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**HM** Harper  
Macleod LLP



**Briefing Paper**  
**- Limitation (Child Abuse)**  
**(Scotland) Bill 2017**



# **Child protection briefing - Limitation (Childhood Abuse) (Scotland) Bill 2017**

## **Overview**

Claims for damages arising from personal injury, have until now, been subject to a rule of law that means that a claim, raised more than 3 years after injury is suffered (\*or knowing that injury has been suffered) will be time-barred and will not be capable of being pursued.

Section 17 of the Prescription and Limitation (Scotland) Act 1973 stops any such action for damages. Courts could relax the rule on a case-by-case basis if it is appropriate, but this was rarely relied upon. Most legal rights have this sort of rule and one of the benefits to this sort of rule is that it stops claims from being taken a long time after the event.

Legislation has now however been enacted by the Scottish Parliament to remove the limiting period of time applicable to claims for personal injury, where the claim concerns child abuse.

It is therefore important that sports organisations considering the effect of this legislation and respond by checking existing arrangements and changing certain practices.

The legislation has been driven to alter the standard position in law because it is recognised that there are many circumstances in which the interests of survivors, the public interest and the interests of justice, require cases to be heard and for survivor pursuers to be able to have their claims heard and ruled upon. There are many instances of abuse survivors not pursuing action in the immediate aftermath of an incident because of fear, embarrassment, or because recovering from the abuse suffered is prioritised over taking a legal action.

## Broad definition of abuse

"Abuse" will, for the purposes of the Bill, be defined as not only "acts", but also "omissions".

It will cover "sexual", "physical" and "emotional" abuse.

Although "neglect" was within the definition of "abuse" (section 17A(2)) in the first draft of the Bill, the Bill enacted by Parliament does not contain this.

Nonetheless the proposed wording notes that the injuries may be from an "act or omission".

Parliamentary discussion suggests that the definition of abuse is abuse that has been caused by *abusive behaviour* – rather than *negligent behaviour only*. Nonetheless, as it will be for the courts to interpret and apply the legislation, for the purposes of reacting to this legislation, SGBs would be best to consider that as acts *and* omissions are covered, what is covered is sexual, physical and emotional abuse, by act or omission, and therefore negligent behaviour may be covered also.

Examples may include:-

Physical abuse is where children are hurt or injured. It includes hitting, kicking and beating. These can cause pain, cuts, bruising, broken bones and in extreme cases death.

Emotional abuse includes degrading punishment, sarcasm, threats and not giving love and attention. All of these can undermine a child or young person's confidence.

Sexual abuse occurs when children are forced or persuaded into sexual acts or situations.

## **Retrospective effect**

The benefit of this legislation to abuse survivors is clear and evident. However there are a number of consequences arising due to the introduction of the legislation, with a number of concerns for organisations. There will no longer be any certainty for organisations. If an organisation has a long history working with children and young people, then it may be exposed to historic claims. There will no longer be any "legal certainty", save for the most historic of claims (explained below).

The Bill will have retrospective effect, in that (1) claims can now be taken regarding incidents that occurred more than 3 years ago; and (2) claims previously raised but settled can be reopened subject to certain conditions.

Actions that were previously settled, may also be the subject of new litigation, if those settlements were agreed by the parties to the initial action; the pursuer entered into the settlement under the reasonable belief that time-bar was an issue and likely to be the reason the court disposed of the action; and the sum of money paid was not in excess of the pursuers expenses in connection with bringing and settling the initial action (\*all section 17C(4)). If the settlement involved paying something other than reimbursement of their expenses, then the condition is not met and the case cannot be opened or re-raised (\*per section 17C(5)).

Actions that were previously litigated but disposed of under the limitation regime, may be re-raised, provided that the claim would not affect a defender's human rights convention rights.

This applies where the action is brought by the person who sustained the injuries.

It will be possible to defend an action brought by virtue of these proceedings by pleading that there would be "substantial prejudice" to the defender in opening up litigation once more or allowing a historic case to be taken forward, balanced against the pursuer's interest. However it is for the defender to satisfy the court that the action should not proceed. The onus on stopping proceedings is very much with the defender.

If death has resulted from the personal injury, the deceased person's estate cannot bring an action in their name using this legislation. It is intended to support a personal action reflecting the unique position of the survivor only.

## Concerns

The legislation is in many ways ground-breaking and far-thinking, and has prompted comment and debate. There have been various concerns raised about the legislation by different persons and commentators from different interest groups, be they legal theorists, practitioners, insurers, etc.

Those concerns are ingathered and outlined below. The concerns are not adopted as correct or incorrect, but repeated in order to consider and discuss options open to organisations, in order to best prepare for the impact of the legislation.

The main comments and concerns can be summarised as:

### 1) Potential problems for pursuers?

An individual who is an abuse survivor and who chooses to take a case, however recent or old, will need to prove their case. They have the burden of proving what occurred and that injury was sustained. To that end, it can be difficult for a pursuer to discharge "the burden of proof" when what is alleged to have occurred took place many years ago.

Defences may be lodged in response to claims arguing that Convention rights (human rights) may be infringed if the action is permitted to proceed. A "right to a fair trial" may not be observed if the claim is permitted to proceed and there is no clear knowledge or evidence of the incident, the pleadings are sparse and lacking in detail, those originally involved in the matter cannot be traced, are not contactable or not on this mortal earth.

Retrospective proceedings reviving historic abuse claims may also be arguably in contravention of Article 1, namely the human right to peaceful enjoyment of possessions, and arguments of this nature will inevitably be attempted by defenders to actions when the legislation is in its infancy.

As a result, although the legislation will make it possible for historic claims to be taken, it will not make it any easier for claims to succeed. The older the case, the more difficult a personal injury action will be to succeed.

If insurance is behind the defence of proceedings (as is likely) then it can be anticipated, at least at the outset, that many different legal arguments will be taken to try to slow and ultimately stop the proceedings.

### 2) A lack of certainty

Human nature tends to prefer certainty.

The legislation is retrospective in two respects:- (1) claims can now be taken regarding incidents that occurred more than 3 years ago; and (2) claims previously raised but settled can be reopened (subject to certain conditions).

Claims that have already been settled in court or in contracts of settlement can be reopened if the settlement was for a payment of "expenses" only or less.

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.

S.19A and the Prescriptions and Limitations Act already allows late claims to be raised. Judges should be given more discretion to use this.

Pre 2001, an employer was not held vicariously liable for the criminal actions of employees abusing children in their care. The Bill will create both confusion and prejudice on the basis that the employer would not have otherwise been held responsible if the claim had been raised at the time. Removing the limitation period would significantly prejudice such employers, often local authorities & charities, who would not have been held liable had the claims been brought in good time. Frequently, these institutions had taken all reasonable and practicable safeguarding measures.

### **3) Data retention**

It will be necessary to consider what adjustments should be made to data retention. It is understood that some insurers are already requiring policyholders to retain data relating to complaints of a certain type or any complaint involving children be retained without limit of time.

However now all organisations working with children and young people will need to adjust their policies, because an evidence trail of what complaint was received, assessed, investigated and the conclusions reached, will inevitably be helpful to the organisation should a claim later be raised. This makes the assumption, of course, that an incident of abuse discovered to have occurred will likely be responded to properly at the time and so the evidence likely retained, will be helpful in defence of any later proceedings.

Organisations are typically advised to destroy data after a reasonable period of time in order not to retain data unnecessarily. It is traditionally typically said that data in relation to claims should be destroyed after a set number of years, such as 5, as that will be the limit for both personal injury and separately contract claims (which has a longer limitation period).

Now, organisations will need to retain child protection data without limit of time (at least initially). Given that in theory a claim may be raised dating back to 1964, and with the average life expectancy ever-increasing, organisations will need to decide what data they wish to retain (recommendations at the end of this paper), how they are going to retain it securely and when they are going to delete it.

Significant care will need to be exercised in retaining data of this nature because it may include sensitive personal data (under the Data Protection Act 1998). That means secure data principles will need to be followed to ensure that problems do not arise. Electronically stored data will need to be backed-up and password protected; hard copies will have to be kept securely, under lock and key.

### **4) Increased costs for employers for data retention**

There will be associated costs for retaining data securely. If the data is retained in hard copy it may be best to keep a digital copy also.

### **5) Increased costs for employers for insurance**

It is likely that insurers will increase costs if to cover historic claims. Care should be taken by organisations to be clear on the extent of their insurance cover, that is both in place at present and that is arranged in future.

## **6) Increased legal costs**

Legal costs of pursuing and defending historic claims are much greater than those relating to more recent events. Investigations have to be made into the re-structuring of organisations to identify the current source of responsibility for historic conduct, documents have to be searched from disparate sources and witnesses have to be traced.

Over the past 5 years public sector, legal aid and judiciary spending has been slashed. The introduction of this bill will likely increase all the expenses of all concerned, including a potentially significant cost for legal aid in a time when legal aid budgets elsewhere are being cut.

Organisations should ensure that they understand whether their insurance cover protects them from having to pay legal fees to defend an action, or whether their insurance only covers liability.

## **7) Strain on the court system with the increase in case loads**

It has been suggested that a strain will be placed on the court system. This remains to be seen.

## Vicarious Liability

An action can be raised against the individual who caused the injury together with any other party that may be found liable, for example on a secondary basis, through employer's vicarious liability.

Vicarious liability is the concept whereby an employer is liable for the actions of the persons whom it employs and providing that the action complained of is sufficiently close connected to the employment. There have been various cases to look at the latter, and the way in which the law is presently stated, the focus is not necessarily the act or actions complained of (which will rarely connect to the purpose of the employment) but rather the general circumstances.

Thus someone who is employed as a coach and who commits child abuse and the child is a sportsperson under their care, or introduced to them in consequence of their coaching role, and who is abused on a sports trip under the control of the SGB or club, may well lead to vicarious liability to the SGB or club concerned.

The separate question, but as important, is whether all categories of persons within the workforce are potentially covered by vicarious liability. People in the workforce may have different status:-

- The employee, employed under a contract of employment
- The worker, for example someone who is casually used, or who is self-employed for tax purposes, but who is more closely controlled by the employer and who is contracted to provide their services on an individual basis
- The genuinely self-employed person, for example the professional doctor who is not contracted on an ongoing basis and who is retained to give certain services from time to time.
- Directors
- Volunteers
- Secondees

There is case law to suggest that a person who is not said to be an employee and who is designed as a worker within the business, for the purposes of employment rights, can still be an individual for whom the employer has vicarious liability. Persons on secondment to the end-user organisation may create liability. Directors and volunteers should equally be covered. The law of vicarious liability can apply equally to agents as it does to employees. It is therefore safest to assume that the insurance and record-keeping principles should be applied to all persons working within sport.

### Does this apply to SGBs only, in sport?

No. SGBs are covered but any other organisation (and individual) may be affected by this legislative development. An unincorporated association that is a club is potentially covered. A limited company is affected. Individuals are affected. There is no limiting provision.

### Does this extend to vulnerable adults?

The legislation only applies to persons who were under the age of 18 at the point in time that the action giving rise to the injury (the abuse) occurred.

A person aged 19, 20 or older (for example) who has a mental age of 17 years or younger, at the time of the abuse occurring, would be regarded as a vulnerable adult and out with the scope of the legislation.

## **Pre-1964 abuse**

There is a point to note regarding abuse alleged to have taken place before 26 September 1964. The law of prescription stated that the prescriptive period for a personal injury claim was 20 years, after which the right to bring a claim for damages was extinguished.

This was changed in 1984, whereby it was decided that the prescriptive period would be extinguished, but only for claims from that point forward. Therefore, any abuse that occurred before 26 September 1964 has prescribed and cannot be pursued, whereas any abuse that occurred after that date may be potentially pursued.

## Changes required

### (A) Insurance

- A. The starting point is to assess current insurance policies and to understand the extent of existing cover. Will that insurance be fit for purpose in light of the new legislation being introduced? If not will your insurer amend cover?
- B. The conditions applicable to the insurance in place needs to be considered, and applied, in the context of the new legislation. Any guidance issued by your insurer should be followed and adopted or insurance may be impacted – in the worst case, it may not apply.
- C. In particular, check whether or not insurance will cover acts alleged to have occurred out with the term of the insurance policy (i.e. pre-dating it). Or will the insurance apply only to claims raised and intimated within the time that insurance cover is in place?
- D. SGBs should check whether their insurance includes cover for legal fees in defending proceedings.

### (B) Practical steps

There are certain other practical steps that SGBs can begin to take:-

1. Ingathering and recording any historic claims that the SGB is aware of, which were the subject of any form of intimation of claim, legal action or otherwise, is worthwhile. These may be ultimately raised once more, if they had been disposed of previously. The past claims profile may also be useful in discussions with insurers.
2. Changing the methodology used in respect of retaining data and evidence, regarding any complaint or concern regarding any person under the age of 18. This will help if any claim is later received. Any complaint/concern noted at present should be retained along with all accompanying documentation. Even if a claim is not presented within the three year period after an incident has occurred, the data should be retained.
3. A check should be conducted to establish what, if any, past records are retained of any complaints/concerns concerning any person under the age of 18. The records should be ingathered and stored away securely.
4. A check should be conducted to establish what, if any, court actions have been raised and settlements have been reached, checking to establish if any are for expenses only. The accounting records of the SGB are a starting point to assist in this task.

Notes 1:- All of the foregoing checks should, of course, be focused on any complaint, claim or case involving any allegation that could be regarded as child "abuse" for the purposes of the legislation. Sexual, physical or emotional abuse is to be covered.

Note 2:- Examples of data that is to be retained would include:-

- Any written complaint/concern made (leading to investigation)

- Any written record of a verbal complaint/concern made (leading to investigation)
- Correspondence relating to investigations
- Statements taken from witnesses
- Investigation report (generally)
- Significant incident forms
- Investigation outcome / responding to concerns document
- Disciplinary or misconduct proceedings or equivalent (formal procedure documents)
- Child protection referral forms
- A list of the identity of persons involved (witnesses, investigators, decision-makers, etc)
- Any training records applicable to those persons involved
- A copy of the applicable and relevant policies and procedures in place at the time
- Recruitment documents relative to any person against whom a complaint has been upheld (self-declaration forms, references, documentation demonstrating training and education in relevant topics (e.g. signed code of conduct)

## Frequently Asked Questions:

***Q – Our SGB's insurance policies contain a pre-litigation date and say they will not cover the cost of any claims made pre-dating the policy period. Who is therefore liable for these claims?***

A - Insurance is provided on the basis of a contract. The law that applies is contractual. A person is "insured" as and when they comply with their contractual terms. The extent of insurance depends on the purchased terms at the time the contract is entered into.

I know of no proposals to legislate and force insurers to specifically change their terms on account of this legislation.

*If an incident is not insured under this contract then the SGB shall be uninsured and if the SGB is found liable they will need to meet the award of damages made.*

***Q – The new General Data Protection Regulations come into force on 25<sup>th</sup> May 2018 and state that we should keep data for no longer than necessary. Won't we get into trouble if we now retain child protection case data?***

A - The fact that claims can be taken even although they occurred many years ago, will mean that sports organisations will have a purpose in retaining certain information. It will be necessary to retain information and as such no issue should arise with the GDPR.

As matters stand under the Data Protection Act and parent legislation, organisations can retain information for many years, provided that the organisation has a legitimate reason to retain the information.

***Q – The new guidance is that we should retain child protection case data indefinitely. How long does this mean in practical terms.***

A - "Indefinitely" may suggest holding this information without limit of time however organisations may wish to make arrangements to hold information for several decades, rather than "indefinitely". In making decisions about length of retention though, organisations must take into consideration any requirements of their insurers as well as the ever increasing life expectancy rate. It is recommended that statutory agencies retain data for 99 years and many organisations are likely to apply a similar timescale.

***Q – Where does responsibility sit for cases which arise at club level? Is the SGB held responsible or the affiliated club?***

A - The SGB will be responsible when it is fixed with legal liability, which is typically only through vicarious liability and being held responsible for the actions of certain individuals. For example SGBs who take a responsibility in the safe recruitment of club coaches or for coach licencing may be held vicariously liable if one of these coaches later commits an offence and it is found that the safe recruitment procedures were not followed as they should have been. An SGB would not typically be legally responsible for the actions of a separate legal entity such as a club, as that club will only be responsible if it is liable for the actions of persons for whom it can be found legally liable. That club will need to therefore be aware of the difficulties that can arise and the club will need to consider whether to adopt changes to their record-keeping. It is therefore important that SGBs disseminate information about the new legislation to clubs and other affiliated bodies.

***Q – Is there a phase in period for this legislation? When does it come into force?***

A - The Bill has been enacted and there is no phase in period; we are waiting for Royal Assent to be granted which will take a few weeks once the 28 days period for challenge has expired (the 28 days period runs from the date that the Bill has been passed at stage 3 of the Parliamentary process) so to

all intents and purposes the Act will be fully in force very shortly; given the nature of the Act there is no need to have a future date for the Act becoming full law; the need for a lead in time is usually to help people adapt however in this instance there is nothing that will really be gained by organisations and individuals having an extra month or two. As such organisations should begin to amend practices and policies with immediate effect.