Children and Families Directorate
Redress, Relations and Response Division

Scottish Government
Riaghaltas na h-Alba
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Convener
Education and Skills Committee
Scottish Parliament

6 October 2020

Dear Convener

Thank you for the opportunity to give evidence on the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill ("the Bill") on 30 September. During the evidence session we indicated that we would follow up in writing where further detail was required. We also offer further clarification to our responses to the Committee's questions where this may be helpful.

Governance of Redress Scotland
Mr Johnson asked about the approach in the Bill for Redress Scotland to have a Chair without a separate Chief Executive. We explained that in view of the relatively small size of Redress Scotland, it was not considered necessary to have both a Chair and Chief Executive.

The Bill allows Redress Scotland to appoint staff in addition to the Chair and panel members appointed by the Scottish Ministers. The Bill does not prohibit the appointment of a Chief Executive as part of this. At the time of drafting however, the Scottish Government considered it "unlikely" for Redress Scotland to require both a Chair and a Chief Executive because of the very small size of the new organisation, its proposed functions (which do not include processing applications or making payments) and the time limited nature of the redress scheme. That said, we absolutely agree with Mr Johnson that good governance is vital and will consider this matter further.

Number of children in care
The original scoping exercise carried out for the redress scheme sought to estimate the number of individuals who had been accommodated in the care settings covered by the Scottish Child Abuse Inquiry (SCAI) up to 2014. In order to estimate this, we used multiple data sources including data from official statistics on: the numbers of children looked after in Scotland, young offenders in the prison population, Scotland's Census, the Independent Schools census and other publically available data sources. Data on children cared for in some of these settings is sparse in earlier years as requirements for recording data changed over time. Where contemporaneous records were not found, numbers were extrapolated back from more modern figures to generate an estimated number per year.

We have estimated the number of individuals accommodated in these care settings between 1930 and 2014 to be between 534,000 and 566,000. Of that group, it has been estimated that between 330,000 and 365,000 would have been alive in 2020. These estimates do

however come with a degree of uncertainty given the limitations on available data noted above.

Number of organisations historically providing care no longer in existence
There was a very large number of organisations involved in the care of children during the time period covered by the scheme. Our engagement to date has focused on those organisations selected for investigation by the SCAI, but it is our intention to reach as many organisations as possible, and we will look to all to play their part by making fair contributions to redress payments to survivors.

In addition to the organisations which provided care over the period covered by the scheme which continue to provide services to children or others today, there are those which no longer exist, and those which are no longer active, but where legacy responsibilities continue. Of those selected for investigation by the SCAI we have so far identified three organisations we currently believe are no longer in existence in any form and seven organisations now operating as trusts, but we know that this does not reflect the full picture. We will continue to build our knowledge in this area and will keep the committee updated.

Fair and meaningful financial contributions
The Committee explored the cost of the scheme and asked what proportion would be met by those institutions responsible for the care of children at the time they were abused.

A wide range of options that could act as leverage to secure participation in the redress scheme was explored, including measures to compel contributions. Our judgement is that in order to create obligations to compel financial contributions to the redress scheme, we would have to create a scheme which made binding determinations on fault or negligence. Were the redress scheme to do that, it would in effect be duplicating the work of civil courts and would have to be designed in a way which allowed similar rights of disclosure and challenge.

However, as we explained, the model of the redress scheme proposed in the Bill is deliberately designed, following extensive engagement with survivors, to be an alternative remedy to action in the civil court. It is not designed to mimic the process or outcome of litigation and will not establish legal liability in the way that a civil court would. As such, we therefore consider that obligations to compel financial contributions cannot appropriately be imposed in a way consistent with the model of the redress scheme proposed.

We do however know how important it is for those organisations to contribute and proportionately share the cost of the scheme. In two consultations, survivors have told us that it is important that providers contribute to the scheme in order for them to feel they have accessed justice. In addition, the human rights framework is clear that institutions responsible for conduct should contribute to redress to the extent to which they are accountable.

In this way, the redress scheme is an opportunity to hold institutions to account through their making of fair and meaningful financial contributions. Our assessment is that the redress scheme offers a way to secure financial contributions at a scale, and for the benefit of more survivors, than a civil court may be able to. We know that survivors abused before September 1964 are simply unable to secure financial recompense through the courts but we also recognise a range of other circumstances where some survivors may not choose the court route - those who believe they do not have sufficient evidence and those who do not want to go to court; perhaps because they have not told anyone about the abuse, they do not want to face questioning about the abuse or it can take years before the court hearing.

We want survivors choosing redress over the court process to receive a payment that is partly funded by the care provider.

An organisation will make a fair and meaningful contribution by paying redress payments to survivors where it is named by the survivor as where abuse took place, above the government contribution.

In addition to paying all the costs of setting up and running the redress scheme, providing support, paying for legal advice to applicants and paying the costs of non-financial redress, the Scottish Government is committed to a financial contribution equivalent of £10,000 per redress payment. A participating organisation will pay the equivalent of the remainder of each payment where it is named in an application as where the abuse occurred. For example, where a participating organisation is named in an application where Redress Scotland determines that a £80,000 payment should be made to the survivor, the organisation will contribute £70,000.

To ensure all survivors receive the redress payments as decided by Redress Scotland, the Scottish Government will pay in full the cost of redress payments to survivors where the organisation named in the application no longer exists, or where the organisation does not join the scheme. Only those organisations making fair contributions to the scheme, as defined above, will join the scheme and be included on the waiver to be signed by survivors.

We anticipate that the Government will fund the majority of overall costs of the scheme, but the precise proportion of the cost of the redress payments themselves paid by Government, will depend on how many organisations participate in the scheme and the average level of payments which result.

Being part of the redress scheme means that organisations will acknowledge the harms of the past and support faster, trauma informed, access to redress for survivors.

Next of kin
Mr Greer asked for clarification on whether the Bill required cohabitants of deceased survivors to demonstrate six months cohabitation before they were ranked above the surviving children of the deceased in terms of their entitlement to apply for a next of kin redress payment.

The Bill does not set out such a minimum term. Cohabitants of deceased survivors would always rank before the children of the deceased for the purpose of applying for a next of kin payment.

As highlighted by Mr Greer, duration of cohabitation is the determining factor to decide who holds the right to apply for a next of kin payment where there is both a cohabitant and a spouse or civil partner. The Bill provides that where the cohabitant has lived with the deceased for six months immediately before death, the cohabitant would hold the entitlement to apply and not the spouse or civil partner (see the definition of “specified next of kin” in section 26(1)(a) as read with 26(2)).

Six months cohabitation is not, however, a general requirement for a cohabitant to gain the right to apply for a next of kin redress payment. It requires only be met where there is both a spouse/civil partner and a cohabitant to resolve what would otherwise be competing rights. But even where the six month requirement does not apply, Redress Scotland would still have to assess that the prospective applicant for a next of kin payment had been living with the

deceased survivor as if they were married to each other. In doing so, Redress Scotland would be able to take into account relevant case law in relation to other legislation such as the Family Law (Scotland) Act 2006.

In drafting these provisions, we considered other legislation which ranked categories of next of kin and found that cohabitants are not generally required to establish a minimum term of cohabitation in order to accrue various rights or standing. We did not wish to create a provision that treated cohabitants markedly differently than other pieces of legislation. We do however recognise the unique and sensitive nature of the redress scheme and will give this aspect further consideration.

Assessment framework
As noted during the evidence session, we will submit a draft assessment framework to the Committee as soon as possible and before the close of Stage one evidence.

We have been developing the framework with the advice and assistance of a number of clinical psychologists with experience and expertise in the field of trauma and in particular historical child abuse.

Creating an assessment framework is a difficult but necessary part of the redress scheme as it is essential that there is a transparent mechanism to differentiate between the individually assessed payment levels.

The framework will be used operationally by the independent decision makers of Redress Scotland to ensure that similar experiences of abuse result in the same redress payment being offered. In this way, the framework, which will be published and available to survivors, will support fair, transparent and consistent decision making.

The framework will not be overly prescriptive as we recognise that the amount payable in any individual case, is a matter for the judgment of the independent decision makers of Redress Scotland, taking all relevant considerations into account as provided for in the Bill (nature, severity, frequency and duration of the abuse and other relevant facts and circumstances).

In striking the balance to ensure that assessment is not a rigid, box ticking exercise, nor an exercise of absolute discretion which would lack transparency, we have sought to make sure that our approach is trauma informed, sensitive and credible.

The framework will give examples of types of abusive behaviour that would fall within each payment level but will also use case studies to recognise that abuse was often complex, multi-layered and cumulative.

Our view is that it is not possible or desirable to include the framework within primary legislation given the level of detail involved. We do however acknowledge that for the Committee to properly consider the terms of the Bill, members require more detail on the proposed approach and we undertake to submit a draft framework to you as soon as possible, and certainly in advance of the Deputy First Minister giving evidence.

We recognise that any structure that attempts to measure and quantify abuse is a necessary but emotive element of scheme design. We would however wish to highlight that one concern we have with sharing the framework at this stage, is the impact it may have on survivors. This requires to be carefully and sensitively considered.

Other matters

We recognise that time constraints will have restricted the questions asked during our evidence session and there may be further aspects of the scheme which the Committee may wish to explore. We are keen to support the Committee's scrutiny of the Bill in whatever way we can, so please do let us know how we can best assist.

There was also one part of the Committee session where my evidence was inaudible – at column 8 of the Official Report, responding to Mr Gray, I said that (inaudible part italicised) :

'We are giving as much choice as we can, by introducing a mechanism for survivors who cannot bring civil litigation at all because "*their abuse pre dated 1964"* and for those who know that they have no evidence, as it is sometimes difficult to gather evidence from past decades, or who have evidence but are certain the last thing they want to go through is the type of disclosure processes that are necessary in a civil case.'

I hope that is helpful.

Yours sincerely

Donald Henderson
Deputy Director, Redress, Relations and Response Division