

## **IN CARE ABUSE SURVIVORS (INCAS)**

### **REDRESS FOR SURVIVORS (HISTORICAL CHILD ABUSE IN CARE) (SCOTLAND) BILL**

INCAS welcome the Bill to provide a redress scheme for those survivors of abuse whilst in the care of the state. The need for such a scheme, part of our campaign for many years, has been obvious for a long time. Sadly, over the last 20 years many members of INCAS who were instrumental in the campaign, and in supporting their fellow survivors, have died before they could see or benefit from the outcome of all their work. INCAS wish to recognise that the Scottish Government has tried to ensure that survivors' views were received and heard throughout the consultation process. Equally, INCAS wishes to acknowledge the lengths and efforts to which those involved in the consultation process have gone to ensure that survivors understood the process and were able to contribute to it.

Many INCAS members are aged 60 years or over and would welcome not having to go through the lengthy process of civil action but engaging with the redress scheme needs to be a process that allows the survivors to feel they have finally achieved some justice in order to get closure and move on with their lives. In welcoming the Bill, INCAS has certain concerns and issues, set out below, that it would ask the Scottish Government to consider and address to improve on this welcome development.

#### **Waiver**

It is recognised by the Committee and members of INCAS that, throughout the consultation process, it has been clear that the provision of a waiver will be a key requirement for accessing the redress scheme. INCAS are aware that the provision of a waiver is a cause of concern for other survivor groups, who have made submissions in this regard. INCAS acknowledge those concerns, and would not seek to add further to what has been submitted by others in this regard.

The waiver proposed in section 45 of the Bill applies in all cases to future action against the Scottish Ministers or against a "relevant scheme contributor". It is understood that the public authority or voluntary organisation that was responsible for the care of the survivor (the care provider) would be a relevant scheme contributor if it is included in the contributor list at the relevant time. The terms of the Bill in this regard give rise to the following concerns on behalf of INCAS:-

- I. A relevant scheme contributor is one who satisfies the Scottish Ministers that it is making, or has agreed to make, a fair and meaningful contribution to the funding of redress payment. INCAS welcomes the requirement for care providers to contribute in a fair and meaningful way. This is the most significant factor in satisfying survivors that the receipt of a payment from the fund will involve an element of acknowledgement and redress from the care provider. As such, it is essential that the contributions made by the care providers are open and transparent. If the level of contribution is not disclosed, survivors will have no way to be assured that the contribution has, in fact, been fair and meaningful. For obvious reasons, it is not considered sufficient for survivors to have to rely upon the Scottish Ministers' assessment of that contribution.

INCAS would ask that section 12(5)(a) of the Bill be amended to include a requirement to publish the agreed level of contribution.

- II. The rationale for a survivor signing a waiver is that the care provider has contributed or is going to contribute to the fund. If the care provider does not agree to contribute, there will be no requirement for a waiver in respect of that provider. It is a concern to INCAS that the provisions of the Bill would allow a care provider to agree to become a scheme contributor, thus securing waivers from survivors preventing future civil action against them, only to later default on the agreement. That is an outcome that has been experienced in other jurisdictions, including in Ireland. Should those circumstances arise, the survivor will have signed a waiver, where the practical effect is that the care provider has not ultimately met the conditions for such a waiver. To avoid such an occurrence the terms of section 45(6)(b) should be amended to reflect that a relevant scheme contributor who fails to satisfy the undertaking given will cease at from time to be considered a “relevant scheme contributor”. If the waiver is worded to make reference to a relevant scheme contributor, the change of status would no longer prevent future action by the survivor. The treatment of survivors at the hands of the care providers, and the reaction of care providers to schemes in other jurisdictions, mean that there is can be no trust afforded to these organisations by survivors. If survivors are asked to waive their rights of action, they must be satisfied that there will be full compliance with any agreement, or that they will have recourse to the courts.

### **Payment levels**

The payment levels set out in sections 37 and 38 of the Bill are considerably lower than those of the equivalent Irish redress scheme. INCAS would ask why survivors who were abused at the hands of one organisation in Scotland should be told, in effect, that the harm they suffered is less significant, in terms of redress, than someone who suffered the same abuse, at the hands of the same organisation, in Ireland. It is understood from the process of consultation that the Irish scheme has been used as a model for the scheme proposed in the Bill. It is also acknowledged that there were concerns expressed about the level of expenses incorporated into the Irish scheme, particularly legal expenses. The scheme proposed by this Bill should appropriately aim to reduce such expenses, but it is not acceptable that survivors are treated in a way that suggests their suffering is considered less significant in the eyes of the state than those in Ireland. INCAS seeks that the payment levels be set to reflect those in Ireland. The Irish scheme involved stage payments of 50,000, 100,000, 150,000, 200,000 and 300,000 Euros. The upper level payments will only be appropriate in exceptional cases, but it is not clear why the Scottish Scheme should set an upper limit that is so significantly lower than the Irish scheme.

### **Pre 1964 survivors**

INCAS is concerned that the provisions of the Bill do not meet the undertaking given by Angela Constance and John Swinney to INCAS in connection with those whose abuse ended before 1964. INCAS met with Angela Constance immediately prior to her statement to Parliament where she undertook to address the issue of time bar. She acknowledged that the removal of time bar would not assist those “pre-64” survivors and undertook to provide a solution that would mean they were treated equitably when

compared to those who had a right to pursue claims in the court. This undertaking has been restated on many occasions since by John Swinney. INCAS has lobbied consistently for the establishment of a scheme for redress payments to be made to pre-64 survivors equivalent to the level of payment they may have otherwise received through the courts. The current Bill does not provide for such a scheme. Those who were abused post 64 can elect to accept a payment from the Scheme or to pursue a claim in the civil courts. No such option exists for the pre-64 survivors. As such INCAS expects the Scottish Government to live up to its promise to survivors, and to remove the maximum limit of payment in those cases. Pre-64 survivors deserve to have their redress set to meet the abuse they suffered, and, in those case where a payment of more than the prescribed limit is merited, the Redress Scheme should make an individual assessment and meet that payment from the fund. The number of pre-64 survivors is small and diminishing, and the cases where a payment significantly in excess of the prescribed limit will be justified will be relatively few, but they have an expectation that requires to be met.

### **Next of Kin**

INCAS does not accept the restrictions that have been placed on applications by the next of kin of survivors. Next of kin will only qualify under the present scheme if the survivor died after 17 November 2016. INCAS is currently engaging in a process through the Scottish Child Abuse Inquiry, which is due to consider delays on the part of the Scottish Government in dealing with child abuse for which the State is responsible, including the call for survivor redress. Survivors have been petitioning the Government since 2002 for such a measure, and those who died whilst their petitions were ignored should not lose out as a result. Further, it is the very essence of the abuse suffered by survivors that they were unheard, ignored or summarily dismissed when reporting abuse either at the time it was happening or in later life. The families of deceased survivors have suffered with them, and suffered themselves as a result of the damage caused to their loved ones. INCAS expect the Bill to be amended to allow the next of kin of any survivor who can establish that they made a report or claim of abuse during their lifetime, to be admitted to the scheme.

### **Legal Fees**

INCAS welcomes the commitment to the payment of legal fees contained in sections 88 to 90 of the Bill. The process of seeking redress is one which survivors will not find easy, and dealing with authorities (even ones established to assist them) is a daunting task. INCAS acknowledge the desire to avoid legal costs spiralling to the extent that was observed in the Irish redress scheme, and, as such, acknowledge the requirement for controls to be put in place regarding levels of expenses. INCAS would stress, however, that the process of advising survivors regarding this process, and of assisting them with it, is unlikely to be straightforward, involving, as it will, the requirement to satisfy survivors that they can trust the process. Specifically, the issue of advising whether to accept a payment, and to sign the required waiver, is a matter of huge legal significance to the survivor. It is INCAS' position that, when levels of payment are assessed and provided under regulations, the payment should be sufficient to enable a survivor to seek appropriate advice from a suitably experienced solicitor, and, in connection with the waiver, to obtain appropriate advice on the significance of the rights that they will waive. It is the view of INCAS that that requires the provision of an

opinion from Counsel as to the potential for success in civil action, and the level of damages that may be recovered if successful. The absence of such advice would mean that the decision to waive rights to civil action would be one which is uninformed. INCAS seek a commitment from the Scottish Government at this stage that the level of fees provided will be sufficient to meet that test.

### **Unintended consequences**

It is not clear at present what impact a payment under the scheme will have upon the financial arrangements of a survivor. These payments will be a recognition of abuse committed against the survivors when they were children. The redress has to be seen as redress for the deficit caused to the child, rather than a source of income to be set against existing benefits or pensions. INCAS seek an assurance from the Government that payments under the scheme will not be offset against benefits or pensions.