

## Faculty of Advocates

### RESPONSE ON BEHALF OF THE FACULTY OF ADVOCATES TO THE REDRESS FOR SURVIVORS (CHILDHOOD ABUSE IN CARE) (SCOTLAND) BILL

The Scottish Parliament's Education and Skills Committee has sought views on the above Bill, and has indicated that it is particularly interested in views on ten specified aspects of the Bill, but welcomes comments on any other aspect. We have considered the ten specified aspects and only commented on those where we felt it necessary but have also commented on some other aspects of the Bill.

#### 1. Eligibility to the scheme

1.1 Section 16(4) is awkwardly worded. We suggest that a better wording is:

“The age limit for a child stipulated in subsection (3) does not apply to a child making an application for a next of kin payment.”

1.2 Section 21 provides that the Scottish Ministers may by regulations create exceptions to eligibility. The Policy Memorandum at paragraph 85 gives examples of the types of abuse or circumstances where an exception to eligibility may be appropriate. It is of concern that the critical issue of exception from eligibility is subject to regulations not yet available, on which there will be no formal consultation process.

#### 2. Applications by next of kin

##### 2.1 Cohabitee as next of kin

Section 26(2)(a) states that for the purposes of identifying a specified next of kin, where there is both: (i) a spouse or civil partner of the deceased person; and (ii) a cohabitant of the deceased person, the specified person is the cohabitant provided that the period of cohabitation subsisted for a period of at least 6 months immediately before the death of the deceased person. Where there is no spouse or civil partner, however, there is no qualifying period of cohabitation stipulated before which the cohabitant becomes the specified next of kin in preference to the deceased's children. We identify that the absence of any qualifying period in this situation is an anomaly whereby a cohabitant effectively ranks above a child of the deceased without any qualifying period of cohabitation. We suggest that a similar period of 6 months cohabitation should apply before a cohabitant can be the specified next of kin in preference to the deceased's children.

##### 2.2 Child as next of kin

Section 26(4) states that the child of a deceased person includes a person 'who was treated by the deceased person as the deceased person's child'. We suggest that the wording should be "who was accepted by" rather than "who

was treated by”, to be consistent with the definition in the Damages (Scotland) Act 2011.

### 3. Definitions of “in care” and care settings eligible

#### 3.1 It is noted that the definitions of “in care” and of places in which that care took place

in the proposed sections 18 and 19 in the Bill, excludes from the Bill residential care in fee paying schools in terms of section 19(1).

The policy reasons for this exclusion are noted in the Policy Memorandum accompanying the Bill and, in particular, at paragraph 89 where it is stated that to include fee paying schools “was not in keeping with the overall purposes of the scheme. The overall purposes of the scheme are broadly to cover children who were “in care” because their families were unable to look after them on a day to day basis and, in consequence, the children were required to be placed in an institutional care setting, and to cover children who were subject to some form of intervention by a body exercising public functions.

#### 3.2 We would adhere to the observations we previously made on behalf of the Faculty of Advocates in response to the Pre-Legislative Consultation where we stated that we saw no good reason not to include fee paying schools within the terms of the proposed legislation.

The overall purpose of the scheme is to recognise the wrongs of historical abuse and to allow the survivors the right to compensation as part of the process to remedy those wrongs. The redress scheme should first and foremost be focused on those who were abused and should not seek to differentiate between different types of children who suffered harm.

As we stated previously in relation to fee paying boarding schools: “Given that such children were cared for in a residential setting away from their parents, they were vulnerable to abuse for which their parents were not responsible and presumably of which their parents were unaware. To exclude such children from the scheme and require them to seek reparation through other legal processes is unfair. It would compromise the survivor-oriented approach to redressing historical child abuse while in care, and create a ‘survivor hierarchy’ wherein only some survivors of abuse in residential care are provided with redress under the scheme.”

To include fee paying schools would also be consistent with the Terms of Reference of the Scottish Child Abuse Inquiry.

### 4. Determination of the application - section 34

#### 4.1 Consideration of fault or negligence

In section 34 of the Bill, subsection 3 states that: “When determining an application, the panel must not consider or make a determination on any issue of fault or negligence arising from any matter to which the application relates” [underline added]. Subsection 6 then states that: “Neither the offer of a redress payment nor the failure to make an offer is to be taken as a finding as to whether or not a person who is referred to in an application acted, or failed to act, in a way suggested in the application”.

As drafted, this seems to preclude the panel from determining whether abuse actually took place. That being so, it is not obvious how the panel can even determine whether the eligibility criteria in section 16 are met since one of those criteria is that a person “was abused”. The same problem would apply, by extension, to section 22.

We do not see any way around the panel being required to determine whether, as a matter of fact, the alleged acts/events which amounted to abuse took place. Accordingly, we suggest that section 34(6) be removed. At the very least it should be reworded. For example, the following words could be added at the end: “... except insofar as necessary to make a determination under any part of this Act, and is not to be founded upon in other proceedings”.

#### 4.2 Standard of proof

When the panel is reaching a determination under section 34 it is not clear what standard of proof it is to apply. At paragraph 17.5 of the Faculty of Advocates’ Response to the Pre-Legislative Consultation, we suggested that the applicable standard of proof be “balance of probabilities”. In other words, before something is established it must be shown to be more likely than not. That remains our position. For the Bill to remain silent on the standard of proof risks inconsistent approaches being adopted in practice.

#### 5. Process of applying/advice and support needed/waiver scheme

5.1 In the Faculty of Advocates’ Response to the Pre-Legislative Consultation, we stated that applicants should not have to choose between accepting a redress payment and pursuing civil litigation. Steps could be taken to avoid double-compensation, with account being taken of redress payments and of compensation given, both in applications to the scheme and in court proceedings. We understand, however, from the Policy Memorandum that there are concerns that without such a waiver, parties would be less likely to contribute to the scheme.

5.2 If the waiver remains a feature of the Bill, the interaction of sections 45 and 89 of the Bill will make the application process exceedingly difficult for applicants and may have a significant deterrent effect on such applicants, due to the denial of access to funded legal advice. Expert legal advice is necessary if applicants

are to reach an informed decision as to whether applying to the redress scheme is preferable to pursuing civil litigation in their particular circumstances.

5.3 Section 45(1) of the Bill states that an applicant to whom a redress payment is made, who wishes to accept the offer, must sign and return a waiver agreeing to abandon civil proceedings, or, if there are no civil proceedings, to waive any right to bring relevant civil proceedings. Section 89(3) of the Bill sets out that fees incurred in connection with legal advice and assistance on whether to pursue litigation as an alternative to making an application for a redress payment, are excluded from legal fees that may be recovered by an applicant in connection with an application under the redress scheme.

5.4 Applicants therefore must choose between accepting a payment under the redress scheme or retaining the right to pursue redress via the civil courts, without funded access to legal advice on this decision. A payment from the redress scheme might be lower than an award achieved via litigation in court. Assessing the sufficiency of evidence in respect of pursuing a claim in the civil courts, the likelihood of such a claim being successful, and the likely award are matters that requires expert legal knowledge. To expect potential applicants to the redress scheme to evaluate, without legal advice, the merits or otherwise of accepting an award under the redress scheme rather than pursuing litigation, is inherently unfair to applicants.

5.5 The Policy Memorandum acknowledges that a redress scheme without a waiver could be set up. The waiver has been introduced for its potential to increase the number of third party contributors to the scheme, by allowing them to avoid the financial and reputational risks of costly litigation and to have a level of certainty about their overall liability. This provides a number of potential benefits to the third parties who were responsible for the abuses of the past. Potential contributors are likely to have the benefit of expert legal advice setting out the merits or otherwise of becoming contributors. The denial to applicants of funded access to legal advice is inherently unfair: it impedes their access to the scheme and does not reflect a survivor-focused approach. Section 203 of the Policy Memorandum defends the decision to introduce a waiver by claiming the introduction of the redress scheme gives survivors more rather than less choice as to how to pursue financial reparation. It is true that the scheme provides an alternative to litigation, but the benefits / negatives of this alternative compared to litigation require proper consideration, to enable an informed choice to be made. Making a choice between accepting a payment under the redress scheme instead of potentially pursuing civil litigation, without having the benefit of legal advice, is not an informed choice. Applicants need funded access to expert legal advice to enable them to make this decision.

5.6 The Scottish Ministers have a stated objective of fairly and compassionately supporting those who have been harmed and respecting their right to justice. To enable them to make an informed choice, potential applicants under the scheme need to have funded access to legal advice on the merits of applying to the scheme as opposed to pursuing civil litigation. It is recommended that clause 89(3) is re-worded specifically to allow the recovery of legal fees in connection with legal advice and assistance on whether to pursue litigation as an alternative to making an application for a redress payment.

## 6. Level of payments

6.1 Sections 37 – 40 set out the potential payments under the scheme: the fixed rate payment is £10,000; individually assessed payments can be £20,000 (level 1), £40,000 (level 2) or £80,000 (level 3).

6.2 The basis on which a panel determines what level of payment should be made beyond a fixed payment is set out in section 38(4), which provides that the panel must have regard to the nature, severity, frequency and duration of the abuse, and may have regard to any other matter it considers relevant.

6.3 At paragraph 111 of the Policy Memorandum it is said that guidance on the assessment framework will be produced and published by the Scottish Ministers under section 97. It is said that this framework will assist decision-makers and survivors (paragraph 113 of the Policy Memorandum). We consider that such guidance is essential, both for the decision-makers to enable consistency in decision-making, and for the survivors' expectations from the scheme.

6.4 The scheme allows for a fixed payment at each level, rather than a range of lower and upper limits at each level. As noted in the Policy Memorandum at paragraph 125, having a range within each level would further individualise payments and distinguish the experiences of survivors. This approach was not taken in the Bill, apparently due to a concern that it would be detrimental to the transparency of decision-making and would introduce an excessive amount of discretion to decision-makers and associated uncertainty for survivors. We disagree with this, and consider that it would be fairer to have a range within each level. This would enable the decision-makers, having considered the circumstances holistically, properly to assess the appropriate figure for each individual case.

## 7. Fair and meaningful contributions to the scheme

We note from the Policy Memorandum that the Scottish Government will take specified factors into account, when assessing potential contributors to the scheme and their level of contribution. As previously stated in the Faculty of Advocates' Response to the Pre-Legislative Consultation, we consider that what amounts to a fair and meaningful contribution is a matter of policy.

## 8. Applicants with serious convictions - section 58

8.1 We maintain the position stated in paragraph 10 of our previous Response: a criminal

conviction should not be a bar to an application to the scheme. We note that the "purpose of the scheme is to acknowledge and provide tangible recognition of harm as a result of historical child abuse" (Policy Memorandum, paragraph 6). Furthermore, the scheme is intended to "treat survivors with dignity and respect and which faces up to the wrongs of the past with compassion" (*ibid*).

8.2 While the proposed scheme does not automatically exclude those with serious criminal convictions, it does permit such applicants to be precluded from receiving a redress payment on 'public interest' grounds (section 58(5) and (6) of the Bill). It is our view, however, that there no need for such a public interest exception.

8.3 Given the scheme's focus on the recognition of the harm caused by child abuse and treating survivors with dignity, respect and compassion, a person's character or conduct after the abuse should have no bearing on any redress payment. Accordingly, it should never be in the 'public interest' to preclude an applicant from receiving a redress payment on the basis of a serious conviction.

8.4 In our view, such an approach would also be consistent with that proposed for non-financial measures such as acknowledgment and therapeutic support, which would always be potentially available for applicants with serious convictions.

## 9. Timetable under the scheme

Throughout the Bill, there is a requirement for applicants to take steps within a period of 4 weeks of a panel decision e.g. section 24 request for a review of a determination under section 23; section 50 request for review of a direction made under section 49; section 42 request for review of determination under section 34; section 65 request for review of determination made under section 64(3). There is no set time period within which the Scottish Ministers or Redress Scotland must act in response. Nor is there any indication of the timescale

within which applications will be determined by Redress Scotland. We suggest that the Scottish Ministers/ Redress Scotland publish indicative timescales for the determination of applications and also for reviews of determinations provided for under the Bill.