



Association of Personal Injury Lawyers (APIL)

Briefing: Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill – stage 3 – March 2021

Removal of the waiver

There are elements to be welcomed in the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill, but it must be amended at stage 3 to remove the provisions related to the waiver.

The Bill will establish a redress scheme for survivors of abuse in care, but those who accept a payment under the scheme will have to sign a waiver which will prevent them from pursuing a separate legal claim against organisations which financially contribute to the scheme.

The waiver does nothing to benefit survivors of historical child abuse. Instead, it restricts their legal rights, risks leaving them under-compensated, and adds complications to a process which should be simple for survivors. The Education and Skills Committee which scrutinised the Bill at stage 1 found that “the overwhelming view conveyed to the Committee by victims/survivors was that the waiver restricted their choices...” and victims and survivors “felt it should be removed”¹. The committee itself concluded that the Scottish Government should consider removing the waiver from the Bill².

We urge MSPs to protect the rights of survivors of child abuse and table amendments at stage 3 to remove the waiver from the Bill.

Legal rights sacrificed in favour of the wrongdoer

The waiver benefits only those organisations where the abuse took place. Its purpose, as openly admitted by the Scottish Government, is to provide an incentive to organisations to contribute to the scheme.

¹ Stage 1 report, Education and Skills Committee, page 17

² Stage 1 report, Education and Skills Committee, page 12

The Education and Skills Committee, however, spoke to many care providers during its stage 1 scrutiny and concluded it “heard no evidence to suggest that the waiver would incentivise them to participate in the redress scheme”³.

The Scottish Government has claimed that without the waiver, organisations may still face the financial and reputational risk of future legal action from survivors. It is unacceptable that survivors should be expected to sign away their legal rights to a future claim just to incentivise organisations to contribute to the scheme. It should not be the responsibility of survivors to protect the “financial and reputational risk” of those organisations responsible for their abuse, and it should never be considered the fault of survivors if organisations do not contribute to the scheme.

Risk of under-compensation

Childhood abuse can have a lifelong effect, with some survivors being unable to maintain relationships, or hold down jobs because of the trauma of what they went through as children. The £100,000 maximum individually assessed payment available under the scheme may be nowhere near an appropriate amount of compensation for some survivors. As acknowledged by the Cabinet Secretary for Education, John Swinney, during a debate at stage 2 about the payment amounts in the Bill, “the redress scheme is an alternative remedy for survivors. It does not follow the same rules and procedures as courts and is not designed to achieve the same outcome”⁴. Some survivors, however, may not know that the redress scheme is an alternative to a civil claim, and could make an application to the scheme without taking independent legal advice. The insistence of a waiver risks leaving those survivors under-compensated.

The very purpose of compensation is to put someone back into the position in which they would have been, had it not been for the act, which in this case is the abuse. It may only be after they have accepted a redress payment and signed a waiver that some survivors will become aware that what they have received is not an appropriate amount to compensate for their psychological trauma and loss of earnings. Once the waiver has been signed it will be too late, and the survivor will have been under-compensated to the benefit of the organisation which was responsible for the abuse.

³ Stage 1 report, Education and Skills Committee, page 17

⁴ Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill, stage 2, 17 February <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=13137&mode=pdf>

After a redress payment has been made, survivors should have the option to pursue a separate civil claim in order to “top-up” the redress payment to ensure it is an appropriate amount to cover their individual circumstances. Only then will they receive the appropriate, and much-needed compensation they deserve, and to which they should have a right.

Added complications to the process

Without the need to consider and sign a waiver, an application for a redress payment could be made by some survivors without the support of a solicitor, but the waiver adds a level of complexity to the process because of the need for legal advice. Survivors will have to have their cases individually assessed so that they are properly advised about their options in terms of either applying for a payment or pursuing a claim through the courts. Only in cases where the abuse occurred before 1964, where survivors are not able to pursue a civil claim, can a solicitor give advice easily. Otherwise, it could involve lengthy and costly investigations while a solicitor determines whether a legal claim or a redress payment should be pursued.

A race against time

The Bill was amended at stage 2 after the Cabinet Secretary for Education agreed to increase the time period for which an offer of a redress payment is valid from 12 weeks to six months. This period is designed to provide an opportunity for a survivor to speak to a solicitor and decide if they want to accept the payment, and sign the waiver. During this period survivors might want to investigate the possibility of a legal claim if this has not already been considered. Each case will have its own unique circumstances, so it is not possible to say how long survivors and their solicitors would need before knowing if a redress payment should or should not be accepted. A period of six months is still too short if survivors did want to pursue a separate civil claim. If a waiver is insisted upon, survivors should have as much time as they need to investigate and pursue a civil claim before deciding whether or not to accept a redress payment.

We recognise that survivors do have the option to first pursue a civil claim, but then apply to the scheme if that claim is unsuccessful; this would, however, become a race against time because of the Scottish Government’s decision only to allow applications to the scheme for five years. Survivors with unsuccessful legal claims could then find they have missed the deadline for applications at the end of the five-year period. Survivors of historical child abuse in care would be left with no financial redress, which goes against the very purpose of the Bill.

About APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have more than 3,200 members who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with advocates, legal executives, paralegals and some academics.

For further information please contact:

Sam Ellis
Public Affairs Officer, APIL
Email: sam.ellis@apil.org.uk
Tel: 0115 943 5426