1.

2. The Bill removes the limitation period, also known as 'time bar', for civil claims relating to childhood abuse. The Committee supports this approach. It heard powerful evidence that the current limitation regime has created an insurmountable barrier to access to justice for survivors of childhood abuse. Survivors have been let down by the justice system and denied the opportunity to have their voices heard.

3. The Bill, however, is no panacea and pursuing a civil action will not be the right solution for all survivors. It is important that appropriate support is available for survivors to decide whether to pursue a civil action and, if so, to help them through that process. Further, the Bill will not enable claims to be brought in respect of abuse which took place prior to 1964. The Scottish Government must explore what other options for redress could be made available for this group.

4. The Committee supports the general principles of the Bill. In addition, this report makes a number of recommendations relating to the more detailed aspects of the Bill, including the definition of abuse and the provisions relating to previously raised cases. The Committee also heard concerns about the potential financial and resource implications of the Bill, which need to be given further consideration. The Committee expects discussion around these matters to continue should the Bill progress further.

Introduction

Overview of the Bill

5. The Limitation (Childhood Abuse) (Scotland) Bill was introduced into the Scottish Parliament on 16 November 2016. It is a Scottish Government Bill. The Policy Memorandum accompanying the Bill states:

> The policy aim of the Bill is to improve access to justice for survivors of childhood abuse. The Bill removes the current three year limitation period in actions seeking damages in respect of personal injury where the action relates to abuse when the person bringing the action was a child at the time of the abuse.
>
> Source: Policy Memorandum, paragraph 5.

6. The Policy Memorandum goes on to explain that the Bill is concerned only with the limitation period (also known as 'time bar') for claims relating to childhood abuse in the civil courts, and does not alter or affect the substantive law which applies to such cases. In other words, even if a person is able to bring a claim as a result of the removal of the limitation period, the Bill does not change what they would have to prove in court for that claim to be successful.

7. The Bill comprises three sections. Section 1 inserts new sections 17A to 17D into the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act").[i] Section 17A removes the current three year limitation period in personal injury actions where:

- the person raising the action was a child (under the age of 18) at the time the abuse occurred (or, where the abuse took the form of a continuing act or omission, at the time the abuse began);
- the action or omission to which the injuries were attributable constituted abuse (defined as including sexual, physical and emotional abuse); and
- the action is brought by the person who sustained the injuries.

8. The Bill, if enacted, will have retrospective effect as it removes the limitation period for claims relating to abuse which occurred before the Bill comes into force (section 17B). This retrospective effect is limited to the removal of the time bar: as noted above, the Bill makes no provision to alter, retrospectively or otherwise, the substantive law relating to personal injury cases.

9. Section 17C deals with previously litigated rights of action. It allows a person who has previously tried to bring an action relating to childhood abuse to re-raise that action where (i) the initial action was unsuccessful or settled because of the limitation period and (ii) the person did not benefit financially from any settlement other than, at most, having their expenses reimbursed.

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[i] In this report, references to sections 17A-D are to the new sections which would be inserted into the 1973 Act, rather than the actual provisions of the Bill.

10. Notwithstanding the removal of the limitation period, section 17D will require the court to dismiss actions relating to childhood abuse in certain circumstances, including where the defender satisfies the court that a fair hearing would not be possible.

11. The remaining sections of the Bill deal with commencement (section 2) and the short title of the Act (section 3).

The current law on limitation

12. In order to claim damages for any form of personal injury in the civil courts in Scotland, an action must be brought within the time-frames specified in the 1973 Act. Under section 17 of that Act, an action should generally be brought within three years of the date on which the injuries were sustained. Where the injuries were attributable to continuing acts or omissions then the three year period can start to run from when such acts or omissions ceased. Further, if the pursuer did not, at the date of the injuries, know that (i) the injuries were sufficiently serious to justify bringing an action, (ii) the injuries were attributable to an act or omission, and (iii) the defender was a person to whose act or omission the injuries were attributable, then the three year period does not start to run until the date when the pursuer had (or ought to have had) that knowledge.

13. When calculating whether the limitation period has expired, any time during which the pursuer was under a legal disability by reason of nonage (under 16) or unsoundness of mind (mental incapacity) is disregarded (section 17(3) 1973 Act). To put this in context, under the current law a survivor of childhood abuse would normally have to bring an action prior to their 19th birthday.

14. However, the court, under section 19A of the 1973 Act, retains a discretion to allow an action to proceed "if it seems to it equitable to do so", even if the action would otherwise be time barred. The onus is on the pursuer to show that justice requires the action to proceed.

15. It should be noted that childhood abuse can of course also result in criminal prosecutions. The relevant criminal offences are not, in Scotland, subject to any limitation period.

Policy behind the limitation of actions

16. It is the nature of limitation that it can prevent an otherwise well-founded claim from being pursued to a conclusion. As the Scottish Government recognises in the Policy Memorandum, a limitation period "interferes with access to justice by preventing potential claimants from securing a determination of their civil rights from the courts". [1]

17. However, limitation periods are often justified by a number of policy considerations. For example, it is generally accepted that delay may adversely affect the quality of justice: witnesses may be dead, incapacitated or untraceable; key documents might have been lost or destroyed. It is also argued that limitation periods are in the public interest, as they ensure claims are resolved reasonably quickly. Likewise, it is thought that a well-functioning legal system should offer individuals and

organisations the certainty of a final cut-off point. After this, individuals and organisations can organise their affairs knowing there are no pending legal claims against them.

The relationship between the Bill and the law of prescription

18. There is a related area of law - the law of prescription - which is not altered by the Bill. As with limitation, the law of prescription relates to time limits in which a court action must be brought.

19. However, there is a difference between the two concepts. Prescription is considered to be a rule of substantive law. Once the relevant time period has elapsed, an individual's right to bring an action is entirely extinguished. Any associated obligation to pay damages no longer exists in law. The court has no discretion to allow a case to proceed. Limitation, on the other hand, is classified as a procedural rule. The expiry of the limitation period has no effect on the existence of any right or obligation but it does mean that it will no longer be possible to bring an action to enforce that right or obligation. This is unless the court exercises its discretion to allow the action to proceed.

20. It used to be the case that both prescription (with a 20 year time period) and limitation (with a three year time period) applied to actions for personal injuries. This meant that after three years an action became time barred but the possibility remained that the court would allow the action to proceed if it considered it was equitable to do so. However, after 20 years the right of action was extinguished entirely.

21. The Prescription and Limitation (Scotland) Act 1984 ("the 1984 Act") removed personal injuries from the scope of prescription from the date it came into force (26 September 1984). Therefore, from 26 September 1984 onwards, actions for damages for personal injuries were subject only to the three year limitation period. However, the 1984 Act was not retrospective in its effect, meaning that claims which had already prescribed by 26 September 1984 were not revived. In the context of the Bill, this means that, taking the 20 year prescriptive period into account, if the abuse occurred prior to 26 September 1964, any right of action will usually have been extinguished by prescription by the time the 1984 Act came into force.

22. The Bill does not revive rights that have been extinguished by prescription. It will therefore still not be possible for an individual to bring a claim relating to childhood abuse that occurred before 26 September 1964. There are some minor exceptions to this. For example, where the abuse began before 26 September 1964 but continued after that date, the prescriptive period usually will not have started to run until the abuse ended. This means that the right of action will not have been extinguished by the time the 1984 Act came into force.

Human rights considerations

23. The Policy Memorandum sets out that the Scottish Government has considered the effect of the provisions in the Bill on human rights: in particular, Article 6 (right to a

fair trial) and Article 1 of the First Protocol (right to peaceful enjoyment of property) of the European Convention on Human Rights (ECHR). [2]

24. Article 6 ECHR sets out the right to a fair trial. In relation to civil cases, it applies to both pursuers and defenders. The right has various components. It includes a right to practical and effective access to a court (or tribunal). It also protects the right to the implementation of final, binding judicial decisions.

25. Article 1 of the First Protocol to the ECHR (A1P1) provides a person with a right to peaceful enjoyment of their "possessions". "Possessions" has been interpreted broadly by the courts. In two recent cases, the UK Supreme Court considered legislation which removed, with retrospective effect, a defence previously available to defenders in a court action for damages. This, in turn, increased the financial burden on those defenders. The Supreme Court said this amounted to an interference with possessions under A1P1.[ii]

26. These rights are not absolute rights but "qualified rights". This means they may be interfered with where certain legal tests are satisfied, such as the test of proportionality.[iii]

Broader policy context

27. As is discussed later in the report, the Committee heard from a number of witnesses that bringing a civil court action would be appropriate for some, but not all, survivors. It was argued that the Bill needed to be considered in its broader context as one of a number of measures to address historical childhood abuse in Scotland.

28. Key initiatives, both completed and ongoing, which the Committee was referred to include:

- a pilot confidential forum, the Time to be Heard forum, which heard from 98 former residents of Quarriers Homes;
- the work of the Scottish Human Rights Commission (SHRC) in conjunction with the Centre for Excellence for Looked After Children in Scotland (CELCIS), which led to an Action Plan on Justice for Victims for Historic Abuse of Children in Care. The Action Plan contained a number of recommendations including a review of the way in which the time bar operated in civil actions;
- the Victims and Witnesses (Scotland) Act 2014, which established a National Confidential Forum to which survivors of institutional abuse can provide confidential testimony;
- a public inquiry, set up in October 2015, into the abuse of children in care in Scotland. Public hearings are expected to commence on 31 May 2017;

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ii AXA General Insurance Ltd v Lord Advocate [2011] UKSC 46; Recovery of Medical Costs for Asbestos Diseases (Wales) Bill - Reference by the Counsel General for Wales [2015] UKSC 3.

iii For further information, see the SPICe briefing on the Bill (January 2017).

- the Apologies (Scotland) Act 2016, which aims to encourage organisations to give apologies, including in relation to historical childhood abuse;
- the establishment of an In Care Survivor Support Fund, now known as Future Pathways, which became fully operational in September 2016;
- a commitment to a formal process of consultation and engagement, led by CELCIS, on the question of financial redress. [3]

Scottish Government consultation preceding the Bill

29. The Policy Memorandum sets out the background to how the Scottish Government arrived at the proposals contained within the Bill. [4] In summary, in response to a recommendation in the Action Plan on Justice for Victims for Historic Abuse of Children in Care, the Scottish Government committed to exploring the issue of limitation in relation to childhood abuse actions. Following engagement with survivors and other key stakeholders, a consultation was published in June 2015 on the removal of the three year limitation period from civil actions for damages for personal injury for in care survivors of historical child abuse. Thirty-five written responses were received and a participative workshop was held with survivors of historical childhood abuse.

30. In March 2016, the Scottish Government published an independent analysis of the consultation responses. At the same time, it published its response to the consultation, accompanied by a draft Bill and explanatory notes.

31. Overall, the majority of respondents to the consultation agreed with the removal of the limitation period for childhood abuse cases. A significant minority (42% of respondents who provided a clear view), however, disagreed. It should be noted that there have been a number of changes to the Scottish Government's policy, as reflected in the current Bill, since the 2015 consultation. For example, the Bill applies to all childhood abuse, not just to abuse that took place in care settings. Further, not all provisions now contained in the Bill were consulted on. This includes the provision in section 17D, which requires the court to dismiss a case in certain circumstances.

32. There have also been changes in drafting following the publication of the draft Bill, including to the definition of abuse and the provisions on previously raised cases. The Policy Memorandum sets out that these changes were made after further input from key stakeholders, including legal practitioners representing both pursuers and defenders. [5] These changes, as well as changes in policy since the 2015 consultation, are explored in further detail elsewhere in the report, when discussing the relevant provisions of the Bill.

Committee scrutiny

33. The Justice Committee was designated lead Committee for Stage 1 consideration of the Bill on 22 November 2016. The Committee issued a call for evidence on 29 November 2016. The Committee received 15 responses to that call for evidence, as well as eight supplementary written submissions during its Stage 1 scrutiny. All responses accepted as evidence are published on the Committee's website.

34. The Committee took formal evidence on the Bill at three meetings (see further Annex A):

- on 21 February 2017, the Committee heard from a panel comprising representatives from the Association of Personal Injury Lawyers (APIL), Victim Support Scotland, Rape Crisis Scotland and Former Boys and Girls Abused in Quarriers Homes (FBGA), followed by a panel comprising representatives from the Association of British Insurers (ABI) and the Forum of Insurance Lawyers (FOIL);

- on 28 February 2017, the Committee heard from a panel comprising representatives from the Law Society of Scotland, the Faculty of Advocates and the Scottish Human Rights Commission (SHRC), followed by a panel comprising representatives from the Convention of Scottish Local Authorities (COSLA), Police Scotland, Social Work Scotland and the Society for Local Authority Lawyers and Administrators in Scotland (SOLAR);

- on 14 March 2017, the Committee heard from the Minister for Community Safety and Legal Affairs, Annabelle Ewing, and Scottish Government officials.

35. At informal private meetings on 31 January 2017, the Committee heard from four survivors of childhood abuse. These meetings did not form part of the Committee's formal evidence taking on the Bill for reasons of individual confidentiality. However, they were most helpful in informing the Committee of survivors' experiences as well as their views on the Bill. Anonymised notes of two of those meetings are set out at Annex C.

36. As ever, the Committee is grateful to all those who provided evidence. In particular, the Committee recognises the courage it takes for survivors to come forward in any forum and would like to express its thanks to those who did so.

37. The Finance and Constitution Committee received five responses to its call for evidence on the Financial Memorandum on the Bill, following which it agreed that it would give no further consideration to the Financial Memorandum. The call for evidence and responses can be accessed on the Finance Committee's website.

38. The Delegated Powers and Law Reform (DPLR) Committee published its report on the Delegated Powers Memorandum on the Bill on 18 January 2017. In that report, the DPLR Committee approved the one delegated power in the Bill, which relates to commencement. [6]

Removal of the three year limitation period for childhood abuse cases

Scottish Government's policy justification

39. The Policy Memorandum sets out the Scottish Government's policy justification for the removal of the three year limitation period for childhood abuse actions. [7] This justification has two main strands. Firstly, the Government's view is that cases of childhood abuse have unique characteristics which justify a specific limitation regime. These characteristics, it argues, derive from the abhorrent nature of the act, the vulnerability of the victim (who was a child at the time), and the effect of abuse on children. The Policy Memorandum emphasises that it is now recognised that the effects of childhood abuse often themselves inhibit disclosure to third parties until many years after the event.

> It is common for adult survivors of childhood abuse to suppress the abuse because of shame, guilt or fear and/or because of the stigma associated with abuse (the so-called "silencing effect"). The social taboo which has long attached to childhood abuse has added to the reluctance of survivors to come forward.
>
> Source: Policy Memorandum, paragraph 26.

40. The Government made a similar argument in its 2015 consultation and subsequent response. In particular, it emphasised that "the law should recognise that it is the abuse which is the very reason why people do not come forward until many years after the event". [8]

41. The second strand of the Government's policy justification is that the current limitation regime has operated to prevent access to justice for survivors of childhood abuse. During evidence to the Committee, the Minister for Community Safety and Legal Affairs, Annabelle Ewing, stated that survivors had been "let down" by the justice system, which had "denied them access to a remedy". [9]

42. The Policy Memorandum in particular emphasises that the way in which the courts have applied their current discretion under section 19A of the 1973 has operated to create an "insurmountable" barrier for survivors. [10] It notes that the courts have typically not accepted explanations for failing to raise actions within the limitation period, including explanations which have referred to such matters as shame, fear and psychological difficulties as a result of childhood abuse. The Policy Memorandum also states that, once the limitation period has expired, if the defender can show actual prejudice or the real possibility of prejudice in defending the action that has usually determined the section 19A issue in favour of the defender. [11]

Evidence received

43. The Committee heard strong support for the policy aim of improving access to justice for survivors of childhood abuse. There was, however, a divergence of views as to the means to achieve that aim: some positively supported the removal of the three year limitation period for childhood abuse cases; others expressed significant concerns about this approach.

Arguments in support of the removal of the limitation period

44. Those who supported the removal of the limitation period emphasised the impact of childhood abuse on survivors and the length of time it could therefore take for a survivor to be able to bring a civil action. For example, Victim Support Scotland agreed with the Scottish Government's view that the current law on limitation does not adequately reflect the fact that it is the nature of the abuse that creates a barrier to raising a claim within the required period. [12] It commented:

> It can take many years for someone to realise what has happened to them was in fact abuse, and it is common for abusers to use silencing tactics to ensure that the abuse is kept hidden. A significant amount of time can also be required for a person to feel able to disclose their abuse due to feelings of shame or embarrassment, the trauma resulting from the abuse, and/or suppressed memories. Because abusers are often figures of authority in the victims' lives, they are regularly left with feelings of fear or mistrust towards authorities, which presents challenges in reporting the abuse or participating in court action.
>
> Source: Victim Support Scotland, Written Submission, page 1.

45. This view was echoed in other evidence the Committee received, including the written submissions from the Law Society of Scotland, [13] Police Scotland, [14] Rape Crisis Scotland [15] and Social Work Scotland. [16] It was also strongly reflected in the private testimonies the Committee heard from survivors of childhood abuse (see Annex C).

46. The evidence also supported the Scottish Government's view that the current limitation regime had operated to deny access to justice for survivors. FBGA stated that the legislation had "simply failed generations of abused children" because the current law had been "narrowly defined" and "strictly interpreted" by the courts. [17] The SHRC similarly argued:

> the current limitation regime is unduly restrictive, particularly given the limited circumstances in which the limitation is set aside by the courts under section 19A of the Prescription and Limitation (Scotland) Act 1973 ... the courts have typically not accepted explanations where the pursuer has been aware of the abuse. Explanations for the delay which have referred to such matters as shame, fear and psychological difficulties as a result of childhood abuse have been unsuccessful.
>
> Source: Scottish Human Rights Commission, Written Submission, page 5.

47. The Committee understands that, since the 1973 Act came into force, there has been only one reported case where the court has used its discretion under section 19A to allow an action for childhood abuse to proceed, notwithstanding the expiry of

the limitation period.[iv] In oral evidence, Kim Leslie, representing the Law Society, suggested that the reason the section 19A discretion had not been used by the courts may be due to the "natural conservatism" of the Scottish judiciary. [18] Graeme Garrett, representing APIL, argued:

> Anyone who has looked at this matter over the years would be forced to conclude that the Scottish judiciary is an extremely conservative body and that it has operated the discretionary power in a way that has simply closed the door.
>
> Source: Justice Committee 21 February 2017 [Draft], Graeme Garrett, contrib. 119[19]

48. Another point raised in support of the removal of the limitation period was the unfairness that arises from the fact that there may have been a prosecution or conviction in a criminal case but the civil case is still time barred. This point was made strongly by David Whelan, representing FBGA, whose own civil case was time barred despite the criminal conviction of his abuser. In his view, the Bill would right this anomaly. [20]

49. However, as is discussed further below, other witnesses argued that the situations were not directly comparable particularly because with criminal trials there would always be a live accused.

Impact on survivors

50. The Committee heard evidence that the removal of the limitation period would have a positive impact for survivors. Graeme Garrett of APIL argued that the Bill was an "important step in giving [survivors] a voice", which they had previously been denied. [21] Laura Baxter, representing Victim Support Scotland, similarly thought that the Bill would give survivors a "voice" and "allow them to be heard and what they have been through to be recognised". [22] It was also argued that the Bill would improve access to justice for survivors. FBGA suggested that the Bill would mean that survivors would have "equitable access" to the civil courts. [17] Bruce Adamson from the SHRC told the Committee that the current law on limitation represented a real barrier to survivors accessing justice and the Bill would address that barrier. [23]

51. In its written submission, Victim Support Scotland emphasised that the benefits went beyond any financial compensation received as a result of a successful action.

> Many victims pursue civil action for acknowledgement of their abuse, to have their abuser held to account, and for the psychological benefits associated with accessing justice ... those claiming often tell us that the amount of financial award given is of lesser importance than the acknowledgement of the crime and its impact on them.
>
> Source: Victim Support Scotland, Written Submission, page 1.

52. However, some concerns were raised about the potential negative impact of bringing a civil action on survivors. FOIL argued that it is important "not to simply assume the new legislation will be of overall benefit to victims", and that there are "undoubtedly significant pressures and strains that will be placed upon victims who

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iv A v N [2013] CSOH 161; [2015] CSIH 26. (This case is also known as ‘EA v GN’).

choose to proceed with these cases". [24] The Faculty of Advocates similarly argued that "litigation is inherently stressful" and that "significant emotional impact" for those raising actions "appears inevitable". [25] In oral evidence, Laura Dunlop QC, representing the Faculty, told the Committee that sometimes the process of bringing an action for damages, even if successful, could do "more harm than good". [26]

53. The Committee also heard that the removal of the Bill would not necessarily mean that a survivor would be able to bring a successful action and receive compensation. The SHRC noted in its written evidence that there would still be a "necessary or significant evidential burden on survivors in proving their cases, or identifying a relevant defender". [27] This point was echoed in other evidence, including from APIL [28] and the Law Society. [29] The ABI argued that the Bill could "raise hopes which are later disappointed when the case does not come up to proof - adding to the suffering and anxiety of victims and survivors of childhood abuse". [30] Particular challenges were highlighted in relation to cases where the defender is an individual, rather than an institution, and therefore may not have the resources to pay any compensation in the event of a successful claim. [31]

54. It was emphasised to the Committee that the Bill was not a panacea and that bringing a civil action would not be the right solution for all survivors. For example, Bruce Adamson from the SHRC told the Committee that the Bill was not the "whole solution" and that "for a large number of survivors, an action for personal injury damages will not be the best route for justice". [32] This view was reflected in the private testimonies the Committee heard from survivors (see Annex C).

55. However, what came across strongly during the evidence was that the Bill would give survivors a choice about what action to take. This point was made clearly by Harry Aitken representing FBGA when he told the Committee:

> The significance of the Bill is that, at long last, survivors will have the choice. That element of choice has been denied to them up until now. We will make anyone we speak to aware of this. We speak to people quite frequently across the whole nation ... My point is that they will already have heard that it will be a difficult task for them to go to court. They will have to have a robust case, that case will be cross-examined and it will have to stand up to the normal practices of the legal system. However, having made that choice and found the courage to go forward, I believe that that'll fortify them.
>
> Source: Justice Committee 21 February 2017 [Draft], Harry Aitken, contrib. 18[33]

56. Other witnesses also emphasised the importance of choice for survivors, arguing that the Bill should be seen as one of a range of measures available (some of which were set out earlier in this report). Social Work Scotland, for example, commented that the Bill is "one part of a suit of actions necessary to support victims of childhood abuse". [16] Detective Chief Superintendent Lesley Boal QPM, representing Police Scotland, told the Committee:

> Survivors of childhood abuse absolutely deserve access to a range of justice and reparation measures. Each survivor has, or should have, the ability to choose which element or elements they wish to access or progress, and the ability to seek compensation must be one of those elements.
>
> Source: Justice Committee 28 February 2017 [Draft], Detective Chief Superintendent Lesley Boal QPM (Police Scotland), contrib. 130[34]

57. The Committee heard that it would be crucial to ensure that appropriate support was available to help survivors make a choice as to what action, if any, to take. The SHRC argued that further work needed to be done to ensure that survivors are made aware of the options open to them. [27] Bruce Adamson said that there continued to be a "gap in understanding" about, for example, using the Apology (Scotland) Act 2016, or accessing the Scottish Childhood Abuse Inquiry. [35] He commented that:

> It is important that support and advice are given to survivors to ensure that they do not see [the Bill] as being the best option for all of them and that they are made aware of the other opportunities to seek justice, including possibilities for other redress.
>
> Source: Justice Committee 28 February 2017 [Draft], Bruce Adamson, contrib. 106[36]

58. When asked where this support would come from, Bruce Adamson highlighted the survivor support fund (Future Pathways) and the number of agencies that work with survivors. He also suggested that it would be important to ensure that the legal profession had information about the alternatives available. [37]

59. The Law Society and the Faculty of Advocates both emphasised that support would be needed during the civil court process, should a survivor choose to pursue that route. [26] This was recognised by the Minister in her evidence to the Committee, when she stated that it would be "an empty gesture" to provide the possibility of a legal remedy while not recognising the practical issues involved. She told the Committee that there had been "broad-brush" discussions with the Scottish Courts and Tribunals Service about the support that could be made available to survivors bringing civil actions. She also said that the Government had discussed with the Law Society the possibility of specialist training for lawyers, or even a specialist accreditation, for this area of work. [38]

Concerns expressed about the removal of the limitation period

60. Despite strong support for the policy intent of the Bill, the Committee also heard a number of concerns about the implications of the removal of the limitation period for childhood abuse cases. Some of these concerns related to the potential financial and resource impacts of the Bill. Others related to specific provisions in the Bill, such as the application of the Bill to previously raised cases. These issues are explored in further detail later in the report.

61. The Committee also heard more general concerns about the removal of the limitation period, particularly from organisations representing the insurance industry.

The ABI, [30] the Forum of Scottish Claims Managers, [39] and Zurich Insurance plc [40] all argued that the approach taken in the Bill was not a proportionate solution to the aim of improving access to justice for survivors. FOIL emphasised that changes to the limitation regime should not be "undertaken lightly". [41] The Committee notes, however, that while this evidence highlighted significant concerns about the removal of the limitation period, it did not go as far as to argue that the Bill should not proceed at all.

62. There was also division of opinion within the legal profession. In oral evidence, Kim Leslie, representing the Law Society of Scotland, emphasised that, while the Law Society supported the Bill from the pursuer's perspective, there was no "consensus" of opinion. [42] That point was echoed by Laura Dunlop QC, representing the Faculty of Advocates. [43] In its written evidence to the Committee, the Glasgow Bar Association stated clearly that it did not agree with the removal of the limitation period for childhood abuse cases. [44]

63. A recurring concern was that the removal of the limitation period undermined the principle of legal certainty. The ABI argued that there were "strong public policy reasons against perpetually exposing persons to litigation for wrongful acts" [45] and that the Bill could erode "the fundamental rule of law that entitles individuals and organisations to legal certainty". [46] Zurich suggested that the Bill could encourage arguments for exemptions for other types of claim such as abuse of adults, other forms of injury to children, or industrial diseases. [47]

64. The Committee also heard of the risk, due to the passage of time, of poor quality and/or missing evidence, which, it was argued, could lead to an unfair trial. In its written submission to the Committee, the ABI stated:

> The outcomes of cases pursued on the basis of old evidence are not of the quality that should determine the rights and responsibilities of parties ... We are concerned that Judges will find themselves having to determine a factual position based on poor documentation and unreliable accounts.
>
> Source: Association of British Insurers, Written Submission, page 5.

65. FOIL emphasised that there would be practical difficulties faced by defenders in investigating and defending claims brought a long time after the events on which they are based occurred. It also argued that a lack of cogent evidence available could "result in a defender being unable to present a defence". [41]

66. When these concerns were put to witnesses who supported the removal of the limitation period, the Committee heard that the passage of time had not prevented criminal prosecutions in respect of historical childhood abuse from taking place. Indeed, the Policy Memorandum notes that there has been a significant increase in the number of such prosecutions. [48] In oral evidence, Harry Aitken representing FBGA argued:

> The idea that there would be a paucity or a lack of evidence has been debunked. In many cases, people have been able to present their case to the criminal courts and have been successful on the basis of the evidence that is available.
>
> Source: Justice Committee 21 February 2017 [Draft], Harry Aitken, contrib. 42[49]

67. Kim Leslie of the Law Society made a similar point:

> What does not square with me is that there is no such time limit for a criminal prosecution. The situation is either that we cannot prosecute after a lengthy passage of time, or that there is no reason why we should not be able to bring a civil suit for the category of individual concerned.
>
> Source: Justice Committee 28 February 2017 [Draft], Kim Leslie, contrib. 25[50]

68. In oral evidence, Graeme Watson, representing FOIL, accepted that the current discretion in section 19A of the 1973 Act was working in an "obtuse way" if there had been sufficient evidence for a criminal trial to proceed but the civil case was time barred. However, he went on to note that the Bill applied to the "whole spectrum" of cases, not just those where a criminal prosecution had taken place or where there was a live accused available to give evidence. [51] Laura Dunlop QC, from the Faculty of Advocates, also suggested that, where a civil claim is brought against and organisation or institution, it would be more difficult to defend the claim as "it does not have the sort of knowledge of what it did or did not do that an individual who is being proceeded against will have". [52]

Cases where the abuse occurred before 1964

69. As discussed earlier in the report, the Bill only alters the limitation regime for personal injury actions relating to childhood abuse; it does not reform the law of prescription. This means that, subject to a few minor exceptions, where the abuse occurred before 26 September 1964, the person will still not be able to bring claim as their right of action will have been extinguished by prescription.

70. The Scottish Government states it has given "serious consideration" to whether anything can be done to revive these extinguished rights. [3] However, it has concluded that it would not be possible to do so, as it would contravene the European Convention of Human Rights (ECHR). Specifically, the Government considers that reviving rights extinguished by prescription would amount to a disproportionate interference with Article 1 of the First Protocol (A1P1) ECHR, which gives a person the right to the peaceful enjoyment of their possessions.

71. In reaching this conclusion, the Government relies heavily on the 2007 report of the Scottish Law Commission on Personal Injury Actions: Limitation and Prescribed Claims. In that report, the Commission recommended that claims in respect of personal injuries which were extinguished by prescription before 1984 should not be revived (recommendation 18). It also considered whether a special category of claims extinguished by prescription should be revived - namely those whose injuries resulted from institutional childhood abuse - and recommended against such a move (recommendation 19). The Commission emphasised the general

undesirability of retroactive legislation and considered that reviving claims extinguished by prescription would raise serious human rights issues and might well be incompatible with A1P1 ECHR (paragraphs 5.8-5.13).

72. The Scottish Government accepted these recommendations in 2013. [53] However, in both the Policy Memorandum [54] and a letter to the Committee from the Minister for Community Safety and Legal Affairs, [3] the Government emphasises that it has again considered its position on prescription. Nonetheless, it maintains that it would be impossible to revive rights extinguished by prescription without breaching the ECHR. It also argues that the law of prescription is substantially different from limitation and that is why different considerations apply. In her letter to the Committee, the Minister states:

> Unlike the removal of a limitation defence (which ... is qualified by the possibility of the court exercising its discretion to allow an action to be raised after the expiry of the limitation period) reversing the effect of the pre-1984 law of prescription would have the effect of imposing legal liability anew where, for a period of at least 33 years, there had been no such liability at all (not even one which depended upon a court exercising a discretion).
>
> Source: Letter to the Deputy Convener from the Minister for Community Safety and Legal Affairs, 9 February 2017.

73. This was not an issue raised in written submissions to the Committee. However, it was explored by the Committee during oral evidence sessions. All witnesses who expressed a view agreed with the Scottish Government's decision not to amend the law of prescription through the Bill. Kim Leslie of the Law Society argued that a balance had to be struck somewhere and that the Scottish Government had "struck the right balance". [55] Other witnesses made similar points, with Laura Dunlop QC of the Faculty of Advocates commenting that she could see a potential challenge to the Bill if it amended the law of prescription so as to resurrect claims that had been extinguished. [56] Bruce Adamson from the SHRC similarly argued that amending the law of prescription within the Bill might "take us down a path that might frustrate its purpose". However, he emphasised that the rights of survivors abused before 1964 needed to be addressed in other ways. [57]

74. David Whelan, representing FBGA, said that he recognised the difficulties with pre-1964 cases, that this had been fully explained by the Scottish Government, and that FBGA had been in discussions with the Government about redress and had focused initially on pre-1964 cases given that these would not be covered by the Bill. [58]

Alternatives to the removal of the three year limitation period

75. The Policy Memorandum sets out a number of alternatives to the removal of the limitation period in childhood abuse cases that have been considered by the Scottish Government. [59] These include: introducing a presumption that the pursuer was unable to raise proceedings until the date that proceedings were actually

raised; the insertion of a non-exhaustive list of relevant factors which the court should take into account when exercising its section 19A discretion; extending the limitation period to five years; 'window' legislation which removed the limitation period for a short period; removing the limitation period for all personal injury actions.

76. The Policy Memorandum does not specifically discuss the option of doing nothing. However, as noted above, the Committee heard broad agreement that the current limitation regime was operating to prevent access to justice and that some action needed to be taken to address this. Views, however, differed as to the most appropriate action to take.

Guidance on the exercise of the section 19A discretion

77. Organisations representing the insurance industry argued that providing greater guidance for judges on the exercise of their discretion under section 19A of the 1973 Act and/or a statutory list of factors which the court should take into account should be considered as an alternative to the removal of the limitation period for childhood abuse cases. In its written submission, the ABI argued:

> If [the section 19A discretion] has not been exercised sufficiently often, the answer is to issue guidance, in legislative or other form, on the factors which ought to prompt the exercise of the discretion rather than to throw out the limitation period altogether and the fundamental principles of the rule of law that go with it.
>
> Source: Association of British Insurers, Written Submission, page 7.

78. Zurich similarly favoured greater guidance on the exercise of discretion rather than the removal of the limitation period. It commented that a similar discretion existed in England and Wales, which had been used more often, and therefore lessons could be learned from judicial interpretation there. [60]

79. In oral evidence, both Alastair Ross of the ABI [61] and Graeme Watson of FOIL [62] emphasised that no guidance had been given to the judiciary to date. Alastair Ross went on to comment that he could "not understand why Scottish Ministers have opted to go straight to the removal of the time bar as their solution to what everyone agrees is a problem". [63]

80. The introduction of guidance for judges, which would be a matter for the Lord President and the Scottish Civil Justice Council, is not explicitly discussed as an alternative in the Policy Memorandum. However, the reasons for not pursuing this option are likely to be similar to those for not creating a list of statutory factors, which are discussed further below. As an additional point, Laura Dunlop QC, representing the Faculty of Advocates, suggested to the Committee that guidance in a non-statutory form could be a "contradiction in terms", as judges are not given guidance as to how to exercise a statutory discretion. [64]

81. The Policy Memorandum does consider the option of a statutory non-exhaustive list of factors which the court ought to take into account when applying section 19A. However, the Scottish Government argues:

> the unique position of survivors of historic childhood abuse merits a different approach to the application of the limitation regime. Whatever factors might govern the exercise of the court's discretion, the nature of a limitation period, of itself, creates an inbuilt resistance to allowing historical claims, which is not appropriate in the context of childhood abuse. The Scottish Government is of the view that in order to achieve a step change in how these cases are handled, the limitation period should be removed completely for these cases.
>
> Source: Policy Memorandum, paragraph 56

82. In her evidence to the Committee, the Minister again emphasised that a limitation period is itself inappropriate given the "unique set of circumstances" relevant to survivors of childhood abuse, and that it created an "in-built resistance" to cases proceeding. She argued that judges had been operating within the policy of the 1973 Act and that if there is a limitation period that will "in effect be the norm". [65]

83. Other witnesses expressed similar views. The Law Society [66] and the SHRC [67] both thought that the provision of guidance and/or a list of statutory factors would not go far enough to enhance access to justice for survivors. Bruce Adamson, representing the SHRC, argued:

> we would have concerns that keeping the onus on the survivor to explain why the delay took place is unduly restrictive. One of the things that came out in the consultation was the feeling from survivors that they are in some way being blamed for not being able to bring their case forward, so the Commission strongly feels that, in terms of providing access to justice, the right thing to do is to create a particular category of survivors—those who were abused as children—who are exempt from having to face that limitation barrier.
>
> Source: Justice Committee 28 February 2017 [Draft], Bruce Adamson, contrib. 22[68]

84. Bruce Adamson also argued that the Bill provided the opportunity for Parliament to give the courts a "clear indication" that childhood abuse cases should be allowed to go forward. [69]

85. Laura Dunlop QC suggested that creating a list of statutory factors would be a complicated exercise, which could raise more questions than it answered.

> Is the list comprehensive, or is there to be some sort of catch-all—such as “any other relevant factor”—to cater for the multiple different circumstances of the people affected? What weight is to be given to each factor, or are they all of the same weight? If you took that approach [creating a list of factors], you would perpetuate greater uncertainty.
>
> Source: Justice Committee 28 February 2017 [Draft], Laura Dunlop, contrib. 23[70]

86. Sandy Brindley, representing Rape Crisis Scotland, argued that removing the limitation period altogether, rather than relying on judicial discretion, would give greater certainty to survivors. She emphasised that, based on their past experience of the limitation regime, survivors would not have confidence in an approach based on discretion. [71]

87. However, not all witnesses agreed that the Bill would bring certainty for survivors. It was argued by some that section 17D, which will involve the court exercising a discretion in deciding whether to dismiss a case in certain circumstances, introduced a level of uncertainty into the Bill. This issue is explored later in the report.

Financial redress

88. COSLA, [72] Social Work Scotland [73] and SOLAR [74] encouraged the Committee to consider a specific financial redress scheme for childhood abuse cases. Although outside of the scope of the Bill, they argued that such a scheme could be a more effective means of achieving the policy aim of the Bill. In particular, they referred the Committee to Historic Abuse Redress Scheme established in Jersey in 2012 ("the Jersey model"). The Committee understands that this scheme operated outside the court system, with lawyers, independent of the parties involved, evaluating claims on behalf of the scheme.

89. The main argument advanced in support of the Jersey model was that it would be a more proportionate approach to achieving the policy aims of the Bill. Alistair Gaw, representing Social Work Scotland, for example argued that it:

> might be a proportionate approach that gives people recompense and recognition but which does not necessarily involve the stress and the potentially much higher costs of civil court action.
>
> Source: Justice Committee 28 February 2017 [Draft], Alistair Gaw, contrib. 134[75]

90. COSLA suggested that a redress scheme would be more cost-effective than litigation and could also safeguard survivors from the potential "no win, no fee" culture that might develop around childhood abuse claims. [76]

91. As this suggestion was only made towards the end of the Committee's evidence-taking on the Bill, it was not an issue that the Committee was able to explore in depth with other witnesses. It was therefore not able to hear evidence about the strengths and weaknesses of the Jersey model or how it had worked in practice. Further, it was not clear whether proponents of the Jersey model thought it should be instead of the removal of the limitation period - COSLA and SOLAR did not express a clear view; Alistair Gaw commented that it could "complement" the Bill. [77]

92. In a supplementary written submission to the Committee, FBGA emphasised that survivors should be "central to the design, input and implementation" of any redress model. [78]

93. The Committee understands that the Scottish Government intends to consult shortly on a financial redress model for survivors who have been abused in care. This was confirmed by the Minister during her evidence to the Committee. [79] The Minister explained that consultation was in its preparatory stages, with work being done by CELCIS and the Interaction Action Plan Review Group. She also stated the Government had not specifically consulted on the Jersey model, but that broader

discussions had been taking place and she expected that submissions would be made to the consultation which related to the Jersey model. [80]

Conclusions on the removal of the limitation period

94. The Committee supports the removal of the limitation period for actions for damages in relation to personal injuries resulting from childhood abuse, as provided for in the Bill. The Committee heard powerful evidence that the current limitation regime has created an insurmountable barrier to access to justice for survivors of childhood abuse. It is disappointing that the existing discretion in section 19A of the Prescription and Limitation Act 1973 has not been applied in a way which recognises that it is the nature of childhood abuse itself that can prevent survivors from raising a civil action for many years. As a result, survivors have been let down by the justice system and denied the opportunity to have their voices heard.

95. The Committee notes the concerns expressed in some evidence that the removal of the limitation period undermines the fundamental principle of legal certainty. It also accepts that the passage of time can have a negative impact on the availability and quality of evidence. However, the Committee is not persuaded that these concerns outweigh the positive impact that the Bill would have for survivors of childhood abuse. It would be for the courts to weigh up the available evidence in each individual case.

96. The Committee notes that the Bill will not be the right option for all survivors. However, by removing what has been a significant barrier to access to justice, the Bill will give survivors the choice as to whether to pursue a civil action.

97. It is crucial that appropriate support is available to help survivors to make that choice. They will also need support through the court process, should they choose to go down that route. The Committee notes the Minister's evidence that initial discussions have been taking place with the Scottish Courts and Tribunals Service and the Law Society on this issue. The Committee asks the Scottish Government to provide an update on the steps it is taking to ensure the necessary support is available.

98. The Committee notes views that an alternative approach to the removal of the limitation period would have been to provide guidance and/or a statutory non-exhaustive list of factors for the courts to take into account when exercising its section 19A discretion. However, it agrees with the weight of the evidence that this approach may not be enough to facilitate access to justice or provide certainty for survivors about when they will be able to bring a claim.

99. The Committee accepts that the Scottish Government has had to strike a difficult balance in deciding not to reform the law of prescription in the Bill. It is persuaded that this is the right balance, and that to do otherwise would raise serious human rights implications. However, it considers that the Government must address the rights of survivors of abuse which took place prior to 1964. The Committee asks

the Government to provide information on what action it intends to take in respect of this group.

Key definitions in the Bill

Definition of child

100. The removal of the limitation period only applies where a person was a child at the time of the abuse. The Bill defines a child as an individual under the age of 18 (section 17A(2)). The vast majority of evidence received by the Committee agreed with this definition. Those who did not agree, including the Glasgow Bar Association [44] and the Forum of Scottish Claims Managers, [81] considered that the definition in the Bill was inconsistent with the Age of Legal Capacity (Scotland) Act 1991. This provides that from the age of 16, subject to certain safeguards, a young person can enter into "transactions", such as renting a property or taking out a credit card.

101. Other evidence noted that there were a number of definitions of a "child" in existing legislation but went on to support the definition in the Bill. The Law Society, for example, argued that the definition in the Bill should be at the upper limit of the age range in existing legislation to "avoid any artificial barrier to action". [13] The SHRC similarly argued that the broadest definition should apply, noting that the definition in the Bill was consistent with the UN Convention on the Rights of the Child. [82] FOIL stated that it "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". [83]

102. The Committee agrees with the definition of a child in the Bill as a person under 18. This definition was supported by the vast majority of evidence received as it would avoid creating a barrier to access to justice for survivors.

Definition of abuse

103. The Bill provides that abuse "includes sexual abuse, physical abuse and emotional abuse" (section 17A(2)). There were two main issues raised in evidence about this definition: firstly, its non-exhaustive nature, and secondly, whether the particular categories mentioned in the definition were appropriate and/or sufficient.

Setting in which the abuse took place

104. Before going on to consider those two issues, it should be noted that the Bill applies to all abuse falling within the definition regardless of where the abuse took place. In its 2015 consultation, the Scottish Government originally proposed that the removal of the limitation period would only apply where the abuse had taken place "in care". [84] Responses to that consultation highlighted the potential anomalies and injustice that could arise as a result of this restriction. [85] The Government therefore extended the removal of the limitation period to all cases of childhood abuse regardless of the setting. That policy decision is reflected in the Bill as drafted.

105. The Committee heard broad support for this approach, including from those who had concerns about other aspects of the Bill. The Forum of Scottish Claims Managers, for example, commented:

> 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.
>
> Source: Forum of Scottish Claim Managers, Written Submission, page 4.

106. Similarly, the Faculty of Advocates argued:

> Insofar as the "silencing effect" is regarded as 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.
>
> Source: Faculty of Advocates, Written Submission, page 1.

107. On the other hand, FOIL argued that extending the provisions of the Bill to all settings would not necessarily put all survivors of childhood abuse in the same position. For example, it emphasised that some survivors may still find that no financial compensation could be paid in their case due to the fact that there is no insurance provision and the defender organisation or individual has no funds to meet the claim. [86] This is likely to be a particular issue in domestic settings where, as the Forum of Scottish Claims Managers pointed out, any insurance will not cover the criminal actions of the abuser. [87] The Forum of Scottish Claims Managers also noted that abuse by foster parents is ordinarily beyond the scope of an institution's public liability policy, and that institutions are not vicariously liable for foster parents as they are not considered employees of the institution. The Bill, it was argued, could therefore give survivors a "false assurance" of compensation, when in fact there was no financial resource available. [88]

108. A similar point was made by Social Work Scotland in its written submission. While agreeing in principle with the broader approach taken in the Bill, it went on to say:

> we acknowledge that where cases are brought against individuals or small local organisations (even if they still exist), claims may be more likely to be symbolic rather than providing compensation which could impact on victim's trust in the process.
>
> Source: Social Work Scotland, Written Submission, page 1.

109. However, as was noted above, the Committee heard evidence that many survivors pursue civil action for reasons beyond any financial compensation that might be paid. These reasons include wanting acknowledgement of their abuse and to have their abuser held to account. [89]

110. The Committee supports the broader approach taken in the Bill, which removes the limitation period for all cases of childhood abuse regardless of the setting in which the abuse took place. To do otherwise would create an arbitrary distinction which would undermine the Bill's aim of improving access to justice for survivors of childhood abuse.

111. The Committee acknowledges that this broader approach will not necessarily mean that all survivors will receive financial compensation from a civil court case, even if their claim is successful. The Committee notes the particular difficulties that may face survivors when the defender is an individual or uninsured. The Committee reiterates the comments it made above about the importance of appropriate support being available to survivors when deciding what if any further action they wish to take. This could help to manage survivors' expectations about what can be achieved as a result of the Bill, as well as maintain their confidence in the civil court process.

112. The Committee also recognises that many survivors may choose to pursue a civil action for acknowledgement of their abuse or to have their abuser held to account, and not just because of the possibility of financial compensation.

Non-exhaustive definition of abuse

113. The Bill provides that abuse "includes" sexual abuse, physical abuse and emotional abuse. The definition, therefore, is non-exhaustive. It would be open for the courts to decide to remove the limitation period in a case where the type of abuse involved was not covered by one of the categories listed in the Bill. Some evidence was critical of this approach. The ABI [90] and FOIL [91] both argued that it created a risk of uncertainty and the scope of the Bill being extended beyond what the legislature originally intended. The ABI argued that:

> the non-exhaustive nature of this list creates scope for further unintended types of claim being included in the extra-ordinary disapplication of the limitation period. Given that the importance of the principle of legal certainty and the decision to treat cases of childhood abuse exceptionally by removing any time bar, the category of claim to which that relates should not be open-ended. We would propose clause 17A(2) is amended by replacing "includes" with "comprises" or "means" to properly confine and provide greater clarity to the definition of abuse.
>
> Source: Association of British Insurers, Written Submission, page 5.

114. FOIL similarly suggested that "includes" should be replaced with "means". It also commented that the non-exhaustive definition could lead to "satellite litigation on whether behaviour towards a child falls within the ambit of the Bill". [83]

115. Other evidence suggested that there were benefits to a non-exhaustive approach. Sandy Brindley, from Rape Crisis Scotland, argued that if the Bill was more specific it "could potentially limit the range of experiences that it would cover" and that "as wide a range of people as possible" should be able to access the legislation. [92] Kim Leslie, of the Law Society, suggested that a non-exhaustive approach could be justified as it would "provide for discretion, so that when something is presented that is clearly abuse, it can be included". [93]

116. A similar argument was made by the Minister in her evidence to the Committee. She emphasised the importance of having a non-exhaustive definition because:

> we cannot begin to imagine all the forms of abuse that these people have suffered at the hands of the perpetrators or, in trying to represent this heinous and abhorrent harm, set out all the kinds of abuse that could be involved. As a result, we need to let the courts decide.
>
> Source: Justice Committee 14 March 2017 [Draft], Annabelle Ewing, contrib. 102[94]

117. The SHRC argued that the Scottish courts were "well placed" to make the necessary assessments in relation to whether the conduct meets the relevant thresholds. [95]

118. The Committee considers that a non-exhaustive definition of abuse is appropriate, given the range of circumstances which may amount to abuse in individual cases. An exhaustive definition could risk excluding some survivors of childhood abuse from accessing justice.

Categories of abuse

119. Although the definition of abuse is non-exhaustive, the Bill refers specifically to three categories of abuse: sexual abuse, physical abuse and emotional abuse. These categories are not further defined elsewhere in the Bill or in the Explanatory Notes. Police Scotland made the general point that the Bill would benefit from further definition of all three categories of abuse. In oral evidence, Detective Chief Superintendent Lesley Boal QPM referred the Committee to the definitions of sexual, physical and emotional abuse in the Scottish Government's National Guidance for Child Protection in Scotland 2014.

120. Otherwise, evidence tended not to comment on sexual or physical abuse, other than to express support for their inclusion in the definition.

Emotional abuse

121. In contrast, the Committee heard some concerns about the inclusion of "emotional abuse" as one of the categories in the definition. This evidence did not go as far as to argue that it should not be included, but suggested that further clarity would be required. The Faculty of Advocates commented that emotional abuse was a "vague concept" and that there would be merit in seeking to define more clearly what was meant by emotional abuse. [96] In oral evidence, Laura Dunlop QC representing the Faculty suggested that "it is open to the courts to develop the concept of abuse - in particular, emotional abuse". [97]

122. FOIL also argued that the term emotional abuse was "too vague and undefined", giving little guidance to pursuers on what may fall within the definition. As with the non-exhaustive nature of the definition, it again argued that the uncertainty risks "unnecessary litigation on the scope of behaviour covered by the definition". [83] In oral evidence, Graeme Watson from FOIL suggested:

> "Emotional abuse" itself is a not a well-defined term: it is quite straightforward to go to past case law and see what is meant by "sexual abuse" or "physical abuse", but it is much less so with "emotional abuse" ... I encourage the Committee to consider ... whether greater clarity can be brought to what is meant by "emotional abuse".
>
> Source: Justice Committee 21 February 2017, Graeme Watson, contrib. 182[98]

123. Other evidence simply expressed support for the definition of the abuse as drafted in the Bill and did not raise any particular issues concerning emotional abuse. Social Work Scotland noted the "importance of not focussing solely on sexual abuse". [99]

124. The Policy Memorandum does acknowledge the challenges in defining and proving emotional abuse. [100] However, it does not go on to offer a definition. It simply states that:

> if [emotional abuse] causes psychiatric injury in circumstances where the law gives a right of action for reparation (which will be a matter for the courts to decide) then the survivor should have the benefit of the change in the law made by this Bill.
>
> Source: Policy Memorandum, paragraph 81.

125. The Memorandum also points to increasing evidence which demonstrates the harm of emotional abuse and that this harm extends into adult life. [101] Further, the Minister noted in evidence that existing legislation in Scotland, such as the Matrimonial Homes (Family Protection) (Scotland) Act 1981, covers the possibility of mental injury, suggesting that emotional abuse was not an entirely new concept for the courts. [102]

Additional categories of abuse that could be included in the Bill

Neglect

126. The Scottish Government's 2015 consultation proposed that the definition of abuse should cover "physical, sexual, emotional and psychological abuse, unacceptable practices and neglect", noting that this was the definition used in the Scottish Child Abuse Inquiry's terms of reference. [103] The majority of respondents (70%) to the consultation who addressed the issue supported this definition. However, the Government's response to the consultation notes that concerns were expressed about the risk of unintended consequences, confusion and legal challenge arising from the broad terminology used. It therefore came to the view that the proposed forms of abuse could be subsumed within the World Health Organisation definition of abuse which includes physical abuse, sexual abuse, emotional abuse and neglect. [104]

127. This was the definition contained in the Government's draft Bill published in March 2016. However, the Policy Memorandum explains that "informal road-testing" of the

draft Bill suggested that including neglect could inadvertently extend the scope of the Bill beyond what was intended. [105] It goes on to state:

> Harm from neglect may, in some cases, properly be characterised as physical or emotional abuse. However, the Scottish Government is ensuring that it is only actions arising from 'abuse' that are exempted from the limitation period, rather than negligent behaviour that may have caused injury. The key justification for a special case for childhood abuse survivors in relation to the limitation period is the long-lasting negative impacts of the abuse on the individual's mental health, coping strategies, and trust in authorities, and the stigma that surrounds childhood abuse. The change in the law should therefore only capture truly abusive behaviour, and not acts of negligence which do not amount to abuse.
>
> Source: Policy Memorandum, paragraph 83.

128. A similar point was made by the Minister when giving evidence to the Committee:

> In my view, the definition as it stands does not exclude neglect per se, but it would include only neglect that was a result of abusive rather than negligent behaviour.
>
> Source: Justice Committee 14 March 2017 [Draft], Annabelle Ewing, contrib. 102[94]

129. The ABI agreed with the removal of neglect from the draft Bill, arguing that it had "posed considerable questions about the definition of neglect and its application in this context". [90] Laura Dunlop QC, of the Faculty of Advocates, also suggested that trying to capture "sins of omission" in the scope of the definition could present "drafting problems". [106]

130. However, the SHRC strongly argued that neglect should be explicitly included in the definition of abuse in the Bill "to bring it into line within international human rights law standards and definitions". [95] In oral evidence, Bruce Adamson emphasised that neglect is a well-recognised term in the case law associated with the ECHR and international human rights law. [107] Although he accepted that neglect could perhaps be covered by the expansion of the definition of "emotional abuse", he emphasised that international standards clearly listed neglect as a separate category. He went on to argue that "there is a great deal of international evidence that would make not including neglect in the Bill when it clearly could be included seem a little strange". [108] For example, he cited article 19 of the UN Convention on the Rights of the Child, which uses the phrase "protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment". [109]

131. He also emphasised that the definition was relevant to the removal of the limitation period, and did not alter the level of harm that a pursuer would have to establish under the substantive law relating to reparation for personal injury. [110] He therefore argued:

> There does not seem to be a real risk of trivial cases going forward, given that, even for very strong cases, people would not undertake the process lightly. The process is very challenging, and it is able to deliver only monetary compensation for the abuse. I cannot see a situation in which the floodgates would be opened to trivial cases by including neglect in the bill.
>
> Source: Justice Committee 28 February 2017 [Draft], Bruce Adamson, contrib. 61[111]

132. Other evidence supported including neglect within the definition of abuse in the Bill. Police Scotland emphasised that the Scottish Government's National Guidance for Child Protection in Scotland "clearly documents that abuse AND neglect are forms of maltreatment". [112] It also noted that 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%). In Police Scotland's view:

> survivors [of] childhood emotional or physical neglect in many cases have experienced maltreatment that can be just 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.
>
> Source: Police Scotland, Written Submission, page 4.

133. In oral evidence, Detective Chief Superintendent Lesley Boal QPM argued that not including neglect in the Bill might mean it would not be "in the spotlight". She went on to comment that, although not the purpose of the Bill, the specific inclusion of neglect could act as a means of deterring such behaviour. [113]

134. Kim Leslie said that the Law Society, from the perspective of claimant practitioners, supported the inclusion of neglect in the definition of abuse. She also commented that she could not say definitively that abuse that was neglect would always be covered by the term "emotional abuse". [114]

135. Lauren Bruce, representing COSLA, suggested that if neglect was intended to be included within the scope of the Bill, then it may give greater certainty to survivors to provide for that on the face of the Bill:

> If the approach goes forward into the court system, will neglect be included in the interpretation of the forms of abuse that are listed, and should it, if that is the case, be included in the Bill up front, before it becomes an Act, rather than becoming included through the court process, which can be long and would add to the uncertainty for victims?
>
> Source: Justice Committee 28 February 2017 [Draft], Lauren Bruce, contrib. 192[115]

136. The Committee was also referred to examples of existing legislation relating to child protection which specifically identify neglect as a separate category of harm, including the Children and Young Persons Scotland Act 1937 and the Children's Hearings (Scotland) Act 2011. Further, the Committee understands that the Scottish Government intends to bring forward new legislation to criminalise the emotional abuse and neglect of children. [116]

"Spiritual abuse"

137. In oral evidence to the Committee, Harry Aitken representing FBGA said that "spiritual abuse" should be explicitly included within the definition of abuse. He argued:

> That abuse affects a different dimension of a human being and it has to be dealt with; it is not addressed through dealing with mental, physical or sexual abuse. It is probably more damaging, because it affects the soul, heart and mind of a person.
>
> Source: Justice Committee 21 February 2017, Harry Aitken, contrib. 70[117]

138. When asked whether "spiritual abuse" would be covered by emotional abuse, Harry Aitken replied:

> That is not sufficient, because we all feel emotion. We start with feelings, emotions and thoughts and then we move to actions. That is the way the human species operates. We all feel different scales and levels of emotion and there are different formats and expressions, but I am trying—as a layperson—to explain that this is something that is fundamental to a human being. It is not just an item of experience; it is something that gets right into the bones and the soul.
>
> Source: Justice Committee 21 February 2017, Harry Aitken, contrib. 84[118]

139. David Whelan, also from FBGA, suggested that "spiritual abuse" would address the damage that had resulted from children being "indoctrinated in the institutions in relation to religion". [119]

140. This was not a point that was raised in other evidence to the Committee. The Scottish Government's response to its 2015 consultation suggests that it was discussed during a participative workshop held with survivors of historical child abuse. [104] However, there is no discussion in that response, or in the Policy Memorandum, as to why "spiritual abuse" has not been included in the definition of abuse now contained in the Bill.

141. The Committee raised the issue with other witnesses during its formal evidence sessions. Those who expressed a view, including the Law Society, [120] the SHRC [121] and Social Work Scotland, [122] suggested that "spiritual abuse" might be covered by emotional abuse. The Faculty of Advocates commented that it would be open to the courts to develop the concept of abuse, particularly emotional abuse, to include types of harm such as "spiritual abuse". [97]

142. In evidence to the Committee, the Minister said that she too considered that "spiritual abuse" could be covered by emotional abuse. [102]

Psychological abuse

143. In oral evidence, Laura Dunlop QC of the Faculty of Advocates suggested that "psychological abuse" was missing from the current definition of the Bill, arguing

that there may be a "degree of difference" between emotional abuse and psychological abuse. [123] This was not an issue raised by other evidence. When asked for her views, Kim Leslie from the Law Society said that further thought would need to be given to the delineation between emotional and psychological abuse. [124] Further, Laura Dunlop QC had previously commented that she favoured simplicity in drafting and cautioned against "overdefinition". [125]

144. In evidence to the Committee, the Minister said that she thought psychological abuse would be covered by emotional abuse. [102]

Conclusions on the categories of abuse

145. The Committee asks the Scottish Government to respond to the concerns it heard about the uncertainty around the term "emotional abuse" and to consider whether it could provide any further clarity on this category of abuse.

146. The Committee also asks the Scottish Government to respond to the evidence in support of explicitly including neglect within the definition of abuse in the Bill. In the Committee's view, to do so would be consistent with other domestic and international law, including the Government's proposal to introduce a specific criminal offence relating to the emotional abuse and neglect of a child.

Retrospective application of the Bill

Existing rights of action

147. Section 17B provides that the removal of the limitation period applies to rights of action that accrued before the Bill comes into force ("existing rights of action"), whether or not the limitation period has already expired. This means that regardless of when the abuse took place, the three year limitation period will be removed for actions relating to childhood abuse. The exception to this is cases where the abuse took place before 26 September 1964: as discussed above, in those cases the right of action will have been extinguished by the law of prescription and the Bill does not revive those rights.

148. The Policy Memorandum sets out the Government's justification for the retrospective application of the Bill:

> It is clear that, for the reasons already outlined, it can take many years, and even decades, for survivors to reach the point where they are, practically, able to raise an action. If the legislation were not to be applied to existing rights of action, those survivors of past abuse who have now reached the point of contemplating a civil action would not benefit, and indeed the benefits of the legislation may take many years to filter through. This would not satisfy the policy objective of removing a barrier to access to justice in relation to historic wrongdoing.
>
> Source: Policy Memorandum, paragraph 41.

149. The provision in section 17B was not raised as an issue to the Committee, with evidence on the retrospective application of the Bill focusing on previously raised cases (discussed further below). However, one potential implication of the removal of the limitation period for existing rights of action was suggested in FOIL's written submission. FOIL noted that until a House of Lords decision in 2001, [126] employers were not vicariously liable for sexual assault committed by an employee. It suggested that there was therefore the possibility that the Bill could allow a claim to be brought against an employer which would have failed if it had been raised in time. [127]

150. A broader point was also raised by the Committee during oral evidence. This was whether the Bill would mean that a claim could be made on the basis of conduct that was not, at the time it took place, considered to be unacceptable. The example was given of chastisement. [128] Bruce Adamson from the SHRC responded:

> The procedural element of the time bar is the retrospective bit, so there will be a retrospective change relating to the ability to get past the time bar. However, the case itself would need to be judged on the law as it was when the abuse ceased. The court would consider the procedural barrier according to what the law is now.
>
> Source: Justice Committee 28 February 2017 [Draft], Bruce Adamson, contrib. 101 [129]

151. He went on to suggest that, in the context of claims relating to abuse that would lead to damages for personal injury, the standards had not changed. [130]

152. The Committee asks the Scottish Government to provide clarity on whether the Bill would allow claims to be brought in respect of conduct which would not, according to the law applicable at the time, have constituted an actionable harm.

153. The Committee also asks the Government to respond to the specific suggestion that the Bill could allow claims to be brought against employers on the basis of vicarious liability, when such claims would have been unsuccessful if they had been brought in time.

Previously raised cases

154. Given the Bill's application to existing rights of action, the Policy Memorandum sets out that the Scottish Government had to then consider what should happen where a survivor has already sought to bring an action but that action has been unsuccessful because of limitation. [131] Section 17C makes specific provision to deal with this situation. It allows such actions to be re-raised where (i) an action for damages was brought prior to the Bill coming into force and (ii) the action was disposed of by the court either by reason of section 17 of the 1973 Act (the current law on limitation) or in accordance with a relevant settlement. The pursuer must have agreed to that settlement under a 'reasonable belief' that the action would likely be unsuccessful due to the current law on limitation. Further, any payment received must not have exceeded their expenses in bringing and settling the action.

155. In short, section 17C allows a court action, previously found to be time barred, or settled out of court in the belief that it would have been time barred, to be raised again.

156. The Committee heard serious concerns about the provision in section 17C. The ABI [46] and FOIL [132] argued strongly against section 17C on the basis that it would undermine fundamental principles of legal certainty. In particular, they argued that it would contradict the legal principle of res judicata (i.e. matters already judged should not be re-litigated) and defenders' "legitimate expectations" as to how such cases will be treated. Further, they suggested that the provision could be in breach of the right to a fair trial under Article 6 and the right to peaceful enjoyment of possessions under A1P1 ECHR. The Faculty of Advocates also argued that section 17C was contrary to the general principle against retroactivity. [96]

157. The Policy Memorandum recognises the importance of certainty and finality as legal principles, noting that any departure from these principles requires special justification. [133] However, it goes on to state:

> in the very particular circumstances addressed by this Bill, the Scottish Government considers that, having regard to the policy objective, there are unique and special circumstances that justify the application of the Bill to cases that have been previously litigated and decided by the court or settled on the basis of time bar ... it would be unfair to give the benefit of the new law to survivors with existing rights of action who have never sought to vindicate their rights in the courts but to exclude survivors who have previously litigated, but whose claims have never, because of the current law on time bar, been adjudicated upon in substance by the court.
>
> Source: Policy Memorandum, paragraph 46.

158. This view found support in some of the evidence to the Committee. APIL, for example, argued:

> any failure to include these provisions would create a grossly unjust state of affairs where people who have dared to come forward earlier are rejected but people who have waited longer are permitted to pursue their case.
>
> Source: Association of Personal Injury Lawyers, Written Submission, page 1.

159. The Law Society also agreed with the provision in section 17C, arguing that it would be "unfair" to prevent a person whose case had failed due to time bar from raising that case again where time bar would no longer be an issue as a result of the Bill.

> This would, in effect, penalise those that have tried to access justice but failed due to rules that are now under scrutiny.
>
> Source: Law Society of Scotland, Written Submission, page 3.

160. Victim Support Scotland similarly considered that it would be "inherently unjust" for those who were previously denied justice through the current law on limitation to be further prevented from accessing justice. [134] The SHRC argued that the policy justifications for the change in law applied equally whether or not a pursuer had previously made a claim for damages. It also commented that retrospective effect in relation to A1P1 ECHR is not prohibited. [135]

161. In evidence to the Committee, the Minister emphasised at several points that section 17C would only allow a case to be re-raised if limitation was the reason it had previously failed, and that it would not allow cases to be re-raised where there had been substantive adjudication on the merits of the case. [136]

162. There are two technical points to note here. Firstly, the Committee understands that there may be cases in which some evidence has been heard which relates to the substantive merits of the case, but ultimately the court went on to dismiss the case because of limitation. This is because, as the Minister noted herself in evidence, [137] limitation is not always dealt with as a preliminary matter and the court may decide to hear evidence before deciding the limitation issue. The Committee understands that even in such circumstances, as long as the reason the initial claim was unsuccessful was limitation, and that there was no actual decision by the court on the merits of the case, the action could be re-raised under section 17C.

163. The second point is that section 17C, as currently drafted, would only allow cases which have been unsuccessful because of the current law of limitation - i.e. that contained in section 17 of the 1973 Act - to be re-raised. In oral evidence to the Committee, Laura Dunlop QC of the Faculty of Advocates said that she assumed the reference to section 17 of the 1973 Act in the new section 17C would encompass any predecessor provisions. [138] If this is not the case, then survivors will not be able to re-raise actions brought before 25 July 1973 (the date section 17 came into force), even if those cases were settled because of earlier provisions on limitation (which date back to 1954).

164. The Committee asks the Scottish Government to clarify whether section 17C would allow previously raised actions to be re-raised even if the court has heard some evidence as to the merits of the case, as long as it did not go on to make a decision on the merits and the reason the initial action was unsuccessful was limitation.

165. The Committee also asks the Scottish Government to clarify whether the Bill as currently drafted means only those actions disposed of by reason of section 17 of the 1973 Act would be able to be re-raised. If that is indeed correct, the Committee asks the Scottish Government to justify its reasons for restricting the scope of section 17C in this way.

Decree of absolvitor

166. When an action is disposed of by the court in favour of the defender, whether following its own decision on a matter or in accordance with a settlement, there are two types of disposal available: a decree of dismissal or a decree of absolvitor. The Committee understands that a decree of dismissal is often given where the pursuer has failed to clear some procedural hurdle set by the court, including time bar. With such a decree it is (in theory) open to the pursuer to raise the case again. A decree of absolvitor, on the other hand, is a final judgment of the court and, in the absence of statutory provision to the contrary, usually prevents the same issue being litigated again.

167. Section 17C(3) specifically provides that actions disposed of by decree of absolvitor because of limitation can be re-raised. This aspect of the Bill attracted particular criticism from organisations representing the insurance industry. The ABI argued:

> The decision to introduce a right to resurrect claims previously disposed of by decree of absolvitor challenges a fundamental principle of Scots Law - that the pursuer's claim has been rejected by the court. The pursuer cannot raise the same claim against the defender another time.
>
> Source: Association of British Insurers, Written Submission, page 6.

168. It also suggested that overturning decree of absolvitor in the Bill could set a "damaging precedent for extension to other classes of claim". [46] In oral evidence, Graeme Watson, representing FOIL, emphasised that the proposal in the Bill was "unique" and that there was "no precedent for legislating away final determinations". [139]

169. FOIL also argued that similar considerations which led the Scottish Government to conclude not to revive rights extinguished by prescription applied to actions disposed of by decree of absolvitor:

> 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.
>
> Source: Forum of Insurance Lawyers, Written Submission, page 6.

170. It argued that there was a "real risk" that the inclusion of decree of absolvitor within the scope of section 17C would "fall foul" of the ECHR. [140] In oral evidence, Graeme Watson commented:

> Weight and importance have to be given to the rule and certainty of law, and part of the right to a fair trial is the right to have the court's determination enforced.
>
> Source: Justice Committee 21 February 2017 [Draft], Graeme Watson, contrib. 193[141]

171. The Scottish Government's 2015 consultation asked respondents for views on allowing previously unsuccessful cases to be re-raised. [142] It did not, however, discuss the types of court decree that would be covered. The analysis of responses suggests that concerns were raised by some respondents about the possible application of the Bill to decrees of absolvitor. [143] Again, this issue was not specifically discussed in the Government's response to the consultation, but decrees of absolvitor were included in the draft Bill published in March 2016. The Policy Memorandum does not specifically set out the Government's reasons for including decree of absolvitor in the current Bill.

172. In its response to the Scottish Government's 2015 consultation, the Faculty of Advocates suggested that a large number of claims brought by survivors of childhood abuse which were settled because of limitation had been disposed of by decree of absolvitor. [144] There was some debate during the Committee's scrutiny of the Bill about whether, when cases had been settled and a decree of absolvitor granted, it had been the insurer who had insisted on a decree of absolvitor as a condition of that settlement. David Whelan, representing FBGA, in supplementary evidence to the Committee said that in his own case (which was settled after legal aid was withdrawn following an unsuccessful test case relating to limitation and historical childhood abuse), it had been the insurer who had required a decree of absolvitor. [145]

173. However, both FOIL [146] and the ABI told the Committee that they were not aware of this having been standard practice by insurers. [147] In supplementary written evidence to the Committee, FOIL explained:

> Where a pursuer abandons an action, it may then be disposed of by way of decree of dismissal or decree of absolvitor. A pursuer is entitled to a decree of dismissal if they meet the defender's expenses. If they do not, then the defender is entitled to insist on a decree of absolvitor. In the vast majority of childhood abuse cases in which we have acted, the pursuer was legally aided. There was no prospect of recovering expenses, nor did our clients intend to seek expenses. We were contacted by the pursuers' agents who asked whether we were prepared to agree the cases could be abandoned on the basis that no expenses were paid by either party. We confirmed to them that we had instructions to that effect. The pursuers' solicitors proposed to draft joint minutes to dispose of each action. They then provided us with joint minutes which provided for decree of absolvitor.
>
> Source: Forum of Insurance Lawyers, Supplementary Written Submission, page 1.

174. FOIL stated that such a scenario represented the "vast majority of childhood abuse cases" with which its members had dealt with. It went on to explain that in a small number of cases which were settled without the admission of liability but with payment of damages to the pursuer, payment was expressly on the basis that the pursuer would consent to a decree of absolvitor. It argued that it would be professionally negligent of a defender's solicitor to accept decree of dismissal in those circumstances, as only decree of absolvitor provides certainty that the action is entirely concluded. [148]

175. When this issue was explored during the Minister's evidence on the Bill, Elinor Owe, a Scottish Government official, told the Committee:

> From the point of view of policy and how we have developed the Bill, it does not matter exactly how cases ended up having a decree of absolvitor.
>
> If there were a link between a case having a decree of absolvitor and the fact that it would have failed on limitation, it does not exactly matter what the process was and who proposed what, because the point is that the case failed as a result of limitation. That is the clear link that determines which cases should be allowed to go ahead.
>
> Source: Justice Committee 14 March 2017 [Draft], Elinor Owe, contrib. 60[149]

176. The Minister also told the Committee that decree of absolvitor can be granted where there has been no substantive consideration of the merits of the case. Again, she emphasised that the Bill would not allow actions where there had been such substantive consideration to be re-raised. [150]

177. The Committee heard concerns about the provision in the Bill that would allow cases disposed of by decree of absolvitor to be re-raised. The Committee understands that this is a unique provision which some witnesses argued could undermine fundamental principles of Scots law. The Committee asks the Scottish Government to provide further explanation as to its justifications for including decree of absolvitor within the scope of the Bill. Further, the Committee asks for clarity as to whether the Government considers this provision to be compatible with the ECHR.

Settled cases

178. Section 17C allows previously raised cases which have been disposed of by the court in accordance with a "relevant settlement" to be re-raised. To qualify as a "relevant settlement" the following three conditions must be met (section 17C(4)(b)):

- it was agreed by the parties to the initial action;
- the pursuer entered into it under the reasonable belief that the initial action was likely to be disposed of by the court by reason of section 17 of the 1973 Act; and
- any sum of money which it required the defender to pay to the pursuer, or to a person nominated by the pursuer, did not exceed the pursuer's expenses in connection with bringing and settling the initial action.

179. Section 17C(5) goes on to provide that the third of these conditions is not satisfied if the terms of the settlement indicate that the sum payable under it is or includes something other than reimbursement of the pursuer's expenses in connection with bringing and settling the initial action.

180. In its written submission to the Committee, APIL focused on its specific concerns about how this definition of a relevant settlement would work in practice. [151] These concerns were not specifically raised in other submissions to the Committee but were explored during the oral evidence sessions.

181. APIL's concerns were two-fold. Firstly, it highlighted the potential unfairness that could arise from the definition of "relevant settlement" as one where the pursuer did not receive any payment exceeding their expenses in bringing and settling the claim. Graeme Garrett, representing APIL, told the Committee:

> Our concern is that, if it is the intention to permit people who have previously brought actions to bring fresh actions—which it clearly is—there is a provision in new section 17C that will eliminate a large group of those people at source. We fail to understand the rationale for saying that someone who may have received what would have been a trivial payment many years ago should be prevented from bringing a claim for full and proper compensation now.
>
> Source: Justice Committee 21 February 2017 [Draft], Graeme Garrett, contrib. 95[152]

182. In its written submission to the Committee, APIL gave the following hypothetical example:

> A defender agreed to make a token payment of £2,000 after an initial action was brought. The payment, sometimes referred to as a 'nuisance value' payment, would be offered to the pursuer to discontinue his claim. The amount would be nowhere near the true value of the claim. The pursuer, under the reasonable belief that the initial action was likely to be disposed of by the court due to limitation issues, accepted the payment. As the pursuer's judicial expenses came to £1,950, the pursuer was left with a small payment of £50. As the settlement in this case exceeded his judicial expenses, he is now unable to bring a fresh action under the terms of the Bill ... His claim in current terms without the obstacle of limitation may be worth a six figure sum.
>
> Source: Association of Personal Injury Lawyers, Written Submission, page 2.

183. The Policy Memorandum does not specifically discuss this aspect of the definition of a relevant settlement, and therefore the policy intent behind the provision is unclear. It does not appear to have been consulted on by the Scottish Government in 2015. Indeed the 2015 consultation did not consider the application of the Bill to previously settled cases at all. Nor was any provision on settled cases included in the draft Bill.

184. APIL suggested that the policy aim may have been to avoid "double compensation". [153] However, Graeme Garrett argued that the provision went "very far beyond" what was necessary to achieve that aim. [154] APIL advocated an alternative approach - that any compensation already received should be off-set, with interest, against any compensation received in the fresh action. [153] In oral evidence, Kim Leslie of the Law Society expressed support for this approach. She argued that if the point of section 17C is to prevent "those who have tried and failed" under the current law on limitation from being in a worse position than those who have never tried at all, the definition of relevant settlement needed to be revisited. [155]

185. Most other witnesses did not express a firm view on this issue. Police Scotland, in a supplementary written submission specifically on this issue, said that the current definition of relevant settlement "may penalise certain survivors who previously received nominal financial settlement". It stated that the alternative approach put forward by APIL was "pragmatic". [156]

186. The ABI, however, agreed with the approach taken in the Bill. [45] In oral evidence, Graeme Watson from FOIL said that he recognised the "force" of APIL's alternative suggestion but commented that there would have been little or no incentive for an insurer to pay the pursuer's expenses plus a nominal sum for damages, as in APIL's hypothetical example. He told the Committee that in the 400 to 500 cases he personally had dealt with, he had never come across that situation. [157]

187. When this issue was raised by the Committee with the Minister, she emphasised that the Scottish Government had tried to "strike a balance" in terms of the cases that could be re-raised: that balance, she argued, was achieved by restricting the scope of section 17C to cases where there had been no compensation paid. She also reiterated the point made by Graeme Watson that the scenario put forward by APIL was unlikely, and most cases would have been settled on the basis of no expenses being due to or by either party. [158]

188. The second issue raised by APIL in relation to the provisions in section 17C(4)(b) and (5) was the practical difficulties that would arise as a result of having to establish the terms of a settlement. [153] The Explanatory Notes to the Bill state that where the terms of the settlement explain the nature of the payment being made, that is taken to be conclusive (avoiding an examination of the expenses actually incurred). [159] However, APIL suggested in its written submission to the Committee:

> Some of the initial actions which this Bill attempts to deal with will go back 20, 30, or 40 years, and it is likely to be difficult to prove the settlement terms in these cases. Solicitors are only required to retain files for 10 years, and court papers are unlikely to record settlement terms. A joint minute (the document which would usually bring proceedings to an end in a negotiated settlement) will simply record the fact that the action was settled out of court, while insurers' records may just record that a payment was made.
>
> Source: Association of Personal Injury Lawyers, Written Submission, page 3.

189. APIL also argued that it was not clear on the face of the Bill whether it would be for the pursuer or defender to prove the details of the relevant settlement. [153] Most other evidence did not express a view on this issue. When asked in oral evidence, Graeme Watson from FOIL suggested the burden would rest with the pursuer. [157] On the other hand, Kim Leslie of the Law Society said she thought that it would rest with the defender, as the party seeking to establish that the previous settlement should prevent the pursuer from re-raising the action. [160]

190. In oral evidence to the Committee the Minister made it clear that the Scottish Government considered that the burden would lie on the pursuer. This included establishing that the pursuer entered into the settlement under a reasonable belief that the initial action was likely to be disposed of because of the current law on limitation (section 17C(4)(b)(ii)). When asked how a pursuer might satisfy this condition, the Minister said that she thought this could be done by a personal statement from the pursuer to the effect that they had held a reasonable belief that a case would not proceed because of limitation. However, the defender would be able to rebut this evidence and ultimately it would be a matter for the court to decide on the facts in an individual case. [161]

191. The definition of relevant settlement in the Bill, which would prevent a pursuer from re-raising an action if they previously received any compensation (no matter how small the sum), could operate unfairly. The Scottish Government has not provided a clear justification for this provision as currently drafted. The Committee considers that there is merit in taking an alternative approach, based on off-setting any compensation previously paid against any compensation paid as a result of a fresh action. The Committee asks the Scottish Government to consider adopting this alternative approach in the Bill.

192. The Committee notes the Minister's evidence that the burden of proof would rest on the pursuer to establish the conditions of a relevant statement. This is something that could be clarified in the Explanatory Notes to the Act.

193. The Committee also notes the Minister's comments that a personal statement from the pursuer could be relied on to establish that the settlement was entered into under a reasonable belief that the case would likely be disposed of by reason of the current law on limitation. In practice this may not place a significant burden on the pursuer.

194. On the other hand, the Committee heard that pursuers may face difficulties in establishing the terms of the settlement. It asks the Scottish Government to provide further detail as to how it envisages these difficulties may be dealt with in practice.

Safeguards for defenders

195. The Policy Memorandum states that:

> The Scottish Government recognises that, in removing any statutory time bar for this particular class of case, it is necessary to build in safeguards which acknowledge the implications of the change in the law for defenders who may be required to meet claims long after the events in question.
>
> Source: Policy Memorandum, paragraph 47.

196. The Government considers that such safeguards are provided for by the inclusion of section 17D. This section identifies two circumstances in which the court may not allow an action to proceed. The first is where the defender satisfies the court that it is not possible for a fair hearing to take place ('the fair hearing test'). The second is where (a) the defender satisfies the court that, a result of the retrospective application of the Bill, they would be substantially prejudiced were the action to proceed and (b) having regard to the pursuer's interest in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed ('the substantial prejudice test').

197. The main policy driver for this provision appears to be to protect the defender's rights under the ECHR, in particular the right to a fair trial under Article 6 and the right to peaceful enjoyment of possessions under A1P1. Although the Scottish Government's 2015 consultation did not contain a specific question on whether a provision like section 17D should be included in any legislation, its response to the consultation noted that concerns had been raised about the impact of the removal of the limitation period for defenders. It therefore decided to include in the draft Bill an "express filter" that the court may not allow an action to proceed if satisfied that the defender's rights under the ECHR would be breached. [162]

198. However, this filter only applied in relation to actions brought as a result of the retrospective application of the Bill. The Policy Memorandum sets out that, following stakeholder feedback on the draft Bill, the Scottish Government concluded that a provision requiring dismissal of the action if a fair trial is impossible should apply to all cases raised under the legislation. It then introduced the 'substantial prejudice' test to provide a specific safeguard in relation to the retrospective application of the Bill. [163]

199. Evidence to the Committee commented that section 17D was a "reasonable", [164] "necessary" [165] and "important" [96] [166] provision to safeguard the rights of defenders. However, some concern was expressed that section 17D could undermine the policy aim of improving access to justice for survivors. The SHRC, for example, argued that section 17D "could have the effect of undermining certainty and limiting the right to a remedy which lies at the heart of this legislation". [135] In oral evidence, Bruce Adamson told the Committee that survivors were concerned that section 17D might lead to the same barrier to access to justice as exists under the current law on limitation. [167]

200. Similar points were made by other witnesses. Graeme Garrett of APIL argued that there was "a legitimate fear" that section 17D would simply transfer a discretionary

power to decide whether a case should proceed to a later stage in the court process. [168] Sandy Brindley from Rape Crisis Scotland told the Committee that they had been contacted by survivors who had been concerned about how section 17D would operate in practice. She went on to say:

> The effect is very difficult to predict, since it will be dependent on case law. We do not know how the tests will be interpreted, and I have not seen any clarity from the Government on how it anticipates that they will be interpreted, so I think that they introduce uncertainty about how the legislation will be implemented.
>
> Source: Justice Committee 21 February 2017 [Draft], Sandy Brindley, contrib. 122[169]

201. Graeme Watson of FOIL also questioned how much the Bill would "open the door" for survivors, suggesting that section 17D substituted one form of discretion for another. [170]

202. Kim Leslie of the Law Society, on the other hand, emphasised that the reversal of the burden of proof created the expectation that a pursuer should be able to bring a claim. She commented:

> It is then for the defender to do the heavy lifting in persuading the court that it simply cannot allow the case to proceed.
>
> Source: Justice Committee 28 February 2017 [Draft], Kim Leslie, contrib. 37[171]

203. Laura Dunlop QC, representing the Faculty of Advocates, also argued that the reversal of the burden of proof was a significant factor. [172] Responding to concerns that section 17D would prevent childhood abuse actions from proceeding, she went on to say:

> My final point is that the system—the common-law or judicial system—does from time to time, particularly in the area of personal injury, undertake a reboot. It is obvious from the context of the passing of this legislation that a reboot is what is intended. I would be surprised if, in five or 10 years' time, it is business as usual.
>
> Source: Justice Committee 28 February 2017 [Draft], Laura Dunlop, contrib. 44[173]

204. During the Minister's closing evidence session, the Committee questioned whether section 17D could lead to cases being dismissed, particularly where those cases had previously been disposed of by decree of absolvitor but were being re-raised by virtue of section 17C. The Minister responded:

> The substantial prejudice test under section 17D brings us back to the onus falling on the defender to show that proceeding would be of substantial prejudice. It would not just be theoretical prejudice, and it would not just be that it might be likely ... Furthermore, in consideration of that test, the court must balance it with the pursuer's interest in proceeding. It is only after that further balancing consideration is made, presumably in terms of the gravity of the substantial prejudice, that the court would find in favour of the defender and find that the action should not proceed.
>
> After careful consideration, we have included this mechanism to reflect the delicate balance that we need to strike in the drafting of the legislation to ensure that we have the best possible chance of defending the integrity of the Bill should there be any subsequent attempt to undermine it. By including the fair hearing test—which applies anyway—and the substantial prejudice test, we have reflected the balance needed, whereby we need to recognise the defender's interest in legal certainty and finality of the law.
>
> Source: Justice Committee 14 March 2017 [Draft], Annabelle Ewing, contrib. 116[174]

205. Another issue raised during the Committee's scrutiny of the Bill was the timing of any determination by the court under section 17D. In oral evidence, Graeme Watson of FOIL suggested that it was not clear from the drafting of the Bill whether the court would hear all the evidence and then decide that the conditions in section 17D were met, or decide at an earlier stage that the case should not proceed. He argued that he did not think the former approach would be a "step forward". [175] The Forum of Scottish Claims Managers commented that defenders would only be able to satisfy section 17D "after significant time and expenditure". [176]

206. On the other hand, in its written submission FBGA argued that no case relating to childhood abuse should be dismissed without "first having a fair hearing of all the facts and evidence". [177] The SHRC similarly suggested that making findings as to whether the case should be allowed to proceed at a preliminary stage denied survivors the opportunity to present their case. [135]

207. During her evidence to the Committee, the Minister said that it would be a matter for the court to decide at what point to determine any issue under section 17D. She noted that under the current law, issues as to limitation are not always considered at the beginning of proceedings. [178] Elinor Owe, from the Scottish Government, added:

> The issues around a fair trial and substantial prejudice are very difficult for the court to determine. In a particular case, it might be that, until all the evidence has been heard, it will not be known what evidence is relevant. For example, a witness could die and the defender could claim that that made the trial unfair, but the evidence could show that that witness's evidence was not relevant and that the trial would not be unfair because of the witness's death.
>
> Source: Justice Committee 14 March 2017 [Draft], Elinor Owe, contrib. 124[179]

The fair hearing test

208. Under section 6 of the Human Rights Act 1998, the court is required to act compatibly with the ECHR.[v] This includes the right to a fair trial under Article 6 ECHR. The Policy Memorandum recognises that even without any specific provision in the Bill to that effect, the court could not proceed if it was not possible for a fair hearing to take place. [180]

209. For this reason, the SHRC stated that it was "not convinced" of the need for the fair hearing test in section 17D. [135] In oral evidence, Bruce Adamson told the Committee:

> We would like to see a clearer explanation of the necessity of including that provision, in order to address survivors' concerns that it might be another way in which they would be restricted from being able to take their case forward and having it heard.
>
> Source: Justice Committee 28 February 2017 [Draft], Bruce Adamson, contrib. 43[181]

210. FOIL also questioned the necessity of the fair hearing test in section 17D. Its written submission to the Committee stated:

> 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 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.
>
> Source: Forum of Insurance Lawyers, Written Submission, page 6.

211. The ABI argued that the fair hearing test in section 17D went beyond what was necessary for compliance with Article 6 ECHR.

> Article 6 provides that parties are entitled to a fair and public hearing. Having to prove that such a hearing is impossible is not the same. What does "impossible" mean for these purposes? Requiring proof of a negative is not the same a preserving a positive right.
>
> Source: Association of British Insurers, Written Submission, page 8.

The substantial prejudice test

212. Evidence to the Committee also raised specific concerns in relation to the 'substantial prejudice test'. In its written submission the ABI argued that the concept of substantial prejudice set the bar for dismissing actions too high. It commented:

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v This is unless an Act of the UK Parliament means that they would have no choice but to act in a way which is incompatible with ECHR rights.

> We are not clear what is meant by the addition of "substantial" in this context. Substantial prejudice relates only to prejudice from the change in the law, not prejudice from the loss of evidence. Even then, it has to be balanced with the interests of the pursuer. We are not clear how it can be right for a case to proceed where a court holds a defender will be substantially prejudiced, but that it is in the interests of the pursuer for it to proceed. The scope for satellite litigation on that subject is manifest.
>
> Source: Association of British Insurers, Written Submission, page 8.

213. FOIL similarly argued that the test only applied where the prejudice came from the retrospective effect of the Bill, and that it would not protect defenders from prejudice caused by the loss of evidence or the passage of time. It also raised concerns about how the test would work in practice, including "the prospect of parties having to give evidence on the question of whether there is substantial prejudice". Further, it suggested that requirement of the court to balance any substantial prejudice to the defender against the interests of the pursuer could be incompatible with Article 6 ECHR. [127]

214. In oral evidence, Bruce Adamson from the SHRC commented that the substantial prejudice test might "need further clarification in terms of the factors that will be taken into account". [182] A similar point was made by the Faculty of Advocates in its written submission to the Committee. [96] However, in oral evidence, Laura Dunlop QC representing the Faculty noted that there was a "benefit in simplicity". [183]

215. When asked about the possibility of providing further guidance, the Minister told the Committee:

> There are different views about whether we should amplify that in the Bill. One view is that it might provide further clarity, while another is that it could cause confusion. What is the guidance to be? There are so many possibilities of substantial prejudice that, if we set forth only some of those, even if the list is not exhaustive, it might nonetheless set off red herrings that might distract the court, possibly to the exclusion of the consideration of other matters. I am not convinced that setting forth any particular non-exhaustive list in guidance would necessarily be helpful from the perspective of the integrity of the Bill and the defender's interest.
>
> Source: Justice Committee 14 March 2017 [Draft], Annabelle Ewing, contrib. 118[184]

Conclusions on the safeguards for defenders

216. The Committee heard concerns that section 17D may reintroduce the time bar. In light of those concerns, the Committee asks the Scottish Government to clarify its reasoning for including this provision within the Bill, particularly the 'fair hearing test'. It asks the Government to consider whether, as the courts are already obliged to act in a way that is compatible with the ECHR, there is a risk that

including the 'fair hearing test' on the face of the Bill could suggest that something beyond compliance with Article 6 ECHR is required.

217. The Committee also asks the Scottish Government to consider the evidence received which suggested uncertainty about the factors that would be relevant to the 'substantial prejudice test' and whether further clarity could be provided.

218. As regards the timing of any determination under section 17D, the Committee accepts that this is an appropriate matter for the courts to decide on a case by case basis. However, it notes that dealing with the issue earlier rather than later in the process may have benefits both in terms of court resources and for some individual survivors, as they would not then have to go through what may be a distressing court process only to have their case dismissed under section 17D.

Financial and resource implications of the Bill

219. The Finance and Constitution Committee received five responses to its call for evidence on the Financial Memorandum on the Bill, following which it agreed that it would give no further consideration to the Financial Memorandum. However, a key aspect of this Committee's Stage 1 scrutiny concerned the financial and resource implications of the Bill. Three main issues emerged:

- questions surrounding the estimate in the Financial Memorandum of the number of cases that would be brought as a result of the Bill;
- the impact on potential defenders, particularly local authorities, including their ability to provide current day services;
- the impact on the court system.

Number of actions brought as a result of the Bill

220. The Financial Memorandum states:

> there are a number of challenges involved in estimating the financial implications of the Bill. These include the lack of data on the number of child abuse survivors alive in Scotland today and lack of information on the likelihood of survivors being willing to raise civil actions.
>
> Source: Financial Memorandum, paragraph 12.

221. After setting out its methodology at paragraphs 13-16, the Financial Memorandum arrives at a range of 400 to 4,000 potential pursuers. It settles on a "mid-point" figure of 2,200 actions that will be brought initially as a result of the Bill, representing the "bottleneck" of claims that has been prevented from proceeding due to the current limitation rules. [185] It is this 2,200 figure that is used to model the potential costs of the Bill to the Scottish Courts and Tribunals Service (SCTS) and the Scottish Legal Aid Board (SLAB) (the Financial Memorandum does not attempt to quantify the costs to local authorities or other individuals and organisations, as is discussed further below).

222. Evidence to the Committee suggested that this 2,200 figure could be a significant underestimate of the number of cases likely to come forward as a result of the Bill. The ABI, for example, argued the figure:

> fails to take into account the potential effect of the Bill in encouraging more cases to be brought or of previously heard cases to be resurrected.
>
> Source: Association of British Insurers, Written Submission, page 4.

223. In its written submission to the Finance and Constitution Committee, the ABI also argued that the Memorandum:

> does not acknowledge Claims Management Companies or personal injury lawyers as factors which could increase the number of claims. We would anticipate both these groups would seek to identify and market their services to potential victims of historic abuse.
>
> Source: Association of British Insurers, Written Submission to the Finance and Constitution Committee, page 2.

224. In oral evidence, Alastair Ross of the ABI emphasised the potential for "cold calling", as with other classes of personal injury. [186]

225. The ABI also suggested that the analysis of the financial impact of the Bill could be assisted by "comprehensive data collection on abuse claims and the perceived and actual barriers to claim progression". [187] It questioned why the Scottish Government does not appear to have sought any actuarial advice on the calculations set out in the Financial Memorandum. [188]

226. In its written submission, Police Scotland argued that there would be value in "further scoping" the methodology used in the Financial Memorandum. It also provided details on work Police Scotland had been doing to identify child abuse and neglect files which meet the terms of reference of the Scottish Child Abuse Inquiry and Operation HYDRANT. Police Scotland estimates that at the end of this process it will have identified at least 5,000 files relating to information and reports of child abuse and neglect within an institution or care setting or involving a person of public prominence. [189] In oral evidence, Detective Chief Superintendent Lesley Boal QPM emphasised that this was the number of files, not victims, and that one file could relate to a number of victims. In the Strathclyde area, Police Scotland had catalogued just under 2,300 files, but there were 4,400 victims. She also emphasised that these figures represented a small proportion of abuse and did not cover the vast majority of abuse which takes place in the household. [190] Police Scotland therefore considered that the 2,200 figure in the Financial Memorandum is "a conservative estimate". [189]

227. Harry Aitken, representing FBGA, also drew the Committee's attention to the fact that one firm of solicitors previously had 1,000 survivors prepared to raise an action, but they had not been able to proceed following a test case relating to time bar. [191] The Financial Memorandum notes this point but argues that "the fact that this figure falls safely within the estimated range suggests that the estimated range is a credible one". [192]

228. Other evidence echoed the point made in the Financial Memorandum about the challenges in estimating the likely impact of the Bill. COSLA, for example, commented that it would be "impossible" to quantify the volume of claims. [193] In oral evidence, Kim Leslie of the Law Society said that she thought it would be "imprudent to even try to predict the likely number of cases", emphasising that not all cases that came forward would necessarily end up in court. [194]

229. When asked for her estimate of the number of cases that would come forward, the Minister told the Committee:

> The midpoint figure that we have come up with is 2,200. Of course, nobody knows what the exact figure will be and whether it will be higher or lower than that. The evidence before the Committee shows that we simply cannot scientifically determine the exact figure. It is fair to say that the route of going to court will not be right for many survivors. That is a matter of individual choice and informed choice. It would be absolutely wrong of me as Minister to suggest that anybody should take a particular course of action, because that is entirely for the survivors to decide. It may well be that other people, in quoting figures, have not taken into account the fact that not every survivor will choose to go down that route.
>
> Source: Justice Committee 14 March 2017 [Draft], Annabelle Ewing, contrib. 90[195]

230. The Committee recognises the difficulties facing the Scottish Government in quantifying the potential number of actions that will be brought as a result of a Bill. However, in light of the evidence it heard, the Committee is concerned that the midpoint figure of 2,200 cases used in the Financial Memorandum is conservative and therefore there is a concern that the Government may have underestimated the costs of the Bill. The Committee asks the Scottish Government to respond to this evidence and to consider whether further work could be done to provide a more accurate estimate of the likely number of cases.

Costs to potential defenders

Local authorities

231. The Financial Memorandum recognises that there will be "increased costs to local authorities as a result of defending any actions raised against them". However, it considers that the new burden rules (which would require the Scottish Government to fully fund the policy or agree with COSLA how the additional cost should not be met) do not apply because the Bill applies equally across public and private sector bodies. Further, it states that the there are no direct costs to local authorities as a result of the Bill, as it does not include a policy or initiative which increases the cost of providing local authority services, nor does it impose any new administrative duties or obligations on local authorities. [196]

232. The Financial Memorandum also does not quantify the costs to local authorities of defending any actions brought as a result of the Bill, arguing that for a number of reasons it has not been possible to do so. These reasons include the lack of information on the prevalence of abuse in local authority run children's services and the difficulties in predicting which cases will be brought and the outcome of those cases. [197]

233. In its evidence to the Committee, COSLA strongly argued that the Bill would have a "significant impact" on local authorities. It emphasised that local authorities would be likely to experience a higher percentage of claims raised against them than other organisations given the prevalence of children's services run by them. [198] Further, while recognising the difficulties in estimating the impact of the Bill, COSLA argued

that the Financial Memorandum took a "very narrow" view of the potential costs - focusing exclusively on the costs of defending actions. It considered that the overall implications of the Bill were considerably more complex. [199]

234. For example, COSLA suggested that it was likely that a high proportion of potential claimants would seek to obtain records from local authorities, in order to establish whether they have grounds to bring a claim. It also suggested that information requests could be used to gain clarity if there is confusion about who the respondent organisation is. COSLA argued that there could be a significant amount of work involved as a result of such requests, particularly because during the time period covered by the Bill there had been several iterations of local government. This could have implications for the records held within current structures: some may have been lost or destroyed, and those that are available are unlikely to be in digital format. [200]

235. COSLA also emphasised that there would be resource implications for the insurance and legal teams of local authorities. It noted that most councils do not have legal teams of the size and specialism which might be required to process the volume of claims. [201] This point was reiterated in oral evidence by Vladimir Valiente representing SOLAR, who suggested it was likely that many local authorities would have to make provision either to hire external services or to recruit more people to deal with the volume of cases. [202] COSLA also commented that the legal costs associated with defending a claim would likely surpass the costs of any compensation actually paid to a claimant, arguing that this "would neither be in the best interest of the claimant nor the public purse". [201]

236. In terms of insurance provision, COSLA commented:

> Often the cost of claims brought against a local authority would be covered by their public liability insurance. However, there are a number of issues which mean that councils are unlikely to recover the costs for this legislation through insurance ... these issues are complex and will require each claim to be individually and fully analysed from an insurance perspective. Most councils have only small insurance teams able to process any claims and so the impact on insurance teams could be significant.
>
> Source: COSLA, Written Submission, paragraph 13.

237. In its written evidence to the Finance and Constitution Committee, COSLA provided more detail on the issues that might arise in relation to insurance cover. These included: difficulties for local authorities in establishing an insurer to claim against; the fact that the main insurance provider for local authorities between 1975-1992 ceased to exist in the 1990s; and the varied landscape across local authorities as to how they are insured. COSLA also emphasised that high insurance excess charges were common, and therefore local authorities would not be able to rely on any compensation award being funded by an insurer. Finally, it argued that there could be "unintended financial consequences" going forward, such as increased insurance premiums. [203]

238. In oral evidence, Vladimir Valiente representing SOLAR reiterated the issues that may arise in respect of local authorities' insurance provision:

> Every local authority must do a mapping exercise to ascertain what, if any, insurance was available at the time and what the terms of the contract were and whether it included excesses and limitations. It might well be that some insurance companies are no longer in existence, so the local authority would have to cover the costs. The insurance element will bring about extra work, conducting that mapping exercise. Thereafter, we might even enter into disputes with insurance companies about the terms of contracts at the time. There might be double litigation: the claim itself; and litigation against relevant insurers, if we do not agree.
>
> Source: Justice Committee 28 February 2017 [Draft], Vladimir Valiente, contrib. 169[204]

239. The Financial Memorandum does note that the extent to which local authorities directly incur costs as a result of the Bill will vary depending on their insurance cover, and that in some cases it may not be possible to identify an insurer "given the changing landscape of local authorities over the last decades and the range of services where such abuse may have occurred". [205]

240. Another potential consequence of the Bill highlighted by COSLA was that it could lead to an increase in demand for support services for survivors of abuse.

> This will relate to those considering an action, those actively pursuing an action and those who are affected by publicity which prompts them to seek more general support in relation to their own circumstances. The type of support could be wide ranging, from specialist interventions (trauma and recovery specific services, support to engage with legal processes and attend court) to more general support with issues such as homelessness etc. Some of the cost of this provision ultimately falls on the Local Authority either directly, for example our homelessness provision, or through commissioning of third sector services.
>
> Source: COSLA, Written Submission to the Finance and Constitution Committee, paragraph 18.

241. In conclusion, COSLA argued that "given the financial environment that Local Authorities are operating in, Local Government will struggle to meet the financial implications of this legislation". [206] The Financial Memorandum itself acknowledges that the financial implications of the Bill for local authorities "will have the potential to impact adversely on the funding available for current and future services". [205]

242. In oral evidence, Lauren Bruce was asked whether COSLA's position was that the Bill should proceed but would need to be adequately resourced, or that the proposals should not be implemented at all because the resource implications were so significant. She replied that COSLA supported the "intent of the Bill to widen access to justice" but would not go further than that, stating:

> I do not know whether the question has gone to our membership in quite that form. As with any financial burden, we welcome discussions with the Scottish Government on how costs can be managed, so that we can continue to provide the services that we do—in the knowledge that the burden could be significant in this context.
>
> Source: Justice Committee 28 February 2017 [Draft], Lauren Bruce, contrib. 165[207]

243. The Minister told the Committee that the Scottish Government had been discussing matters with COSLA, however it would be "premature" to discuss particular figures given the variables involved. [208]

244. The Committee heard that the Bill could have significant financial and resource implications for local authorities. While the Committee recognises the difficulties in estimating the potential impact, it does not consider the Financial Memorandum fully reflects the fact that the costs of the Bill may go beyond those associated with defending any actions raised.

245. It is important that the Bill is properly resourced to ensure both that its policy intent is achieved and to prevent any negative impact on the provision of current services by local authorities. The Committee notes that the Scottish Government is discussing these issues with COSLA and asks for an update on how it intends to manage the resource implications of the Bill.

Other organisations and individuals

246. In addition to local authorities, the Financial Memorandum sets out that there will be additional costs to other organisations and individuals in defending claims brought as a result of the Bill. However, for many of the same reasons noted above, it considers that it would be "impractical and unrealistic to quantify the costs for this potentially very wide category". [209]

247. Similar issues arise as for local authorities. For example, the Financial Memorandum notes that costs will fall directly on organisations where no insurance provision was in place or the insurer cannot be identified. [210] This point was emphasised in evidence to the Committee from the insurance industry. In its written evidence, the ABI stated:

> Organisations whose insurance policies did not indemnify them against such claims, or who chose not to purchase insurance and self-insured their risks could face significant financial implications. Compensation awards for successful claims against the organisations would have to be met from current financial resources if no provisions have been made for historic abuse claims.
>
> Source: Association of British Insurers, Written Submission, page 3.

248. FOIL also emphasised the potential negative impact for 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.
>
> Source: Forum of Insurance Lawyers, Written Submission, page 2.

249. The Committee also heard again that the costs of the Bill went beyond any compensation that might have to be paid as a result of successful claims. Alistair

Gaw, representing Social Work Scotland, argued that "the repercussions are much greater than just the cost of any recompense". These included the administrative burden of responding to requests for information, as well "having to support former staff, current staff and others who are affected through hearings processes". [211] Detective Chief Superintendent Lesley Boal QPM commented that "without a doubt" there would be resource implications for the information department in Police Scotland, as when a claim was being considered requests would be made to see if any report had been made to the police and whether that resulted in a charge, a report to the procurator fiscal or a conviction. [212]

250. Another key issue raised in evidence was the unintended consequences the Bill could have for the provision of current services. FOIL, for example, noted that voluntary organisations or groups without insurance cover would have to fund compensation claims from their own reserves, and that this would likely "adversely affect present day service provision". It suggested that organisations may be dissolved to provide funds to meet claims. It also commented that present day volunteers may be dissuaded from engaging in voluntary groups "for fear of becoming involved in litigation arising from activities which occurred years earlier". [86] In its written submission, the ABI noted that organisations exposed to an increased volume of historical childhood abuse claims could see their insurance premiums rise in the future. It suggested that this could "further reduce their current reserves and their ability to fund the delivery of services for children". [213]

251. Similar concerns were expressed by Detective Chief Superintendent Lesley Boal QPM, representing Police Scotland:

> The Committee heard last week that public liability insurance is not compulsory. Many organisations have been uninsured, self-insured or unable to trace insurance that no longer exists, and my main concern is for the many third sector organisations that operate in a way that is diametrically opposed to how they operated 15, 20 or 30 years ago, and which may be required to fund compensation claims from their own reserves. At this moment in time, many third sector organisations carry out an enormous range of activities to improve the wellbeing of children and children's lives, often complementary to and in partnership with the public sector. It seems illogical that the vital support and therapeutic services that are provided by third sector organisations to children who have recently been abused or neglected, or who are at risk of abuse and neglect now, might somehow be adversely affected because of abuse that happened many years ago.
>
> Source: Justice Committee 28 February 2017 [Draft], Detective Chief Superintendent Lesley Boal QPM (Police Scotland), contrib. 130[34]

252. Alistair Gaw, representing Social Work Scotland, similarly argued that consideration needed to be given to the potential impact of the Bill on the provision of services by voluntary organisations. [214]

253. The Financial Memorandum again acknowledges that "financial implications for third sector organisations in particular will have the potential to impact adversely on the funding available for current and future services". [210]

254. In addition to the impact on defender organisations, the ABI expressed "significant concerns" about the implications of the Bill for insurers. [215] Its written evidence argued that there would be increased costs for insurers, both due to new liabilities against policies which were previously considered closed and the "significant" additional legal costs associated with defending claims. It concluded:

> The abolition of limitation could change the insurance market in Scotland by increasing the risk of historic claims being raised and the subsequent increase in costs for insurers ... Scotland would likely become a less competitive and therefore more expensive market in which to write and therefore buy insurance.
>
> Source: Association of British Insurers, Written Submission, page 3.

255. The Committee is concerned by the evidence it heard about the potential adverse impact that the Bill could have on the ability of organisations, particularly from the third sector, to provide crucial services to children today. The Committee asks the Scottish Government to provide further information on what assessment it has undertaken of this impact and what steps it intends to take to mitigate any unintended consequences of the Bill.

Impact of the Bill on the court system

256. The Financial Memorandum estimates a net cost of £57,600 to the Scottish Courts and Tribunal Service (SCTS) on the basis of 2,200 survivors raising a civil action as a result of the Bill. [216] As discussed above, the Committee heard evidence that the 2,200 figure could be a significant underestimate. If so, the financial cost to SCTS could be higher. Other evidence, for example from FOIL, argued that the Bill could increase adjournments and delays in the court system, putting the system "under pressure at a time when it is already undergoing radical reform". [217] The Faculty of Advocates commented that the actions brought under the Bill would likely be "complicated" and involve "evidential difficulties", which would have resource implications for the courts. [218]

257. During oral evidence sessions the Committee explored these concerns with proponents of the Bill, particularly the potential for delays because of the number of claims that may come forward and the negative impact this might have for survivors. David Whelan, representing FBGA, told the Committee that he thought there had been "scaremongering" about the vast numbers of cases that might come forward and that ultimately it was for the courts to "facilitate the justice process in a proper and expedient manner". [219] Harry Aitken, also representing FBGA, suggested that priority could be given to cases brought by "the frail, the infirm and the elderly". [220]

258. Sandy Brindley from Rape Crisis Scotland argued:

> There are resource issues for the court service as a result of the Bill, but that should not be used as a reason not to improve access to justice. That is an issue for the Government to consider.
>
> Source: Justice Committee 21 February 2017 [Draft], Sandy Brindley, contrib. 24[221]

259. Kim Leslie of the Law Society emphasised that not all cases that came forward as a result of the Bill would end up in court. She also noted that court time would now not be taken up by considering arguments as to limitation. [222]

260. When the Minister was asked during evidence whether the court system would be able to deal in a timely manner with cases brought as a result of the Bill, she replied:

> it is important to state that we do not expect all those cases to be raised simultaneously, to be raised in the same court or to proceed at the same rate. There will be different issues and disposals at different times.
>
> Source: Justice Committee 14 March 2017 [Draft], Annabelle Ewing, contrib. 90[195]

261. She went on to say that the impact on the SCTS would be kept "under advisement" as part of the Scottish Government's normal budgetary considerations. She also emphasised that the SCTS had moved to "full cost recovery" through court fees. [223]

262. The Committee notes the Minister's commitment to keep under review any impact of the Bill on the Scottish Courts and Tribunals Service. Survivors should not have to face undue delay in accessing justice due to limitations in court resources.

Implementation

263. During its scrutiny of the Bill, the Committee heard some suggestions about how the Bill, if enacted, could be implemented, particularly as a way to mitigate some of the potential resource implications discussed above. One suggestion, which came from COSLA, was the creation of a 'specialist hub' of the Personal Injury Court to deal with childhood abuse cases. [224]

264. The Personal Injury Court was established in September 2015, as a result of the Courts Reform (Scotland) Act 2014. It is based in Edinburgh and can hear and decide cases from the whole of Scotland. Pursuers have a choice to raise their cases there or in a local sheriff court. Personal injury cases of a value of £100,000 or more can also be heard in the Court of Session.

265. COSLA argued that there would be benefits to childhood abuse cases being dealt with by a specialist hub, including:

> the development of a degree of consistency in case management and the ability for lessons learned from the experience of hearing the cases to be reflected upon and applied quickly to assist future actions. Training for the speciality Sheriffs could help to ease the process for victims.
>
> Source: COSLA, Written Submission, paragraph 24.

266. When this proposal was suggested to other witnesses, Laura Dunlop QC of the Faculty of Advocates recognised that there were benefits from specialisation. However, she suggested that there would need to be three or more sheriffs depending on the volume of cases, with the necessary expertise, rather than just one specialist sheriff, to avoid a fixed mindset emerging. [225] Bruce Adamson from the SHRC also agreed that there could be benefits from specialisation. He commented that he did not think there would be any human rights issues in terms of a fair hearing from the defender's perspective. [226] Kim Leslie of the Law Society said she would need to see more detail to be able to comment, but noted that a specialist court would need to be properly resourced. [227]

267. The Minister accepted that there were arguments in favour of a specialist court but told the Committee that ultimately this was a matter for the Lord President. [228]

268. Another suggestion, this time from the ABI, was the creation of Pre-Action Protocol for historic child abuse claims. [229] In supplementary evidence to the Committee, the ABI suggested that such protocols are intended to: ensure earlier contact between the parties; facilitate the better and earlier exchange of information; and put the parties in a position where they may be able to settle cases fairly and early without litigation. It argued that this could "improve the legal process and reduce the emotional impact for victims and survivors seeking access to justice". [230]

269. While outwith the direct scope of the Bill, the Committee heard some suggestions as to measures which could support the Bill's implementation, such as a Pre-Action Protocol and a specialist personal injury hub. The Committee asks the Scottish Government to consider exploring these suggestions further.

General principles

270. The Committee supports the general principles of the Bill. The Committee considers that removal of the limitation period is appropriate in the particular context of childhood abuse actions. It heard powerful evidence that the current limitation regime has created an insurmountable barrier to access to justice for survivors of childhood abuse. Survivors have been let down by the justice system and denied the opportunity to have their voices heard.

271. The Committee has made a number of recommendations relating to the more detailed aspects of the Bill, including the definition of abuse and the provisions relating to previously raised cases. Further, the Committee has highlighted the concerns it heard about the potential financial and resource implications of the Bill, which need to be given further consideration. The Committee expects discussion around these matters to continue should the Bill progress further.

Annex A - Extracts from the minutes

Extracts from the minutes of the Justice Committee and associated written and supplementary evidence

11th Meeting, 2016 (Session 5) Tuesday 29 November 2016

Limitation (Childhood Abuse) (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed (a) to issue a call for written evidence on the Bill; (b) to consider potential witnesses to invite to give oral evidence at a later date; and (c) to note the outline timetable for consideration of the Bill at Stage 1.

3rd Meeting, 2017 (Session 5) Tuesday 24 January 2017

Limitation (Childhood Abuse) (Scotland) Bill (in private): The Committee considered written evidence received and agreed proposed witnesses for its scrutiny of the Bill at Stage 1.

6th Meeting, 2017 (Session 5) Tuesday 21 February 2017

Limitation (Childhood Abuse) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Graeme Garrett, Solicitor, Association of Personal Injury Lawyers;

David Whelan, Spokesperson, Former Boys and Girls Abused in Quarriers Homes;

Harry Aitken, Former Resident, Quarriers Homes;

Sandy Brindley, National Co-ordinator, Rape Crisis Scotland;

Laura Baxter, Operations Manager, Victim Support Scotland;

Alastair Ross, Assistant Director, Head of Public Policy, Association of British Insurers;

Graeme Watson, Member of the Sub-Group on Historic Abuse, Forum of Insurance Lawyers.

Written evidence

Association of British Insurers

Association of British Insurers (supplementary submission)

Association of Personal Injury Lawyers

Former Boys and Girls Abused in Quarriers Homes

Former Boys and Girls Abused in Quarriers Homes (supplementary submission)

Former Boys and Girls Abused in Quarriers Homes (supplementary submission)

Forum of Insurance Lawyers

Forum of Insurance Lawyers (supplementary submission)

Rape Crisis Scotland

Victim Support Scotland

7th Meeting, 2017 (Session 5) Tuesday 28 February 2017

Limitation (Childhood Abuse) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Laura Dunlop QC, Convener, Law Reform Committee, Faculty of Advocates;

Kim Leslie, Convener, Civil Justice Committee, Law Society of Scotland;

Bruce Adamson, Legal Officer, Scottish Human Rights Commission;

Lauren Bruce, Policy Manager, Convention of Scottish Local Authorities (COSLA);

Lesley Boal QPM, Detective Chief Superintendent - Public Protection, Specialist Crime Division, Police Scotland;

Alistair Gaw, Acting Executive Director, Communities and Families, City of Edinburgh Council, representing Social Work Scotland;

Vladimir Valiente, Principal Solicitor, Midlothian Council, representing the Society of Local Authority Lawyers (SOLAR).

Ben Macpherson declared an interest as a non-practicing member of the Law Society of Scotland.

Written evidence

Convention of Scottish Local Authorities (COSLA)

Faculty of Advocates

Law Society of Scotland

Police Scotland

Police Scotland (supplementary submission)

Scottish Human Rights Commission

Social Work Scotland

Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) (supplementary submission)

10th Meeting, 2017 (Session 5) Tuesday 14 March 2017

Limitation (Childhood Abuse) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Annabelle Ewing, Minister for Community Safety and Legal Affairs, and Elinor Owe, Policy Manager, Scottish Government.

11th Meeting, 2017 (Session 5) Tuesday 21 March 2017

Limitation (Childhood Abuse) (Scotland) Bill (in private): The Committee considered key issues emerging from the evidence received on the Bill at Stage 1.

14th Meeting, 2017 (Session 5) Tuesday 18 April 2017

Limitation (Childhood Abuse) (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to and the Committee agreed its report to the Parliament.

Annex B - Written evidence

List of other written evidence

Aberdeen City Council

Forum of Scottish Claims Managers

Glasgow Bar Association

Johnston, David QC, Commissioner, Scottish Law Commission

Zurich Insurance plc

Annex C - Informal testimonies

Notes of informal testimonies from survivors

Note of meeting with survivor R

Note of meeting with survivors T and M

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