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CONSIDERATION OF PETITION PE535 AND PE888

Thank you for your letter of 16 January seeking an update from the Scottish Government on how it will take the issues raised in petitions PE535 and PE888 forward. I am replying as I have portfolio responsibility for the law on prescription and limitation. The reply also covers the interests of the Minister for Public Health, Shona Robison. It also refers to the Historical Abuse Systemic Review of Residential Schools and Children's Homes in Scotland between 1950 and 1995. Adam Ingram will be writing to you more fully on this shortly. I apologise for the delay in replying.

The Committee will be aware that, in a Statement to Parliament on 7 February on support for survivors of historic in-care and institutional abuse, Adam Ingram set out the progress made in improving the support available for survivors of such abuse. He announced that the Scottish Government accepts in full the recommendations contained in the Historical Abuse Systemic Review of Residential Schools and Children's Homes in Scotland between 1950 and 1995. Adam Ingram also informed Parliament that the Scottish Government is actively scoping out the adaptation of the principles of a truth and reconciliation model and that we accept the Scottish Law Commission's recommendations that prescribed personal injury claims should not be revived. I have provided details below on how the Scottish Government intends to progress the issues raised in the petitions.

Scottish Law Commission (SLC) Report on Personal Injury Actions: Limitation and Prescribed Claims

The former Deputy Minister for Justice, Hugh Henry, informed the Committee on 2 March 2006 that the first two points raised in PE888 have already been addressed. In relation to the final point raised, the Scottish Law Commission (SLC) published a Report on Personal Injury Actions: Limitation and Prescribed Claims on 5 December which supersedes previous SLC

Reports on this issue. The Report does not make specific recommendations for survivors of abuse in relation to the limitation period (currently three years) for raising a claim. It does, however, make a number of recommendations on limitation in relation to personal injury claims generally including: increasing the limitation period from 3 years to 5 years; that judicial discretion is retained; and that no time limit should be put on that discretion. On prescription, the report recommends that claims which were extinguished by the 20 year negative prescription period before 1984 should not be revived. As stated above, the recommendations in relation to prescribed claims have been accepted; the remaining recommendations in the Report are under consideration by the Scottish Government.

We have considered the SLC Report in the context of the Scottish Government-wide strategy for survivors of historic abuse. On limitation, we do not believe that a change in the law to enable survivors of childhood institutional/in-care abuse to raise an action for damages regardless of the time which has passed would necessarily achieve the desired outcome. The Government cannot force courts to reach a conclusion by removing their discretion to allow a case to proceed. Witnesses may be missing or may have died. Documents may be unavailable. Judges may therefore continue to dismiss the case due to lack of evidence and survivors would be no nearer to feeling they have achieved some kind of redress.

Prescription is a rule of substantive law. The effect of prescription is to extinguish totally a potential claim so that it no longer exists. Prior to 26 September 1984 claims for damages for personal injury were subject not only to the three year limitation period but also the 20 year long negative prescription. The obligation to pay damages was extinguished completely after a period of 20 years. The Prescription and Limitation (Scotland) Act 1984 removed all personal injury actions from the scope of the long negative prescription period of 20 years by disapplying prescription to all claims which were not already prescribed when it came into force on 26 September 1984. In other words, prescription did not apply to cases arising after 26 September 1964 and did apply to cases arising prior to this.

In these cases, the events in question occurred at least 43 years ago and retrospection to the extent required would most likely be outwith the legislative competence of the Parliament as it would breach the European Convention on Human Rights (ECHR). Retrospective legislation is in general undesirable in principle and for reasons of natural justice. It undermines legal certainty and can result in unfairness – for example where the quality of evidence diminishes over time, records are lost, memories fail and events long ago are being judged by today's standards. Our understanding is that retrospection to the extent required to revive prescribed claims 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 in the SLC report (paragraphs 5.6 – 5.14);
- 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.

Scottish Ministers believe that the move towards a Scottish truth and reconciliation forum, as announced by Adam Ingram during his Statement, is a better way forward and further information on this is provided below.

SurvivorScotland agenda – Truth and Reconciliation Forum

Through close working with survivors and the organisations that represent them, we have come to understand that for many survivors an acknowledgement from society of the abuse they have suffered would be more beneficial than monetary compensation.

To this end, the adaptation of the principles of a truth and reconciliation model is actively being scoped out with the view to taking forward a forum, to give survivors the chance to speak about their experiences, and help them come to terms with the past.

The move towards a Scottish truth and reconciliation forum will benefit victims of historical abuse by providing them with a platform to voice their experiences whilst also giving public acknowledgement to what happened to these children. We hope that through that process there will be an opportunity to give survivors a chance to speak about their experiences but also learn lessons to ensure that children in the future are better protected.

We need to consult closely with our stakeholders on this, but it is likely to take the form of a forum which has the benefit of bringing parties together without the stress and costs of court action. We have already secured funding and hope to make early progress on a full survivor-focussed consultation process.

Under SurvivorScotland, the National Strategy for Adult Survivors of Childhood Sexual Abuse, work is already well underway to create networks of expertise and also support mechanisms which will be an important basis for any discussion forum.

I hope the information provided in this letter and the forthcoming reply from Adam Ingram will help the Committee to reach a conclusion in respect of petitions PE535 and PE888.

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