Aberlour
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Overview

Aberlour works with vulnerable children, young people and families throughout Scotland, providing services and support in communities around the country across a range of settings. We help to overcome significant challenges, like growing up in and leaving care, poor mental health, the impact of drugs and alcohol on family life, living with a disability, or the impact of poverty and financial hardship. We aim to provide help and support at the earliest opportunity to prevent problems becoming intractable or spiralling out of control.

We would like to reiterate our unconditional apology to anyone who suffered abuse while in our care.

We would be happy to give evidence orally at Stage 1 of the Bill.

Introduction

Aberlour understands the intention of this Bill and recognises that redress is an important element of justice. We support the principle of financial redress as part of acknowledging and repairing the impact of child abuse. We are committed to working together with all stakeholders in whatever way we can to realise a redress scheme that meets the expectations of survivors and which will allow for our participation.

However, it is our responsibility to ensure that we do not compromise our ability to meet our financial obligations to any potential claimants and to the organisation as a whole, including the children, young people and families who currently rely in our services. Therefore, we feel it is necessary to highlight our concern regarding the impact the Scheme could have on the viability of the charitable sector in Scotland, if it proceeds, as proposed within the Bill, on the basis of being funded in part by a number of charities.

We note that it is the intention of the Bill that those organisations bearing responsibility for the abuse will be expected to provide financial contributions to the costs of redress. We note that, at this time, there is limited information on who will assess the level of financial contribution, or how. We also note that the Bill leaves open the possibility of changes to charities law, with potential for impact on the charitable funds from which such a contribution may be drawn. We are concerned that this may result in organisations, including ourselves, being precluded from participating voluntarily in the Scheme if the costs prevent us from meeting our financial obligations, either by virtue of the impact of meeting the contribution

assessed for us on our ability to continue to provide services, or by virtue of the effect on securing future income.

We have further outlined our concerns regarding the proposed scheme below.

Financial Issues

General

We note that requirement for contributions to the scheme is a process of agreement between the Ministers and the particular organisation and is not subject to any question of legal liability.

With reference to section 15(1) of the Bill, we have a number of concerns. We are concerned about the impact of the scheme on future funding. Many charitable donors provide funds on the basis that they will be used for a specific or “restricted” purpose. Where this occurs, funds are accounted for as “restricted” and cannot be used for any other purpose. This is a charity law fundamental which provides a protection to the donor and requires to be observed by charity trustees, such that a breach of this principle would constitute a breach of their charity law trustee duties.

There are statutory provisions in the Charities and Trustee Investment (Scotland) Act 2005 (**the 2005 Act**) (sections 39-43) confirming OSCR’s role relevant to permitting changes to restricted funds.

Scottish Ministers’ ability to make regulations in this area is limited in terms of the focus set out in those sections (and operation of s103 of the 2005 Act concerning the making of regulations).

We do not see within the 2005 Act any basis upon which Scottish Ministers, by way of regulation, could change the clear charity law principle noted above that funds given for a specific purpose require to be treated as “restricted funds” and cannot be used for any other purpose.

Furthermore, we do not see how any intervention by Scottish Ministers purporting to change, in law, the status of restricted funds, could be done without need for consultation and then change to the UK Statement Of Recommended Practice (**SORP**) for preparation of charity accounts.

Finally, we consider any change would have significant negative impacts on charity donations as donors wishing to support a specific purpose would have no guarantee that their donation would be restricted to that purpose only.

Additionally, we also note the anticipated and estimated distribution of statutory claims via the Scheme outlined within the Financial Memorandum. However, some organisations that could be liable to claims through the scheme remain uncertain about the potential number of claims they may be exposed to. Therefore, we would require clarity regarding the overall level of contribution and what is seen as meaningful before committing to the scheme. We require to continue to meet existing financial obligations as a whole, including to funders and to the children, young people and families who currently rely on services. It will be crucial to balance our support for the principle of financial redress as part of acknowledging and repairing the impact of child abuse with our commitment to serving those vulnerable children, young people and families throughout Scotland who are currently reliant on our services. Trustees require in law to ensure that any actions they oversee are in the best interests of the Charity.

Fair and Meaningful Contribution

We also note the provisions of Sections 12 and 13 of the Bill. We welcome the opportunity to engage with the contribution process in recognition of our duties to the survivors of abuse who were in our care. We consider that the terms of this engagement and any subsequent contribution to be made should have a clear basis in both principle and law and should not be subject to arbitrary decision-making.

In terms of Section 12, the Ministers are obliged to produce and maintain a "contributor list" of "scheme contributors". Being placed on this list will be of material importance to organisations and institutions which the Ministers invite to make contributions to the Scheme due to i) the public recognition that the organisation is contributing to the redress process; and ii) the protection from civil litigation the waiver provisions confer (discussed below). In order for an organisation to be placed on the contributor list, the same would have to make a fair and meaningful financial contribution to the Scheme. The current drafting of Section 13(1) (read in conjunction with Section 12(1)(b)) suggests that the decision-making on whether an organisation had made such a contribution would be decided by the Ministers. This decision would be made in accordance with a statement of principles which are to be prepared and issued by the Ministers. The statement does not require to be made prior to this provision coming into legal force (Section 13(2)).

We consider that these provisions have the potential to produce arbitrary and inconsistent decision-making on the side of the Ministers which could have negative implications for both the scheme contributors and the public purse due to the following:

1. A statement of principles is not legally binding on the Ministers' decision-making. Accordingly, it is likely that there will be departure from particular principles resulting in inconsistency and leading to uncertainty.

2. It is unclear whether potential scheme contributors would be consulted prior to the preparation of these principles. More importantly, it is unclear if principles would be ready prior to the operational start of the Scheme which could see potential scheme contributors being unable to make a contribution on time.

3. It is unclear what department within the Scottish Government would be making the decisions on the contributor list. The Policy Memorandum is clear that the Scheme would be administratively run by the existing structures of the Scottish Government. But neither the Memorandum nor the Bill provide any indication on who specifically would be making the decisions on the contributor list.

4. The statement of principles would be prepared by the Ministers and it would be the Ministers who would be interpreting the statement's provisions. This allows for ministerial decision-making with significant ramifications which would not be scrutinised either by Parliament or by an independent non-departmental body. This could be remedied by providing Redress Scotland with the final say on the composition of the contribution list after recommendation from the Ministers.

5. The Ministers are not placed under a specific statutory obligation to produce reasons for any decisions taken in respect of the contributor list. Although Ministers are under such a duty at common law (see *Scottish Ministers v Scottish Information Commissioner* [2007] CSIH 8), a specific obligation in the Bill (or any statutory instrument to be issued in light thereof) would increase the level of accountability. In the absence of such a provision, the possibility for ambiguous, unclear and arbitrary decisions is increased.

6. If organisation are unclear about the Ministers' decision-making on this matter, they may decide that is not possible for them to participate in the contribution process. This will increase the burden on the public purse in respect of the amount of the redress payments which would have to be funded by the taxpayer.

It should be clear that we do not wish to hinder the present legislative effort which is providing comprehensive redress to survivors of child abuse. The Bill should be enacted without delay in order to provide a meaningful avenue which might lead to closure for many survivors. The way to address our concerns above is by simply amending Section 13 and placing an obligation on the Ministers to produce a statutory instrument, as opposed to a statement of principles, governing the decision-making around the contributor list. This will allow for all of the above matters to be ironed out in a separate piece of legislation after proper consultation with all parties (including the organisations listed in para 2.3 of the Bill's Business and

Regulatory Impact Assessment). It is also likely to give organisations the necessary clarity which would enable them to fully participate in the Scheme. Further, in the event that there is the potential for the assessment of what constitutes a "fair and meaningful" contribution to be re-evaluated as the Scheme progresses, it will be important for organisations to be clear on what might be required of them in that process, and what the impact on funds of that might be, at the earliest opportunity.

Waiver

We believe that any scheme which aims to meet the expectations of survivors must be established with human rights at its centre. The Scheme must promote dignity and respect for survivors and should not impose barriers to them fulfilling their rights to appropriate levels of redress. We recognise the Scheme's intention of providing an alternative to civil litigation, and of avoiding the possibility for some survivors of having to go through the potentially retraumatising experience of civil proceedings and court actions to seek redress.

We welcome the inclusion of waiver provisions within the Bill which would achieve fairness between the survivors of child abuse and care providers. The requirement for the signing of a waiver would not only create legal certainty but would be a significant step towards bringing a form of closure to survivors.

In the interests of making the provisions as a fair as possible, we would suggest that the regulations under Section 46 should not be a matter of ministerial discretion. Rather, the Ministers should be placed under an express obligations to make such regulations so that both survivors and organisations understand the proposed waiver mechanism better. This should be done mainly for the benefit of survivors who will without doubt seek to obtain legal advice on the ramifications of signing such a waiver to their legal rights.

Further to the above, survivors should be given unfettered access to legal advice on whether or not to accept an award by Redress Scotland which would include the signing of a waiver. We therefore welcome the generous provisions in Part 5 of the Bill on the Ministers meeting such legal costs. Nevertheless, it appears to us that the provisions of Section 89(2)(d) and Section 89(3) are in contradiction to one another. Comprehensive legal advice on whether an offer of redress payment should be accepted (including the signing of a waiver) cannot be provided without legal advice being given to the survivor on their prospects of success in raising a civil claim. It is our view that Section 89(3) should be removed to allow for the provision of holistic legal advice which would enable and empower survivors to make an informed decision on the mode of redress they wish to obtain.

Making sure that survivors are fully advised on their legal rights prior to signing the waiver will also remove any question of the legal validity of the waiver which might

be otherwise arise. A waiver has the effect of abandoning a legal right. In order for the waiver to be effective, the party providing it must have knowledge of the right that is being waived (see *Porteous's Trustees v Porteous* 1991 S.L.T. 129). In the event that a survivor is not fully advised on all its rights, remedies and pleas in law in respect of the abuse perpetuated on them, the Court might find the waiver ineffective in whole or in part. Removing Section 89(3) would resolve this issue and allow for survivors to receive the proper and comprehensive legal support to which they are morally entitled.

Competency of the Scheme

We understand that work is being undertaken by the legal profession in relation to the overall competency of the scheme and Aberlour, beyond the points noted above relevant to restricted funds and the Charity and Trustees Investment (Scotland) Act 2005, is not qualified to comment on this matter.