

Education and Skills Committee

2nd Meeting, 2021 (Session 5), Wednesday 20th January 2021

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

Submissions pack

The Committee received the following submissions from the Witnesses:

- Former Boys and Girls Abused in Quarriers Homes
- In Care Abuse Survivors
- Wellbeing Scotland

In Care Abuse Survivor

IN CARE ABUSE SURVIVORS RESPONSE TO THE SCOTTISH GOVERNMENT RE REDRESS FOR SURVIVORS (HISTORICAL CHILD ABUSE IN CARE) (SCOTLAND) BILL

Stage 2

We welcome the opportunity to make submissions ahead of the stage 2 hearings of the Bill. We would refer the committee to the written response submitted on behalf of INCAS in connection with the stage 1 hearings, which set out the views of INCAS on the terms of the Bill. I would wish to add the following submissions, specifically to address issues as they have developed.

Definition of abuse –

INCAS notes that the definition of abuse mirrors the definition applied by the Scottish Child Abuse Inquiry (SCAI). INCAS was involved in the consultation process leading to the establishing of the definition for the Inquiry, and have been present and engaged every day where the Inquiry has heard of evidence to date. We have observed that the definition of abuse has been wide enough to cover every instance of abuse that has been presented to the Inquiry. The Inquiry has always been careful to ensure that decisions regarding abusive behaviour are considered against the legal and moral framework of the time. Corporal punishment that was lawful at the time and administered in appropriate circumstances should not be seen as abuse. The Inquiry has, however, had little difficulty in identifying the instances where such punishment was meted out in an inappropriate or excessive manner and amounted to abuse. The Scottish Government's response to the stage 1 report sets out the intentions of the Bill regarding corporal punishment. INCAS supports the intention that corporal punishment should not fall outwith the definition of abuse in the circumstances set out in paragraph 10. We would however be concerned that a strict definition of "lawful" corporal punishment may result in cases of abuse being excluded. There will be circumstances where the delivery of punishment that is strictly in compliance with the letter of the law, or guidance at the time, would still amount to abuse. Consideration has to be given to the reason for the punishment, the manner of the delivery of the punishment, and the circumstances of the child. INCAS considers that it is sufficient to provide that any consideration of the actions of alleged abusers has to be considered against the legal standards and guidelines of the time.

Payment structure and levels –

INCAS has submitted that the large gaps between the payment levels is a cause for concern. The Government response at paragraph 29 acknowledges that concern, but the response at paragraph 30 is that they "remain concerned that a wider range of payment levels may result in different payments being offered for similar experiences". INCAS shares the concern that survivors who fall either side of a differentiating line may have similar experiences, but fall to be treated differently. INCAS cannot understand, however, how that situation is more acceptable within the broad band approach. Where survivors fall either side of a line under the present proposals the difference in the redress they receive would be £20,000. It cannot be better to allow for that situation rather than a more specifically addressed banding where the relative difference in award would be significantly less.

Regarding payment levels, INCAS repeats its earlier concerns about the level of proposed payments. At paragraph 33 the Government response to such concerns is to point to the fact that Ireland was an adversarial process, which would not be the case under the present scheme. It is difficult to see why that would be relevant to the assessment of the level of redress. The delivery of a non-adversarial scheme greatly benefits survivors and others involved in the process and should reduce legal costs, but at the end of that process, why should a survivor receive a lower level of redress for the same abuse survivors suffered in Ireland? The advantages of a non-adversarial scheme stand separately from the assessment of the level of redress, and as such INCAS does not accept the Government's reason for differentiating from the levels in Ireland. The upper limit should be raised to allow for the most serious of abuse cases. It would only be appropriate in the few cases where abuse was the most severe, and where that abuse merits such a payment.

Pre-64 survivors –

INCAS raised concerns about the levels proposed with a view to the pre-64 survivors, but this matter has not been addressed in any discussions to date. The Government response at paragraph 36 confirms that the redress scheme will offer a remedy to pre-64 survivors and that is accepted. What it does not do, however, is deliver on the promises made to INCAS and other survivors by Angela Constance (when she announced the time bar bill) that the Government would come up with a scheme to ensure that pre-64 survivors are offered the same access to redress as those post-64 survivors. That promise has been repeated by Ms Constance's successors. The intention was to ensure that those who could not take advantage of the removal of time bar were afforded the same rights as those who could. The redress scheme provides a means of seeking redress that is also open to post-64 survivors. Unlike the post-64 survivors, however, there is no option of pursuing compensation via civil action. If the scheme is to deliver what was promised to pre-64 survivors it has to reflect that, for them, it is the only means of securing compensation or redress. As such, INCAS submits that for pre-64 survivors an assessment should be made of the level of redress to take into account damages that they would otherwise have been afforded in the civil courts. The number of pre-64 survivors is few, and reducing every year. It is not anticipated that there would be a large number of claims, but they should not have an upper limit on any award.

The application process –

INCAS welcomes the exploration of seeking disclosure from the SCAI of evidence held for applicants. It is acknowledged that this will require an approach to be made to Lady Smith, and INCAS urges the Government to canvas this option with the SCAI team in early course.

Regarding the standard of proof INCAS would draw the committees attention the fact that the SCAI invited submissions at the close of the first case study in January 2018 regarding the standard of proof to be applied. The committee may wish to have regard to the decision of Lady Smith in this regard.

Waiver

INCAS would refer to its earlier submissions on the issue of waiver. The primary concern of INCAS is that the survivors are properly advised prior to accepting a waiver. We welcome the Government's proposed amendment to extend the period for acceptance of an offer under section 47(3) to 26 weeks. We also welcome the

Government's response at paragraph 134 to the issue of default on the part of a scheme contributor. INCAS submits that any waiver should be revoked in the event of the organisation defaulting on an undertaking to contribute.

Legal Fees

INCAS has raised concerns about the interpretation of section 89 of the Bill which have not been addressed thus far. INCAS submits that the signing of a waiver has to be in circumstances where the survivor is fully aware of the rights that are being waived, and the impact of that waiver. To be so informed, the survivor will have to understand what the prospects of success of a civil court case may be, and what the outcome of a successful action would be. In the absence of this information a survivor cannot fully appreciate what is being waived. Section 89(2)(d) of the Bill provides for legal fees reasonably incurred and up to a maximum limit in connection with advice on "whether to accept an offer of a redress payment and sign a waiver". INCAS submits that the proper interpretation of that section would require advice to be given on the alternative of civil action as this is a key factor in the decision of whether to accept an offer. Section 89(3), however, expressly excludes "legal advice and assistance on whether to pursue litigation as an alternative to making an application for a redress payment". That leaves open two possible interpretations. The first is that the legal fees will not include any advice on whether to pursue a civil action. If that is the intended purpose of the subsection INCAS would strongly object to such a restriction, and would stress that survivors cannot make a decision on waiver in a vacuum. The second interpretation, which may be supported by the specific wording of the subsection, is that it strikes at those seeking advice on whether to pursue civil action "as an alternative to **making an application** for a redress payment". That would be at a stage in advance of an application being made, as opposed to when a waiver has to be considered. INCAS seeks clarification on this point, as advice on the alternatives of civil action or signing a waiver has to be provided to survivors prior to a waiver being signed.

INCAS is of the opinion that the level of payment outlined within the Financial Memorandum are inadequate to secure proper advice for survivors. Whilst INCAS supports the intention to prevent legal fees escalating as has happened in other jurisdictions, the level of payment available has to make it possible for advice to be sought and obtained. INCAS agrees with the Law Society position that block fees would be of assistance. INCAS would submit that, at the stage of the signing of a waiver, fees be available to cover the obtaining of an opinion from counsel on the issue of whether to waive the right to civil action. This is the only way of ensuring that such a waiver is signed in full knowledge of the consequences.

Next of kin payment –

We refer you to our earlier submissions. INCAS submits that next of kin payments should be available to the next of kin of any deceased survivor who has made a complaint of abuse. The survivors were denied justice and redress because they were not listened to, and the Bill recognises that their families also suffered as a result. Those whose family member died before they were listened to should not be prevented from seeking redress at this stage. INCAS welcomes the Government's proposal to consider amending the eligibility criteria to 2004 when the First Minister issued his apology. It is the case that, in the aftermath of that apology, survivors engaged in a process which they expected to deliver redress. They were disappointed and let down in that regard, and had to wait a further 10 years before such a scheme

was proposed. If the intention is to reflect the date when a reasonable expectation of redress was created, it should be 1 December 2004. INCAS still maintains, however, that next of kin of all survivors who can establish that they made a report of abuse but died before the relevant date should have access to the scheme.

Impact of payments

INCAS welcomes the Government's acceptance at paragraph 169 of the need to secure disregards for redress payments in relation to benefits taxes and social care entitlements.

Simon Collins
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