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Minister for Public Health
Minister for Justice
Cabinet Secretary for Justice
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BRIEFING FOR CROSS-MINISTERIAL MEETING ON ADULT SURVIVORS OF CHILDHOOD SEXUAL ABUSE

Tuesday 18th December, 1E.09, St Andrew's House

Purpose

The Minister of Public Health in her capacity as national lead for the overarching Survivors Scotland strategy has called this meeting to enable all Ministers with an interest to discuss respective roles and responsibilities, with a view to agreeing a coherent cross - Government approach.

In particular, two recent reports, the Tom Shaw Historical Abuse Systemic review and the Scottish Law Commission's Review of "time bar" matters, require a co-ordinated Government response early next year. It would be expedient if this response could be underpinned by the principles of the Survivors strategy, as well as being sufficiently robust to address the specific concerns raised by the survivors of abuse while in care.

Background

The Survivors Strategy which includes historical abuse seeks to:

- enhance the health and wellbeing of survivors through improved self-care, community, primary and tertiary care;
- improve local services through disbursement of a Survivors Development Fund;
- further develop understanding of prevalence and incidence through improved data collection;
- create comprehensive web-based interactive information, advice, research and training materials to support survivors, professionals and academics;
- scope the potential introduction of a truth and reconciliation model of restorative justice for victims;
- map gaps in the judicial system process for survivors;
- fulfil Cosgrove recommendation 26 in respect of training change programmes for sex offenders.

Further details appear in **Annex A**.

Annex B, provided by Care and Justice Directorate, summarises and discusses Mr Ingram's ongoing work on behalf of survivors of In-Care Abuse including the findings of Tom Shaw's independent review of Residential

Schools and Children's Homes in Scotland from 1950-1995 and the Kerelaw List D School Inquiry.

Annex C, provided by Civil and International Justice Directorate, details the technical complexities of the recent Scottish Law Commission Report on Personal Injury Actions – Limitation and Prescribed Claims which means that those who were abused prior to 1964 are not able to seek redress through the courts system.

Discussion

The Survivors Strategy is being very well received by victims and those who support them. However, some of those who were abused whilst in care continue to believe that Government (whom they advocate is a reflection of society as a whole) is ignoring their ongoing suffering. A minority have gone on to take court action with varying degrees of success. Their perspective is compounded to a degree by the recent SLC findings and adds to the sense that some correspondents with Government have that the judicial system and its processes disadvantage them. It would be helpful to consider this view and the appropriate cross-Government response.

The position is complex. During the course of the previous administration, the then First Minister made a public apology on behalf of the Scottish people by way of redress. This gesture was welcomed but seen as insufficient in that the principal perpetrators in the form of their employers have not all been open in acknowledging the past. Mr Ingram's officials are involved in ongoing dialogue with some of the parties concerned and will be able to provide details.

Many survivors make it clear that what they seek is not monetary compensation but acknowledgement through acceptance that they are telling the truth. On this basis, the Minister for Public Health has recently asked her officials to begin to explore the use of a truth and reconciliation model. The way in which this could operate is not yet clear, but could have the benefit of bringing parties together without the stress and costs of court action (for those who are not debarred). It is likely that, given the time that has elapsed since the incidents, that individual perpetrators will no longer be around to be answerable. But the organisations who employed them will be and may be persuaded to engage in this type of exchange to move on from the adverse publicity that has surrounded them. Great care would need to be taken to ensure that victims understood that the process was instead of court proceedings.

There is no doubt that those who have been abused often lead diminished lives, have poor self-esteem, suffer disproportionate degrees of physical and mental ill-health and so are unable to contribute to Scottish society by growing the economy through being meaningfully employed. It would, therefore, be helpful to agree to piloting of this approach and reviewing the findings at a later date.

Finally, thought needs to be given to the merits and demerits of having a Parliamentary debate on the subject - particularly given the recent announcements on In-Care abuse and on time bars. A clear benefit would be to show case what the Survivors Strategy is already achieving.

Jean MacLellan
Adult Care and Support Change Team

ANNEX A

SurvivorScotland – The National Strategy for Adult Survivors of Childhood Sexual Abuse

Background

The National Strategy is the culmination of efforts by the Cross Party Group for Survivors of Childhood Sexual Abuse (CPG), survivors and many others. It draws together the recommendations of the Short Life Working Group Report presented to the Health Minister in 2004; stakeholder views and recent research findings.

It was launched in September 2005 and a National Reference Group takes forward its implementation. Membership of the Group includes Scottish Government officials from Education, Criminal Justice and Health Directorates, representatives from a wide range of voluntary and statutory services, and survivor groups, including those who have been abused whilst in care.

The strategy is now badged as SurvivorScotland so that survivors can easily access what is available. A major conference in February 2007 attended by 350 delegates served as a significant means to raise the profile further because of the considerable media interest that was generated.

Initial priorities were to create a website to act as an information, networking and education resource, to map existing data and services for survivors and to establish a Survivors' Service Development Fund.

Awareness Raising

These are all important communication elements which will have started to move public attitudes and the confidence of service users and support services in the right direction. Awareness raising and public education are key issues now being further addressed by the Reference Group's focus on a communications campaign, which could be further used as a vehicle for rolling out some of the cross-cutting issues detailed.

The Fund

The Service Development Fund was set up to with the aim of improving services, creating new and innovative services and promoting development of appropriate research to inform future service commissioning and delivery. We hope to use this exercise positively in order to map out what existing services are currently available to survivors across Scotland, and enable us to identify gaps in services. There were around 100 applications received and

the Minister for Public Health agreed to funding of £1.7m over a 2 year period to 25 organisations, to develop a range of services of survivors.

Impact on Health and Wellbeing

The Strategy is not an explicit part of the Mental Health Delivery Plan but there are clear linkages. The overwhelming experience of research and practice is that many survivors face a range of difficulties in their mental health and wellbeing. 'Yes You Can', the training booklet for use by those working with survivors will soon be launched by the Mental Health Division.

Research evidence indicates that if self-care and preventative services were developed for this under-diagnosed group, the benefits to both the individuals concerned and to the public purse could be considerable. If we can raise awareness and educate the general public and train those working with survivors appropriately, we can help ensure that they receive the services they require, thereby avoiding unnecessary burdening on primary care and mental health services.

Research also suggests that only a small percentage of cases of childhood sexual abuse are currently documented in health records, and there is no clear requirement on services – such as primary care, mental health, addictions or homelessness – to identify those affected. Obtaining better baseline data from current services is therefore a priority, to gain a better understand of service needs. We are currently negotiating with two health and local authorities in Scotland to develop pilot projects in order to gain this data.

Various pieces of research have found that sexual abuse as a child is a significant risk factor both for serious physical illnesses and for medically unexplained physical symptoms. These can be manifested in a range of symptoms from treatment resistant depression, somatic symptoms such as chronic pain; alcohol and drug dependency, through to psychosis. Consequently extensive demands are placed on primary and psychiatric care services. For example the Scottish Government recently commissioned a literature review which identified 96 relevant studies of people with medically unexplained conditions. This confirmed that survivors of childhood sexual abuse are not only at greater risk of many medically unexplained symptoms, but that understanding and treatment are currently inadequate. This again means that resources are not well targeted.

Future priorities include devising a national training programme for frontline staff, creating care pathways and mainstreaming of services for survivors.

Data Collection

It is very important for key services to collect information sensitively where people have a background of sexual abuse, and may need to have their support needs addressed. We have already commissioned and funded 2 projects in Scotland, one based in gynaecological services in Fife and the

other in a large project for homeless young people in Aberdeen. These pilot projects will provide valuable indications of how other services can collect necessary data sensitively.

Sex Offending

Part of this strategy includes responsibility for taking forward recommendation 26 of the Cosgrove Report. This suggested that consideration be given to identifying and securing funding for risk assessment and personal change programmes for individuals who have admitted sexually offending behaviour and individuals who admit concerns that they may be at risk of sexual offending.

This is based on the premise that some perpetrators, or those who think they may become perpetrators, may also have suffered from sexual abuse and need access to ongoing support and intervention while they are in the community to reduce the risk they present to the public.

The Government is funding more than £200,000 over the next 3 years to 'Stop it Now', an organisation already working across the UK one of whose key aims is to encourage adult abusers and potential abusers to recognise their behaviour as abusive and seek help to change.

The SurvivorScotland website also contains information around prevention.

On the wider Justice agenda, the prevention and educational work included in the strategy can help to target and reduce those caught up in the prison system.

ANNEX B

SUPPORTING SURVIVORS OF HISTORIC IN-CARE/INSTITUTIONAL ABUSE

In his response to the IPQ announcing the publication of the Historical Abuse Systemic Review, the Minister for Children and Early Years welcomed the review's recommendations, in principle, and that a detailed set of proposals for taking them forward would be announced by the Scottish Government shortly. These would centre on improvements to the quality of care and education provided in residential care and, as part of the Survivor Scotland strategy, improvements to services for adult survivors.

The recommendations of the Shaw Historical Abuse Systemic Review focus on three areas for improvement. Thinking is at a very early stage. We also want to ensure that progress fits with other work, for example More Choices, More Chances. An early indication of progress is as follows:

1. **A new strategic approach to the improvement of residential care (incorporating implementation of any findings from the Kerelaw Independent Inquiry).** This would include:
 - Supply and demand: developing a shared understanding of the role of residential care in the spectrum of care for looked after children; and identifying the levers to ensure provision which matches need, based on that understanding of role.
 - Commissioning and outcomes: developing a consistent approach to commissioning based on outcomes, and agreed roles and responsibilities between commissioning authorities and providers (this is a recommendation coming out of the inspection of residential services for young people with sexually harmful behaviour)
 - Care planning: strengthening planning through, during and out of placements, using the GIRFEC framework
 - Protection and quality assurance: agreeing outcomes and respective responsibilities for ensuring safety and quality for children
 - Workforce: a strategy for raising skills and aspirations
2. **Support for survivors which will help them access the services they need, including supporting them through the judicial process, if appropriate.** The Survivor Scotland Reference Group has established a sub-group to recommend proposals for the specific

needs of historic in-care/institutional abuse survivors. This sub-group includes survivors. It plans to submit its recommendations to the Expert reference group on 29 February. These are likely to include a proposal to tender for a national service which will help the individual link into local services. It will be crucial that this service links closely with existing aftercare services for looked after and accommodated children and also local services provided by health providers and other independent agencies. Officials are visiting a similar service for England and Wales on 17 December. A questionnaire has also been issued to 300 providers to identify existing service provision and gaps.

3. **A central hub where personal records can be stored and accessed.** The National Archives of Scotland (NAS) provided support to Mr Tom Shaw and has welcomed the opportunity to take forward the Review's recommendations. The first meeting with NAS is on 19 December.

Background: Scottish Executive Activity between December 2004 and April 2007

During a debate in Parliament on 1 December 2004, the Executive announced a package of support and the then First Minister made a statement in Parliament giving a sincere and full apology on behalf of the people of Scotland to those who had suffered abuse.

The then Minister for Education and Young People followed this up with the announcement of a package of measures:

- The Announcement of an Independent Historical Abuse Systemic Review
- The Extension of the Scottish Law Commission's review of Limitation and Prescription to review the law on timebar.
- The development of Survivor Scotland, including a development fund.
- Lawyers for abuse survivors, reportedly 300 cases, are awaiting a number of test cases and the SLCs report before taking legal action. A recent test case, in which the Scottish Executive was one of a number of defenders, was lost by a survivor, Mr McEwan, in the Inner House of the Court of Session. He has been given Legal Aid to appeal to the House of Lords. There is also another case, [REDACTED] in which we are also one of a number of defenders, which is going through the Court process.

ANNEX C

**SCOTTISH LAW COMMISSION REPORT ON PERSONAL INJURY
ACTIONS: LIMITATION AND PRESCRIBED CLAIMS****Effect of the Rules of Limitation and Prescription on Historic Childhood
Abuse Cases**

1. The law on prescription and limitation is set out in the Prescription and Limitation (Scotland) Act 1973 (as amended) (the 1973 Act). Prior to 1984 claims for damages for personal injury were subject to both the three year limitation period and the 20 year long negative prescription. The practical effect of the rules relating to limitation and prescription is very similar, but the rules are conceptually different. The effect of prescription is to extinguish totally a potential claim so that it no longer exists, whereas limitation imposes a time limit of three years for bringing an action for compensation for personal injury. The Prescription and Limitation (Scotland) Act 1984 removed all personal injury actions from the scope of long negative prescription by disapplying prescription to all claims which were not already prescribed (i.e. had not already ceased to exist) when it came into force. This means that when the Act came into force on 26 September 1984, all claims where the cause of action arose prior 26 September 1964 ceased to exist.

2. Currently, under section 17 of the 1973 Act, the three year period for bringing an action in Scotland for compensation for any personal injury runs from: the date on which the injuries were sustained, or where the injuries were attributable to a continuing act or omission, the date when the act or omission ceased, if that is later; or the date on which the claimant became aware of the main facts relating to his or her injury, in particular that the injury was sufficiently serious to justify bringing an action in damages. However, Section 19A of the 1973 Act gives the court discretion to allow an action to proceed even though it is raised over three year time limit where the court thinks it would be equitable to do so.

3. The claims of all persons who allege they were victims of childhood abuse prior to 26 September 1964 have prescribed, which means that they are extinguished and the person no longer has a right of action. The court has no discretion in this situation. In practice, claims by victims who allege they suffered historic childhood abuse after 26 September 1964 are in the main also time-barred by operation of the three year limitation period, unless the court exercises its discretion in favour of the pursuer,

House of Lords Appeal

4. On 6 June 2007 the Court of Session upheld the decision of Lord Drummond Young not to allow actions to be raised by 3 people who claim they suffered abuse while resident in Nazareth House, Cardonald in the 1960s and 1970s.¹ In considering the evidence provided for not taking proceedings earlier, Lord Drummond Young concluded that each of the pursuers suffered from personal and psychological problems which would have tended to inhibit them from raising court proceedings; they thought their accounts would not be believed; and until 1997 they did not consciously realise they might start proceedings because they had not given thought to that course,

5. However, other factors weighed against giving permission to proceed, two of which were decisive. The first was that the lapse of time was substantial and that in itself made a decline in the quality of justice available. Firstly, it would for example, be very difficult to assess matters in the very different social attitudes of the time and against other aspects of the personal history of the pursuers. Secondly, substantial amounts of evidence had been lost, important witnesses had died or were very old and unable to give evidence; and many contemporary documents were no longer to be found. This case has been appealed to the House of Lords.

References to the Scottish Law Commission (SLC)

6. Previous Scottish Ministers made a reference to the Scottish Law Commission in September 2004 asking the Commission to examine the operation of the sections of the 1973 Act relating to: the calculation of the time period where knowledge/awareness of the claimant of the injury is a factor; and the discretion of the court to disregard the time limit where it seems equitable to do so. The reference was made primarily in response to concerns around claims arising from occupational diseases with long latency periods, e.g. asbestosis, but is also relevant to historic in-care/institutional childhood abuse.

7. During the course of the Scottish Law Commission's work on its reference on limitation in personal injury actions, Scottish Ministers made a second reference to the Commission which involved consideration of the effect of long negative prescription of obligations to pay damages for personal injury (which was abolished in 1984) in respect of claims which were extinguished by operation of prescription before 1984. The second reference arose from concerns about the position of people who may have been subject to abuse while they were children in institutional care. The two reviews were conducted in parallel and related to all personal injury cases, not just those of child abuse.

¹ *AB, DM and JW v Sister Bernard Mary Murray and Others*
(<http://www.scotcourts.gov.uk/opinions/2007CSIH39.html>)

SLC Report on Personal Injury Actions: Limitation and Prescribed Claims

8. The SLC Report on Personal Injury Actions: Limitation and Prescribed Claims was published on 5 December. It makes 19 recommendations of which 17 (all the recommendations relating to limitation) appear to be neutral to survivors of historic in-care/institutional childhood abuse.

Limitation

9. The precursor discussion paper to the Report noted that in some Canadian provinces the approach adopted in the last decade of the 20th century was to exclude certain sexual abuse cases from any limitation rule. However, that exclusion usually took place in the context of a limitation regime which did not provide for a discretion to over-ride limitation time-bar. The discussion paper indicated that the SLC would not favour any special rule excluding claims of alleged sexual abuse during childhood from the law of limitation of actions, primarily because the passage of time may, as in other personal injury cases, seriously prejudice the defending party in refuting the allegation. They also noted that the Law Commission for England and Wales had in 1998 canvassed the question of whether special provision was required for sexual abuse cases but had concluded that, with discretion to over-ride the limitation time-bar, special rules could not be justified.

10. The Report does not make any specific recommendations for sufferers of historic in-care/institutional childhood abuse in relation to the limitation period. However, it does recommend: increasing the limitation period from 3 years to 5 years; that judicial discretion is retained; no time limit should be put on that discretion; and that there should be a non-exhaustive list of matters to which the court may have regard in determining whether to allow an action to be brought. However, if it was decided to change the law to exceptionally allow sufferers of historic in-care/institutional childhood abuse to raise an action outwith the limitation period and without relying on judicial discretion it is possible that the end result would be the same i.e. that cases may be dismissed by the Judge due to lack of evidence, where witnesses are untraceable, or have died, and relevant documents have been lost.

Prescription

11. On prescription, the Report recommends that claims in respect of personal injury which were extinguished by negative prescription before 1984 should not be revived (recommendation 18). It also recommends that no special category within this should be created for claims resulting from institutional abuse (recommendation 19).

12. The SLC Report makes clear that the Commission sympathises deeply with victims of childhood institutional abuse, but they have had to look at the issue from a principled perspective and taking account of the general legal policy underpinning the rules of limitation and prescription. The events in question occurred at least 43 years ago. Confidence in the law would be

undermined if the rules governing relationships could be changed retrospectively many years after an event. They see no coherent basis for avoiding fundamental objections to retrospective legislation. They consider that unfairness would result from the creation of a special regime and raise serious concerns about contravention of ECHR. They also note that, were prescribed cases to be revived, they would mostly still come up against time-bar by virtue of limitation (assuming that limitation rules would continue to apply).

Preliminary SGLD Advice on SLC Recommendations (Nos.18 and 19)

13. The SLC's general natural justice arguments against retrospection are convincing as regards reinstating rights of action in relation to events that happened over 43 years ago.

14. In 1984 the law on time bar moved from a "prescription and limitation" regime to a "limitation-only" regime. The transition was managed by excluding from the new regime cases where the injury had occurred more than 20 years before (i.e. before 1964) and had already prescribed. There was, however, an element of retrospection in the 1984 legislation: injuries that had occurred after 1964 were to be subject only to the 3 year limitation period; the 20 year long negative prescription period no longer applied to post-1964 injuries. These arrangements seem a sensible, fair and reasonable way to achieve the transition from one regime to another.

15. Survivors of historic abuse would appear to wish long negative prescription to be abolished retrospectively to a much greater extent than it was in 1984, so that it would not apply to events that occurred before 1964. This would require legislation that was retrospective in effect to 43 years ago at the very least.

16. Retrospective legislation is in general undesirable in principle and for reasons of natural justice. It undermines legal certainty and can result in unfairness, e.g. where the quality of evidence diminishes over time, records are lost, memories fail and events long ago are being judged by today's standards. The greater the extent of the retrospection, the more compelling are the reasons to avoid it.

17. In relation to ECHR considerations, retrospection to the extent required would most likely be outwith the legislative competence of the Parliament on the grounds that it would breach Article 1 Protocol 1 ECHR, because it would:

- not be in the public interest for all the reasons stated by the SLC;
- not be proportionate in the sense of striking a fair balance between the rights of potential defenders and what public interest there may be (given the passage of time) in calling them to account for their actions;
- not be "subject to conditions provided for by law" in the sense of being law that was precise, accessible and foreseeable during the period from 1964 until such time as there was an announcement of intention to make retrospective provision.

Civil Justice and International Directorate
Civil Justice, Law Reform and International Division
12 December 2007