**Digby Brown LLP**

**Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill**

**Overview: -**

The Scottish Parliament introduces this Bill as part of the package of measures to recognise and redress the impact of historical child abuse in care.

These measures have been heralded as a progressive step and a model that other legal systems may, in time, adopt.

A scheme of tariff based payments is broadly welcomed. There are, however, features of the proposed scheme which over-complicate the process and appear to operate against the over-arching principles of the Government's declared policy. In particular, forcing survivors to waive their civil rights in exchange for a redress payment is, in my view, a misguided and retrograde step.

It should be recognised that a scheme currently exists to compensate victims of crime of violence, namely the Criminal Injuries Compensation Scheme. That Scheme has successfully resolved the issue of avoiding double compensation and therefore the concept is not a new one. There is in my view no requirement to re-invent the wheel.

The requirement to sign a waiver on acceptance of a redress payment is predicated on the assumption that survivors will face a relatively straightforward choice. The number of cases where there will be a clear and obvious choice at the outset between a redress payment and civil damages is likely to be small. There will be cases where there are no prospects of success in a civil case (where for example the abuse occurred prior to 1964) and, at the other end of the spectrum, there will be cases where a conviction has been secured and there is an identified and solvent organisation to pursue.

However in all but these cases the choice will be far from clear. Significant investigation will be required to advise survivors not only on the prospects of winning a civil case, but also what their potential damages might amount to. The potential value of a claim is critical in allowing the survivor to weigh in the balance what they might potentially be giving up by accepting a redress payment. The assessment of quantum involves a number of crucial factors including the nature and extent of any psychiatric injury and its consequences on working capacity and ability to contribute to a pension scheme.

A fairer and more workable, approach would be to operate an offset in the event that civil damages have been or will be recovered. This mirrors the equivalent system under the CICA Scheme. No satisfactory explanation has been given as to why the redress scheme cannot operate in a similar way.

The insistence that a waiver has to be signed to recover a payment benefits only the scheme contributors. It would clearly be inequitable to have double compensation for the same injury but the principle of offset allows any payment recovered under the scheme to be repaid if the survivor is ultimately successful in a civil claim.

There is provision for an application to be paused. This **may** allow those who apply swiftly to the scheme to make their application and pause it pending the outcome of their civil

damages claim. However the scheme as currently proposed has a timeline of 5 years. (Section 29.)

Section 30 (5) has the effect that any paused application would be treated as being withdrawn as a result of the "sunset provision" of 5 years. The result is that an applicant whose civil damages claim has not concluded within that period is faced with difficult and stressful decision of opting to wait the outcome of their civil claim or accept a (probably) more modest redress payment. This Draconian and unnecessary provision is likely to heap further pressure and anguish upon a group of particularly vulnerable individuals. It seems to me to fly in the face of the Scottish Government's declared aims and objectives.

As a bare minimum an applicant who has submitted and "**paused**" an application to Redress Scotland within the 5 year period should be allowed to conclude their civil damages without the threat that their application may be deemed to be withdrawn.

**Call for changes in the law**

The Scottish Government could do more to assist survivors in the litigation process. The introduction of the Limitation (Childhood Abuse) (Scotland) Act 2017 reversed the burden in relation to limitation.

Consideration should be given to introducing legislation to allow identified insurers on risk for the period of abuse to be sued directly where the identity of the appropriate party to sue is difficult to ascertain or where that party no longer exists.

Additionally, consideration should be given to introducing legislation to replicate the situation in England and Wales by introducing a statute to transfer the liabilities to an identified entity to allow viable claims to proceed against an identified defender.

This is perhaps best explained by an example: In the Supreme Court case of Various Claimants v Catholic Child Welfare Society [2012] UKSC 56 the case proceeded against the "managers" of the school *and* the religious order involved in the running of the school. The case was about physical and sexual abuse at St William's School, Market Weighton, in the Roman Catholic Diocese of Middlesbrough. Unlike Scotland there was a transfer of liabilities from "the managers" (often respected local dignitaries) to the Archdiocese. It is for this reason that the claim could proceed against "the Middlesbrough defendants (The Archdiocese). By contrast in Scotland no such transfer of liabilities took place and therefore although there should by law be a record of these "managers" in practice the records may no longer exist or cannot be traced. The "managers" would be long dead in any event and in order to pursue a claim their executors would have to be traced and pursued. This is an access to justice issue and is unpalatable, particularly where insurance exists to meet any potential claim.

In a recent decision of the Sheriff Appeal Courts dated 6 December 2019 Sheriff McCulloch dismissed the third party notice served on the "Managers" of a List D school because he was not satisfied that they were the correct legal personality as they were managers but not *the* managers at the time of the abuse.

**The people who are eligible to apply to the scheme**

Eligibility is dealt with in Part 3 of the Bill.

There can be no logical basis for the use of any date other than the date of the inception of the scheme. Section 16 (2) ought to be revised to that extent. The notion that institutional child abuse ceased abruptly when Mr Swinney stood up to address the Scottish Parliament is both absurd and disingenuous. The only intelligible explanation for this provision is as a cost-limiting measure.

Section 16 (2) should be amended from “occur” to “commence” to reflect the situation where abuse begins before the 1 December 2004 but extends beyond this date.

**The Bill’s Definition of Abuse**

In section 17 (1) the word “means” should be replaced with the word “includes” to properly reflect the definition contained within the Limitation (Childhood Abuse) (Scotland) Act 2017.

**The dates used to define “Historical Abuse”**

I acknowledge that the scheme includes those who suffered abuse prior to the 26 September 1964 and this is to be commended. However as previously outlined I believe that Section 16 (2) ought to be replaced with the date of inception of the scheme.

**The Bill’s definition of “In Care” and the places in which that care took place**

Consideration ought to be given to defining “long - term” in Section 19 (1) (A) with reference to “Residential Care Facility”.

**The process of applying for Redress and what advice, support the applicants might need, particularly in relation to the waiver scheme.**

Section 27 provides that the application form and the accompanying information will be in such form and accompanied by such information or evidence as Ministers require.

It is therefore not yet clear what evidence the applicant will have to provide to establish eligibility under Section 16. It is suggested that evidence of residence at the locus of place of harm (if available) would be relevant.

A practical solution would be, on receipt of an application, to require the organisation identified to produce any records that it holds in relation to the applicant. Only on confirmation that no records to prove residence are held would the onus reverse back to the applicant.

It should be acknowledged that if an applicant is required to provide, for example, their Social Work records then assistance may be required not just for the practicalities of how to request or recover such records but support to an individual who may not previously have been aware of distressing facts from their early life.

It would be entirely reasonable for an applicant to elect not to read such records. It is therefore submitted that representation or support may be needed for the ingathering and processing of material which may be required in support of the application.

It should be recognised that the application process and any subsequent representation at appeal will be within the capability of some but by no means all applicants.

It is not as yet clear whether a report to the Police will be a pre-requisite of eligibility.

It is not yet defined what evidence will be required to establish that abuse took place in care. The level of support and advice in large part will be determined by what is required in the application and the supporting evidence.

While the Bill gives power to The Scottish Ministers to commission reports it is imperative that applicants have the right to produce their own independent medical evidence to accompany their application. It is well recognised that childhood trauma is likely to result in significant psychological consequences. A GP report would not, in my view, be appropriate to provide a diagnosis and prognosis on the long term effects of the abuse. It should be noted that the CICA Scheme expressly provides that any psychiatric/psychological injury must be supported by a report from a psychiatrist or a clinical psychologist.

**The Waiver Provision**

The inclusion of the Waver Provision in Section 45 is clearly one of the most controversial aspects of the Bill.

It necessitates legal advice. To require a survivor to waive their civil rights is a major step, designed to benefit only the scheme contributors.

It over complicates the process.

The advice is not without risk to the legal advisor as it is unclear what level of investigation is expected to be carried out prior to providing the advice.

For survivors who act quickly and seek legal advice on the implementation and creation of Redress Scotland there is some prospect of pausing their applications pending the conclusion of any civil claim but inevitably some will be too late in doing so. The Bill has a sunset provision. Even an applicant who seeks legal advice within 18 months of the 5 year deadline may well come under intense pressure to accept a redress payment rather than risk their civil claim not being concluded before the Redress Scheme option is removed. The law removing the previous time limits in childhood abuse cases was only introduced in October 2017. There is as yet insufficient jurisprudence to allow clear guidance to be given.

The waiver system proceeds on the assumption that a claimant's prospect of success is static. Prospects of success in a civil case can and frequently do change. An example may be where a second complainer comes forward to the police. A case which could not proceed either in a criminal or civil context may now have prospects of success particularly if a conviction is secured. A fairer way of dealing with a redress scheme payment would be an offset provision similar to the CICA scheme. At the very least the scheme should commit to dealing with all applications within 5 years with a provision that the scheme will extend time to allow all applications with linked civil proceedings to be honoured after the conclusion of the civil proceedings.

By insisting on the retention of the waiver applicants who apply to the scheme themselves will require to take legal advice and may well feel pressurised to take what may be a much more modest scheme payment for fear that their civil damages claim will not conclude

prior to the sunset provision. Some applicants may be desperate for immediate financial payment and this provision plays upon their vulnerabilities.

**The level of payment offered to the survivor**

Payments under the redress scheme will in many cases fail to adequately reflect the degree of harm suffered. Even the maximum payment of £80,000 for the most serious cases will not begin to compensate for the past and future loss of earnings many of this group of survivors will incur, let alone their psychological injuries. This category has attracted seven figure sums in civil cases.

**What you believe to be a "Fair and Meaningful" contribution to the scheme from the organisations responsible for the abuse.**

This is primarily a response from the survivors. However the concept of polluter pays is well recognised.

Kin Leslie

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