

Association of Personal Injury Lawyers (APIL) – October 2020

Increased support

We welcome the Scottish Government's ongoing work to support survivors of child abuse, and there are elements to be welcomed in the Survivors (Historical Child Abuse in Care) (Scotland) Bill.

Previous measures introduced by the Scottish Government in the Limitation (Childhood Abuse) (Scotland) Act 2017, which abolished the time limit for survivors to make civil legal claims, did not apply to those survivors who suffered abuse before 1964. It is a welcome development that those survivors who suffered abuse before 1964 will now receive some financial redress.

We support the decision to allow applications to be made by the next of kin, as well as those survivors with serious criminal convictions. The decision to allow applications by those with serious criminal convictions is an important recognition that the trauma suffered by survivors can have serious consequences later in life.

We also support the definition of abuse which will be used in the Bill, which the Scottish Government has based on the definition used in the 2017 Act. It should be noted, however, that section 1 of the 2017 Act states that abuse 'includes...'¹, while section 17 of this Bill says that abuse 'means...'. To achieve the Scottish Government's intention of using the same definition in the 2017 Act, section 17 should be amended to say 'includes' and not 'means'.

Operation of the waiver

We welcome the decision of the Scottish Government not to exclude applications to the scheme from those survivors who have already received compensation through the courts. The Bill includes a sensible approach, in section 41, for avoiding double compensation whereby any compensation already received will be deducted from the redress payment. Those who have received compensation through other means

¹<https://www.legislation.gov.uk/asp/2017/3/section/1/enacted>

will also be entitled to non-financial redress through the scheme, such as access to emotional or psychological support.

Survivors who have not yet made a civil claim will, however, be prevented from doing so if they accept a redress payment. Survivors will be required to sign a waiver, which will prevent them from pursuing a separate civil claim against an organisation which has contributed to the scheme. The Scottish Government has said the waiver is required to encourage organisations, which would be the defenders in a civil claim, to make contributions to the scheme.

To ask survivors of historical child abuse to waive their legal right to a claim for compensation is contrary to the Scottish Government's declared policy objective of increased support for survivors. The press coverage around the scheme may be the first time some survivors are aware they can make a claim for compensation. Each survivor's case will have to be individually assessed so that they are properly advised about their options in terms of either applying for a payment or pursuing a claim through the courts. This will be far from straightforward if a waiver is insisted upon.

The Scottish Government has acknowledged "it would be possible to develop a redress scheme without provision for waiver whilst also preventing double compensation payment for the same matter"². In this approach, which we would support, a survivor would be allowed to make a legal claim. The redress payment would then be offset, or deducted, from future compensation. This approach was ruled out by the Scottish Government, and the policy memorandum goes on to say that "offset is not an incentive to third parties to financially contribute to the scheme as they may still face the financial and reputational risk of legal action...".

It is unacceptable that survivors should be expected to sign away their legal right just to incentivise organisations to contribute to the scheme. It should not be the responsibility of survivors to protect the "financial and reputational risk" of those organisations responsible for their abuse, and it should never be considered the fault of survivors if organisations do not contribute to the scheme.

² Policy memorandum page 58 paragraph 215

Childhood abuse can have a lifelong effect, with some survivors being unable to maintain relationships, or hold down a job because of the emotional trauma. The maximum individually assessed payment of £80,000, which is available under the scheme, may be nowhere near an appropriate amount of compensation for some survivors, especially if they are unable to work because of the abuse. In a civil claim, however, a court will determine all individual circumstances of a case, including loss of earnings, and decide on compensation without the constraints of a maximum limit. After a redress payment has been made, survivors should have the option to pursue a separate civil claim in order to “top-up” the redress payment. Only then will they receive the appropriate, and more importantly, much-needed compensation they deserve, and to which they should have a right.

The Bill’s policy memorandum says “Scotland is a country which fairly and compassionately supports those who have been harmed, and respects their rights to justice”³. There is no fairness in treating survivors differently depending on whether or not they have already made a civil claim through the courts before applying for a redress payment. All survivors should have their rights to justice respected, and be allowed to apply for a redress payment as well as be allowed to make a civil claim through the courts.

We accept that without the need to consider and sign a waiver, an application for a redress payment could be made by some survivors without the support of a solicitor. The waiver adds a level of complexity to the process because of the need for legal advice, which is encouraged by the Scottish Government⁴.

Survivors will be placed in the impossible position where they will need to make a choice between making an application for a redress payment or pursue legal action through the courts. We recognise that if the legal claim is unsuccessful, a survivor could still make an application for a redress payment: this would, however, become a race against time because of the Scottish Government’s decision only to allow applications to the scheme for five years. Survivors with unsuccessful legal claims could then find they have missed the deadline for applications at the end of the five-

³ Policy memorandum page 1 paragraph 5

⁴ Policy memorandum page 58 paragraph 215

year period. They would be left with no financial redress, which goes against the very purpose of the Bill.

Survivors who do make an application to the scheme will be encouraged to obtain “funded independent legal advice before accepting a redress payment”⁵. It is not clear what the Scottish Government envisages by “legal advice”, and what exactly will be funded.

It will be the duty of the solicitor to advise on the best option for the survivor, whether to accept the payment or instead pursue a civil claim, but this could involve extensive and costly investigations. Only in cases where the abuse occurred before 1964, where survivors are not able to pursue a civil claim, can a solicitor give firm advice. In other cases, a solicitor will need to investigate each individual claim to determine the most appropriate course of action for a survivor, and this will be costly.

The Scottish Government must provide more details about the extent of the “funded independent legal advice” and whether it intends to cover the cost of all the advice survivors need from a solicitor to make an informed decision, such as investigative work to decide if a civil claim would be more appropriate. It should not be left to survivors to pick up the bill for legal advice about a waiver which they will be forced to sign if they want to accept a redress payment.

An alternative approach

If the Scottish Government is determined to keep the waiver, it is vital to ensure that applicants do not feel pressurised into making a decision about whether or not to accept a payment because of time.

Once an application has been submitted to Redress Scotland, it should be allowed to be immediately paused by the applicant. This would allow time for a civil claim to be concluded, without fear that the application may be deemed to have been withdrawn, and with the option to continue and conclude an application for a redress payment if the civil claim is unsuccessful.

Section 47 of the Bill should be amended to remove the 12-week time limit in which to accept a redress payment. This period is designed to provide an opportunity for a

⁵ Policy memorandum page 58 paragraph 214

survivor to speak to a solicitor and decide if they want to accept the payment, and sign the waiver. During this period survivors might want to investigate the possibility of a legal claim if this has not already been considered. Each case will have its own unique circumstances, so it is not possible to say how long survivors and their solicitors would need before knowing if a redress payment should or should not be accepted. A period of 12 weeks is too short if survivors did want to pursue a separate civil claim.

Removal of the 12-week time limit will allow time for a legal claim to be investigated and pursued, with the knowledge that the redress payment will still be available if the legal claim is unsuccessful. If the legal claim is successful, the redress payment would not be paid.

An arbitrary time limit

We do not agree with the Scottish Government's decision to allow applications to the scheme for a window of five years. A period of five years is too restrictive, and it will give the mistaken impression that once the scheme has been closed historical child abuse is no longer an issue which needs to be addressed. It should remain unrestrictive in time, similar to the Criminal Injuries Compensation Scheme, and continue to provide redress payments for as long as applications to the scheme are submitted. It is the experience of our members that even with high-profile schemes or inquiries, people do sometimes make applications quite late after their launch. Survivors should never find themselves in a position where it is too late to make an application to the scheme.

Section 16 states that to be eligible for a redress payment, "the abuse must have occurred before 1 December 2004". The redress scheme should benefit all survivors, regardless of when the abuse took place. Survivors of child abuse which took place after 1 December 2004 will find it difficult to understand why they are prevented from making an application to the scheme. If the Scottish Government insists on a proposed cut-off date on 1 December 2004, section 16 must be amended.

Abuse is not always a one-off event, and is something which can happen over a long period of time. We recommend section 16 is amended to read "the abuse must have commenced before 1 December 2004". This would provide certainty for applicants, and prevent organisations which contribute to the scheme to argue that the majority

of the abuse took place after 1 December 2004, and they should not be liable to pay under the terms of the scheme.

Support for survivors

There are no details in the Bill or accompanying documents about what evidence will be required to support an application to the scheme. We understand from the policy memorandum that details of the required evidence will be included in guidance for applicants⁶.

It may be that survivors need to provide documents such as their social care history to prove residency, or medical records. Survivors may be trying to get hold of these documents for the first time, and this could be difficult from a practical perspective, but also emotionally. Making an application to the scheme could be the first time some survivors have acknowledged they suffered abuse, or it could cause them to relive painful memories. Redress Scotland, which will administer the scheme, must ensure that appropriate practical and emotional support is available free of charge. This support should include a helpline staffed by professionals. No survivor should suffer financially from making an application, and the scheme should also cover any costs incurred in making an application.

The Scottish Government should alleviate the pressure on survivors, and place a duty on the organisations to which the application relates to provide evidence in the first instance. We recommend that on receipt of an application, the burden should be on the organisation to try to recover any records in relation to the applicant. Only if that search proves unsuccessful, should the onus fall on the applicant to provide any relevant documents.

It is the experience of our members that the older the claim, the harder it is to secure documents which may be needed as evidence. It is not uncommon for files and other paperwork to be lost over time, and those survivors who struggle to gather evidence in these circumstances must not be excluded from the scheme.

There must also be support in place for those survivors who have their applications to the scheme rejected. There will be those who are survivors of abuse, but after making an application to the scheme discover they are not eligible for a payment

⁶ Policy memorandum, page 40, paragraph 141

because, for example, when or where the abuse took place. These survivors may already struggle with mental health issues, and a rejection from the scheme could cause them more distress. Redress Scotland must ensure processes are in place to support those survivors with unsuccessful applications.

About APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have more than 3,100 members who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with advocates, legal executives, paralegals and some academics.

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