

Society of Local Authority Lawyers & Administrators in Scotland (SOLAR)

Response to Education and Skill's Committee Call for Views: Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill

SOLAR is a professional public sector organisation whose aim and purpose is to support the work of those professional officers employed in local authorities and associated organisations in Scotland.

Introduction

1. This response is from the Social Work Legal Officers Child Law Group of SOLAR and informed from discussions between members and knowledge/view sharing and direct discussions with COSLA and Social Work Scotland. We believe they and other councils have also responded directly to the call for evidence.
2. SOLAR previously responded to the Scottish Government's pre-legislative consultation on financial redress. SOLAR agrees in principle with the redress scheme and the legislation and appreciates concerns have been raised about financial issues relating to the scheme and other issues, but does not consider those are for SOLAR to comment on at this time.
3. The dates proposed for the date of historical abuse is appropriate: that which took place before 1 December 2004 and despite prescription rules to the contrary, allowing claims for abuse before 26 September 1964, meaning it is more inclusive than the previous financial redress scheme.

Definition of Abuse/In Care - Eligibility

4. The definition of abuse is set out in the legislation and appears to now include "abuse by peers within a relevant care setting." We note the exemption of "Corporal punishment that was lawful at the time it was administered" from constituting physical abuse for the purposes of redress.
5. Neither of these points were consulted on prior to the legislation being drafted or presented. There are various implications of including peer abuse. It should be explained why this has now been included and was not previously in order to allow consideration of the appropriateness of this inclusion.
6. Corporal punishment is rightly no longer legal, however at the time it was legal the administration of that could still amount to abuse of a child. A complete exemption could therefore rule out a possible claim by a survivor where they were abused by corporal punishment. This would appear to be the case even if the punishment was extreme. Consideration should be given to whether some form of clarification or guidance needs to be issued with this.
7. Clarification of how 'in-care'/relevant care setting' may be adjusted and whether further consultation would be carried out should be provided by Scottish Government. The Advance Payment Scheme was run for a limited

period of time and for a limited purpose. Comparisons with the intended new scheme are limited and suggestion of the power to modify the definition of 'relevant care setting' being available should be limited unless further scrutiny and monitoring of that is in place. Leaving this to be freely varied or modified would mean applicants not being clear at any one given time about their ability to make an application. Further changes risk uncertainty in terms of retrospective applications or contributing organisations being asked for further payments/contributions to the scheme because of a widening of the definition. If the experience Scottish Government has of the advance payment scheme tells them it may need modified then it is unclear why they are unable to commit to a full definition for the purpose of this scheme at the outset. We consider clarity at this stage to be very important.

Fair and Meaningful

8. The term is used to reflect how organisations contribute to the scheme. It is anticipated that all local authorities will be asked to contribute regardless of the level of potential claims or contributions they might be liable for. A standard contribution determined by Scottish Government may be possible, and no doubt other organisations will provide evidence about the implications of this.
9. To only allow organisations who have provided a fair and meaningful contribution to be determined by Scottish Government and contained in the s12 list of contributors, without any further detail or definition of what this is means organisations could be unfairly exempt from the scheme or the waiver (s45), which a survivor is being asked to sign to receive their compensation.
10. The legislation should permit organisations who have been unable to contribute to the scheme for valid reasons to still benefit from the waiver signed by the survivor, as ultimately Scottish Government has offered to largely fund the scheme and support organisations who are unable to pay. So, to suggest the waiver will only apply on a fair and meaningful contribution basis is possibly misleading and could lead to a survivor being able to seek civil compensation against that organisation.
11. If settlement is sought through the scheme by a survivor and they agree to accept payment from the scheme they should entirely waive their right to make a further claim, regardless of whether the organisation has or not made a fair and meaningful contribution to the scheme. The sole purpose and operation of this phrase is to support Scottish Government to request funds from organisations. A direct request for a contribution could be made, or a minimum percentage set at which the organisation can then benefit from any waiver. Clarification on the approach by Scottish Government to contributions by any organisation, not just local authorities or public bodies must be provided before the legislation is finalised.

Waiver

12. Any waiver will need to be unambiguous in its terms about the claim which has been made, reasons for settlement, agreement to disclose the terms of it if further civil litigation action is taken, parties involved and ultimately full disclosure of this and the opportunity to comment by the organisation which it directly affects.
13. The terms of proposed waivers should be available for initial comment by contributors.
14. Survivors should be supported to obtain independent legal advice on the terms of that waiver and all aspects of the scheme, including their options to pursue other forms of dispute resolution.
15. Support is to be offered to survivors more generally and there is no reason for this not to also be broad independent legal advice, without boundaries. A panel of solicitors could be appointed to provide advice, or an individual could choose to seek their own. It is no doubt of concern to Scottish Government that applicants are provided with appropriate legal advice, but this is a matter they can address with the Law Society of Scotland if there are specific concerns. It is inappropriate to exclude provision or support for advice to applicants on civil action and its merits v. the scheme. It is questionable how a survivor could be fully, proficiently or professionally advised about the scheme, without consideration given to the implications of waiving a civil action or other such routes as may be available to them.
16. No provision is made for this scheme to be considered or settlements obtained from it as 'civil' claims or action to the extent that insurers will cover the compensation costs or charges for organisations arising out of this scheme. It is understood these concerns have been voiced by other organisations/associations.
17. All waivers may be a matter of personal record for a survivor/applicant, but each organisation affected or on whom it is binding should be provided with the opportunity to review and comment on that waiver prior to completion and signing. Unless there is to be complete standardisation of all waivers by Redress Scotland/Scottish Government.

Evidentiary Standards/Accountability of Redress Scotland

18. There is a proposed flexibility and approach in the evidence to be provided by survivors, which is understandable when trying to make it more accessible and easier to compensate survivors. Some steps should be taken to protect and minimise advantage being taken of the scheme by applicants, and to ensure that real survivors are fully compensated. A lack of clarity on the level or requirements around evidence could lead to confusion and a lack of understanding by survivors or their representatives of what is required and needed by Redress Scotland to fully consider the application.
19. It is understood that the test for proof or evidence of a claim is not intended

to be laid out in such terms as being on the *balance of probabilities*. This is a well understood term in Scots law and likely to be in reality the approach that will have to be taken by Redress Scotland for individually assessed payments. Indeed, it will be of assistance to applicants that expectations around evidence are clearly explained so they know what is expected of them. Absence of that could lead to confusion, Redress Scotland being unclear about what would justify an individually assessed payment. It is not anticipated that the same level of evidence will be required for fixed rate payment, but that needs to be clarified – little evidence was required for payments under the Scottish Government Advance Payment Scheme and it is expected this would be the same for fixed rate payments.

20. There are without doubt huge challenges for organisations in accessing and obtaining evidence for claims, with much of it historical, possibly destroyed. Offers of help to survivors to understand and consider evidence/records which may be provided to them must be offered directly and quickly or some route provided for more sensitive information to be provided directly to Redress Scotland rather than survivors, to ensure appropriate support is in place before it is shared with survivors.
21. SOLAR, with other bodies will continue to work with Scottish Government and Redress Scotland to look at ways of supporting survivors to access evidence as quickly and efficiently as possible.
22. Data protection legislation must not become an obstacle to survivors, Scottish Government or Redress Scotland obtaining necessary information. Redactions may be necessary, unless Redress Scotland are able to provide specifications for documentary evidence from organisations. Guidance on proper authority for the release of information, consistent with Data Protection legislation, would be helpful in understanding all parties' obligations.
23. If flexibility is key in the success of this scheme around the provision of evidence then so too should organisations and Scottish Government be in their approach to supporting survivors to make claims, without compromising any legal or statutory duties to the survivors or third parties.
24. There are potential implications for organisations, local authorities and all bodies tasked with providing information, documents and information to Redress Scotland, Scottish Government or survivors. There must be appreciation of that and appropriate timescales set, and acknowledgment that some form of legal order may be needed to release files without repercussion or needing an individual to make a subject access request.
25. It is expected that Redress Scotland panel would consist of two members to assess a fixed rate payment, and three for an individually assessed payment. This is to be supported by a review mechanism for the applicant yet no details of how this work, timescales etc are available of this. It is imperative that Redress Scotland and Scottish Government must be transparent in their assessment of initial applications or reviews of those.

26. The legislation is clear that there is to be a close working relationship between Scottish Government, strong advocates, supporters and funders of the scheme and Redress Scotland. Appropriate auditing and checks must be in place to ensure complete transparency in decision making and handling of applications and reviews.

Conclusion

27. SOLAR is supportive of the Bill but understands many other associations and organisations have responded and called for clarity on similar points. SOLAR would welcome further engagement with the Scottish Government and other interested parties.