

Thompsons Solicitors

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

Stage 1 Submission

This is a legacy moment for the Scottish parliament. A defining moment in the history of the Parliament.

Survivors of historic in-care abuse naturally and understandably have very little trust in authority, including politicians and the Government. On an entirely cross-party basis the Scottish parliament have over many years taken brave and positive steps to support, protect and provide means of securing justice to [for?] survivors of historic abuse. In so doing, the Parliament has built up a degree of trust among the survivor community.

If the Redress Bill is enacted in the current form all of that cross-party work will have been for nothing. The waiver is viewed by a large proportion of survivors as a form of high pressure sales tactic that serves only to save the Scottish Government money in the long term; and collusion with the institutions where abuse took place to save those institutions money. The waiver particularly, but other provisions too in the Bill, have caused anger and distress to survivors.

What legacy does the Scottish Parliament aim and aspire to deliver in relation to survivors of historic in-care abuse? If the Bill remains unchanged the legacy will be that of a Parliament that built up false trust and hope among the survivor community; only for that trust and hope to be dashed. If the Bill is amended the legacy of the Scottish Parliament can be that of one of the most progressive, empathetic and compassionate Parliaments in the world in relation to historic child abuse.

Further, the Scottish Government's Pre-Legislation Consultation process was flawed. Respondents with a clear financial vested interest should not be counted; the key question regarding the waiver (q26) was badly worded and misunderstood by a very large number of individual respondents. Properly viewed, the majority did not support the waiver.

Introduction

Since our firm was founded in 1979 Thompsons Solicitors have only pursued personal injury and employment rights claims. We have never and will never act for a defender. We are committed to fighting for financial justice for survivors of historic abuse in every setting. We have a specialist department of trauma informed solicitors who only pursue claims on behalf of survivors of historic abuse. We understand that we are the only law firm in Scotland to have such a team that works 100% exclusively in this field. We represent many hundreds of survivors and over the years have gained a deep understanding of their views of the law, society, the establishment and authority.

Our experience and insight provides us with a clear picture of what the majority of survivors expect from a Redress Scheme and what should not form part of a Redress Scheme. Further, we have discussed the content of Redress for Survivors (Historic Child Abuse in Care) (Scotland) Bill [hereinafter referred to as the “Bill”] with many of our clients over recent weeks and we know exactly what their concerns are regarding the Bill. They are concerns that we share and shall set out in this submission.

Areas of Concern

In our submission the following aspects of the Bill require to be amended or removed:

- The waiver (s45-46)
- Applicants with convictions for serious offences (s58-62)
- Payment of legal fees
- The scales of payments
- The need for the process to be safe and for Survivors to access trusted support

The Waiver

There are various grounds upon which we consider the waiver to be inappropriate. Our objections and those of our clients fall into the following general categories, each of which we shall explain in more detail below:

- Requiring survivors to sign a waiver is wrong as a matter of general principle and indeed morality
- There are better ways of insuring institutions contribute to the fund and there is no ‘double payment’ of compensation seen in other legislation
- A proper statistical analysis of the pre-legislation consultation clearly shows that a majority of respondents do not support the waiver and the majority against the waiver is particularly large when respondents with a vested interest are removed from the tally

General Principles

According to our detailed research, the proposed waiver system within the Bill is unique in the history of UK legislation. There have been many examples of the Government introducing compensation schemes for various different purposes over the years. We can find no example of any other scheme requiring the claimant to sign a waiver removing their right to pursue separate civil claims against other wrongdoers.

At the most basic level the Redress scheme recognises that the State had ultimate responsibility for the care of the children who suffered abuse in the in-care setting. It is a right and proper that the Scottish government face up to that responsibility and introduce a compensation scheme. They should be commended for doing so. On the other hand, there is absolutely no reason why the Scottish government should seek to introduce measures to limit the financial liability for other organisations who were equally, if not far more, responsible for the abuse. Without very clear justification (which certainly currently does not exist) a Scottish Government scheme for compensation that serves to protect third-party institutions from their full financial responsibility to pay compensation creates the clear impression of deliberate collusion.

Protecting these institutions from the full financial consequences of the abuse for which they are responsible should play no role whatsoever in the thinking of the Scottish Government.

We recognise and accept that any scheme must insure against a claimant being 'double compensated'. But, there are better and more appropriate methods of achieving this outcome, as will be discussed below, that have formed the basis of other legislation.

The narrative of the Scottish government in relation to the Redress scheme has been the wish to introduce a quick and relatively simple means by which survivors of in care abuse can be compensated. The Scottish government narrative suggests that there are many survivors who do not want and who are unable to bare the pressure of pursuing compensation claims. It is suggested that the Redress Scheme and the waiver serves to benefit these survivors.

We find it strange that the Scottish government feel able and willing to presume to know what is best for survivors and that survivors will benefit from the 'quick and easy' cash available under the Redress Scheme; and for which they should be willing, able and happy to sign away their rights to pursue claims against entirely separate and distinct third-party organisations.

The Scottish government should not presume to know what is best for survivors. Such paternalism is offensive to many survivors. There will be survivors who are happy to receive a payment under the Redress scheme and to take matters no further. There are many other survivors who demand financial justice. They believe that can only be achieved through a compensation claim against the institution. They do not believe it is possible through the Redress scheme. But they equally do not believe that they should be excluded from benefiting from the Redress scheme (and from receiving the important acknowledgement from the state that a payment under of the scheme represents) because they also wish to pursue a civil claim for compensation against the institution where they were abused. Those survivors, entirely correctly, in our submission, believe that they should be entitled to benefit from the quick and efficient payment under the Redress Scheme and, if they so choose, be able to continue to pursue finial justice against the real wrongdoer – the institution.

It therefore ultimately comes down to a matter of choice and empowerment. Survivors should have the choice whether they wish to seek a payment under the Bill, against the institution through the civil courts, or both. The law should serve to empower survivors to be able to make that choice. The Bill as drafted does the opposite. It disempowers survivors. It removes their voice. Many of our survivor clients have described the waiver as a "gagging order". It is with regret that we must therefore submit that the concept of a waiver is simply not trauma informed; it does not reflect an understanding of adverse childhood experiences.

Better Ways to Avoid Double Compensation

One of the justification for the waiver seems to be the need to ensure that a survivor who receives a payment under the Redress Scheme is not doubly compensated.

There also seems to be a desire to ensure that institutions contribute to the pot of money from which the Redress payments will be made.

Neither of these considerations justify the waiver. There is precedent in other legislation which provides a more appropriate method of securing these outcomes.

Instead of a waiver there should be a clawback system. That is to say if a survivor secures a payment under the Redress Scheme and then goes on to secure civil compensation then all or some of the Redress payment should be recouped from the civil damages. This is the approach taken in various other legislation including the Criminal Injuries Compensation Scheme, The Pneumoconiosis etc (Workers' Compensation) Act and The Diffuse Mesothelioma Payment Scheme.

If a clawback system was introduced, it would be a matter entirely for the Scottish government to decide if any of the money recouped should be 'credited' to the institutions in terms of their payments into the Redress fund.

It must, nevertheless, be remembered that part of the purpose of the Bill is the Scottish government recognising that the State ultimately was responsible for the care of those abused and the State's failure must be acknowledged in ways that include a financial payment. We would therefore submit that any clawback system should not provide for the full Redress payment to be recouped. Instead we would propose that 50% may be recouped from any subsequent civil compensation.

Flawed statistical Analysis of the Pre-Legislation Consultation

The relevant question in the Consultation was question 26:

"Question 26: Do you agree applicants should choose between accepting a redress payment or pursuing a civil court action? [Yes / No] Please explain your answer."

The official analysis of the responses published on 23 March 2020 indicated that 57% of respondents answered yes and therefore supported the waiver. Even if that analysis was correct we would submit that the majority was simply too narrow to justify such a major policy decision. The official analysis itself highlighted that the question caused confusion in the minds of many of respondents and that there was clear evidence that some of the respondents had answered yes (taking to mean statistically that they supported a waiver) when their explanation clearly showed that they did not support a waiver and their answer was in fact no.

Thompsons Solicitors have therefore committed a substantial amount of time to reading every response to the consultation. Two significant issues arise that establish beyond any doubt that there was not a majority in favour of the waiver.

Firstly, a large number of the respondents had a direct vested financial interest in the outcome of the consultation in relation to question 26. If the majority of respondents had answered "no" and the Scottish Government did not propose a waiver those respondents would face a significantly higher financial burden through civil claims for compensation than they are currently likely to face via simply contributing to the

redress fund. The use of respondents included local authorities, former care providers and the umbrella organisation for independent schools. In a similar vein, various legal firms (pursuer and defender) made submissions. The vested interest of those firms is also obvious. We would submit that all of the submissions where the respondent has a clear financial vested interest should be ignored for the purpose of determining the policy in respect of the waiver.

Secondly, a very large number of individual respondents who answered yes to question 26 (ostensibly supporting the waivers) clearly by their comments did not support the waiver. All of those types of responses require to be re-calibrated and the overall percentage of response to question 26 recalculated.

We attach to this document various spreadsheets showing our detailed analysis of the responses. The headline position is as follows:

- A total of 76 responses who had answered question 26 had, in our reading, misunderstood the question.
 - Of these, 25% misunderstood in that they answered 'No' (allowing both civil action and redress) when they meant 'Yes' (the either-or scenario – no waiver).
 - However, the remaining 75%, or 57 responses, had misinterpreted the question the other way, answering 'Yes' when they in fact supported both redress and civil action being available.
 - This correction had the effect of more than inverting the overall percentages, from 57.9% supporting the waiver, to 58.4% believing that survivors should have the right to accept a Redress payment and still be able to choose to pursue a civil claim. This figure rises to 61.3% when only individual (corrected) responses are considered.
- In terms of the responses of organisations, at face value 58.8% of these responses supported the waiver.
 - However this shifted to 59.1% against the waiver when local authority and related bodies' responses were excluded.
 - This shift against the waiver becomes even more pronounced when other obviously biased organisations, such as former care providers and solicitors representing potential parties to litigation are discounted. When only organisations listed as Other Public Sector, Third Sector and the Faculty of Advocates are included, 90% support both options being available. 100% of Third Sector bodies support both options being available.

We attach a spreadsheet with several pages listing the responses. This includes:

- A full list of all 261 responses as on the site
- A list of the 261 responses after those who had misunderstood the question have had their answer changed to better reflect their intention

- Lists of only organisational responses, only individual responses (one each corrected and uncorrected), and also a list of organisational responses bar local authorities and related bodies
- Two lists of only those who had misunderstood the question, one list with their original answer and one with the corrected answer
- And the all-important data sheet with totals and percentages.

Applicants with convictions for serious offences

It is well recognised and documented that adverse childhood experience causes myriad problems in development into adulthood. Survivors of abuse commonly turn to alcohol and drugs. It is not uncommon for survivors to commit serious crime. As currently drafted the Bill fails to fully recognise this difficult issue. It fails to understand that survivors may have committed a serious crime that would on the face of it exclude them from receiving a payment under the scheme because of the abuse they themselves suffered. In short, in our submission, a payment under section 58-62 should only be withheld in exceptional circumstances. That is not the position reflected in the current drafting.

Legal Fees

When a contract of employment is terminated in circumstances where the employer and employee enter into a settlement agreement the law requires that the employee receive legal advice and that the employer pay for that legal advice. That is because the employee is potentially signing away significant rights to pursue a claim against the employer. The analogy with the Bill is obvious. Every survivor who receives an offer under the Redress Scheme should be entitled to legal advice of their choosing and the Scottish Government should pay for that advice.

The scales of payments

In our submission, the levels of payment are low compared to civil damages and certainly when compared to the abuse survivors have suffered. The basic award of £10,000 is derisory. The scales in our submission require to be revised.

The need for process to be safe Survivors to access trusted support

The process of applying for a payment under the Redress Scheme, even at the basic award, has the potential to re-traumatise. There is little doubt that where an individual submits to individual assessment that process will be very demanding and very likely, without proper support, to cause significant distress and trauma.

Similarly, when a survivor receives a payment under the scheme it is vital that they are in a safe place. A large sum of money can present a significant temptation to recovering survivors.

It is therefore essential in our submission that the Bill provides for survivors to have access to survivor support services of their choosing, without the need to go through Future Pathways and that trusted support is paid for by the Redress Fund.