



Scottish Government

Pre-Legislative Public Consultation on Financial Redress for Historical Child Abuse in Care

A response by the Association of Personal Injury Lawyers

October 2019

Introduction

APIL welcomes the opportunity to respond to the Scottish Government's consultation on financial redress for historical child abuse in care. We are supportive of the establishment of a redress scheme, as an additional option for redress for survivors of abuse. It is vital that anyone who goes through the redress scheme is not subsequently barred from bringing a claim through the civil courts, as this will restrict choice, not improve it. Any risks of double compensation can be addressed by offsetting amounts received through one redress route, against compensation received through another redress route.

Q1) We are considering the following wording to describe the purpose of financial redress: “to acknowledge and respond to harm that was done to children who were abused in care in the past in residential settings in Scotland where institutions and bodies had long term responsibility for the care of the child in place of the parent”

What are your thoughts on this? Do you agree?

We agree with the wording and believe that it encompasses the purpose of financial redress for the purposes of this scheme.

Q2) Do you agree with these guiding principles?

We agree with the guiding principles.

Q3) Do you agree with the proposed approach in relation to institutions and bodies having long term responsibility for the child in place of the parent?

We believe that “in care” for this redress scheme should be where an institution or body had responsibility in place of the applicant's parent, and where the applicant was within an eligible residential setting. There should be no distinction between children who have been sent to a residential home and those who have been sent to a residential boarding school. For some survivors, the scheme may be their only route to financial redress, and it should be as inclusive as possible.

Additionally, we challenge the requirement the institution must have “long term” responsibility for the child in place of the parent. It is conceivable that children may have only been in a residential home for one month, or six weeks. For example, perhaps one parent is taken unwell and the other parent is unable to cope, and the children were taken into care temporarily, and then returned to parental care after a few weeks. If they were abused during

that time in care, they should not be excluded from the redress scheme, simply because they were not in residential care “long term”. We believe that the inclusion of “long term” in the definition raises more questions than it answers – what is “long term”? We also question what “long term” actually adds – the section of the definition that is key is whether is the institution or body had responsibility for the child in place of the parent, not how long they held this position for.

Q4) Subject to the institution or body having long term responsibility for the child, do you agree that the list of residential setting should be the same as used in the Scottish Child Abuse Inquiry’s Terms of Reference?

We agree that the list of residential settings should be the same as used in the Scottish Child Abuse Inquiry’s Terms of Reference, and as such, should include children in boarding schools and healthcare establishments providing long term care.

Q5) Where parents chose to send children to a fee-paying boarding school for the primary purpose of education, the institution did not have long-term responsibility in place of the parent. Given the purpose of this redress scheme, applicants who were abused in such circumstances would not be eligible to apply to this scheme.

As above, there is no distinction between children in a residential boarding schools, and children who were in institutional residential care. It does not matter why the child was sent to a boarding school, the boarding school acted in loco parentis whilst the child was in its care, and therefore those who were abused during their time at a boarding school should be able to access the redress scheme.

Q6) Where children spent time in hospital primarily for the purpose of medical or surgical treatment, parents retained the long-term responsibility for them. Given the purpose of this redress scheme, applicants who were abused in such circumstances would not be eligible to apply to this scheme.

Do you agree?

Again, those who were abused outwith the care of their parents should be able to access the scheme. It must not be assumed that it will be possible to obtain damages from another source in these cases. The redress scheme must be as inclusive as possible. Whenever a child is being looked after by those other than their parents, and as such, those responsible are taking over to care for the child in place of the parent, even for a short period of time, where abuse has occurred in these circumstances, the survivor should be able to access this scheme.

Q7) We intend to use the same definition of abuse as the Limitation (Childhood Abuse) (Scotland) Act 2017 for the purpose of the financial redress scheme. This includes sexual abuse, physical abuse, emotional abuse and abuse that takes the form of neglect. Do you agree?

We agree.

Q8) In our view 1 December 2004 represents an appropriate date to define “historical” abuse for this financial redress scheme. Do you agree?

We do not agree. There is no logical basis for a date from which the abuse suffered falls within the scope of this scheme, other than the date that the scheme comes into force. The purpose of the scheme is to provide an option for redress for those abused in care. Abuse in care has not been eradicated – it is not a purely historical problem - and there should not be

an arbitrary date from which the abuse is deemed to fall within the scope of this scheme. It will be impossible to explain to a member of the public who was abused from 2 December 2004 why they cannot bring a claim through the redress scheme, but if the abuse had begun a day earlier, they would be able to.

Q9) Do you have any comments you would like to make in relation to child migrants who also meet the eligibility requirements of this redress scheme?

We agree that child migrants should be eligible for the redress scheme.

Q10) Do you have any comments about the eligibility of those with a criminal conviction?

We believe that someone with a criminal conviction should not be *automatically* excluded from applying for redress if they meet the eligibility requirements of the scheme. Any scheme should not penalise the victim for the consequences of the abuse that they have suffered. Rather than using the circumstances the survivor can sometimes find themselves in as a result of the abuse against them, it should recognise and cater for these circumstances in a sensitive and sympathetic way. Since 2012, those with unspent convictions have been prevented from accessing compensation under the Criminal Injuries Compensation Scheme. Prior to 2012, there was a discretion to allow an award but the current rules do not allow the reasons for the commission of the offence has been committed is the abuse itself, the conviction will be used as a reason to prevent the survivor accessing compensation through the scheme. It has been recognised that there is a correlation between those who have been in care and/or have adverse childhood experiences such as childhood sexual abuse and neglect, and then go on to commit crime. There must be discretion for those who have criminal convictions to apply to the scheme – there must not be a blanket ban for anyone with an unspent conviction.

Q11) Do you have any other comments on eligibility for the financial redress scheme?

No.

Q12) What options might be available for someone who has been unable to obtain a supporting document which shows they spent time in care in Scotland?

Q13) Do you think the redress scheme should have the power, subject to certain criteria, to require that bodies or organisations holding documentation which would support an application are required to make that available?

Record recovery for things that happened in the past, particularly where a person is vulnerable, is extremely challenging. Records are often in a parent's name, or sibling's name, or the institution itself now exists under a different name. To go some way towards making it easier to obtain documents, we suggest that the process should be similar to the Lambeth Scheme, whereby the survivor puts in their application, and the burden is then on the bodies/organisations to provide relevant documents to the scheme. It is only when the records cannot be traced or produced that the burden reverses back on to the applicant to provide any documents that he/she can in support of their time in care, for example photographs, letters received, references in GP records, or other documents that support that they were in care. If the burden is reversed, this will also prevent duplication of work, because it will reduce the likelihood of the applicant needing to carry out a subject access request, and needing help to do this. We appreciate that this scheme would be far broader in scope than the Lambeth scheme, covering a wide range of institutions. The Lambeth scheme is successful because Lambeth Council has agreed to provide all of the documents

they have in relation to that particular applicant. It is highly unlikely that a redress scheme covering historical child abuse in care in general could obtain agreement from the outset for all institutions that they will disclose material if an application to the scheme involves an allegation against that particular institution – this would simply be unworkable. Equally, it is extremely important that the burden is on the institution to disclose any evidence they have. It is vital, therefore, that consideration is given to how institutions could be compelled to provide the documents that they hold on the particular applicant – perhaps through scheme rules, and what sanctions could be put in place to ensure that institutions do disclose the evidence they have.

Q14) For Stage One, what evidence do you think should be required about the abuse suffered?

- **A signed declaration by the applicant that they suffered abuse, but no other supporting evidence**
- **A short written description of the abuse and its impact**
- **Any existing written statement from another source which details the abuse in care**

We believe that survivors should be consulted on the evidence that they should be required to provide for a stage one payment. Only survivors themselves are able to provide a view on whether it is realistic for them to be required to provide a short, written description of the abuse and its impact, or any existing written statement from another source.

There is a distinction between redress schemes which may offer compensation for people for being in care, and this scheme, which is intended to compensation people who suffered abuse in care. In order for this scheme to have credibility, it does seem appropriate for there to need to be some evidence of the abuse. However, again, it is for the Scottish Government to work with survivors to ensure that the evidential burdens are realistic. It seems sensible for the administrators of the Scheme to be allowed to access police statements or evidence of conviction, along with their application, if available.

Q15) Do you have any additional comments on evidence requirements for a Stage One payment?

We do not have additional comments.

Q16) For Stage Two, what additional evidence of the abuse, and its impact, should be required for the individual assessment?

- **Any existing written statement from another source which details the abuse**
- **Oral testimony of abuse and its impact**
- **Short written description of the abuse and its impact**
- **Detailed written description of abuse suffered and its impact**
- **Documentary evidence of impact of the abuse**
 - **Existing medical and/or psychological records**
 - **New medical and/or psychological assessment**
- **Supporting evidence of the abuse/impact from a third party**

Again, we believe that there is a need to carefully consult survivors on the evidence that should be required for a stage two application.

Our observation is that any, but not all, of the above should be suitable as forms of additional evidence of abuse. There should not be a requirement to give an oral testimony, as this is likely to deter people from making an application. The reason that they have chosen to

pursue a redress scheme payment may be that they do not want to go through the civil court system and be required to give evidence orally. If one of the requirements of this scheme is to give oral evidence, one of the key benefits of the scheme – widening the options for redress for survivors of abuse – will be removed. There should be flexibility however, because applicants may not be able to provide any written evidence, and should have the option to provide an oral testimony in these circumstances.

Survivors should also have the ability to obtain *independent* medical and/or psychological assessment. Existing medical and/or psychological records may not be sufficient, because due to the silencing effect, existing medical records may contain no evidence of the abuse as the survivor simply did not speak about it.

Q17) Do you have any comments on evidence requirements for Stage Two payment?

As above, survivors should have access to *independent* medical and/or psychological assessment.

If there is a particular institution or body that is currently under investigation, we suggest that this may provide evidential weight alongside any other evidence that the applicant is able to provide.

Q18) Do you think applicants should be able to give oral evidence to support their application?

If yes, under what circumstances might it be available?

As above, compulsory oral evidence should not be a requirement for the applicant, but there must be flexibility to allow the applicant to give oral testimony. We suggest that the opportunity for the applicant to give oral evidence should be reserved for the review and appeal process. This will allow for flexibility for those who wish to give oral evidence to do so, but as it is not part of the initial application process, it will not deter people who do not want to give oral evidence who may think that they will have to give oral evidence as part of their application.

Q19) Do you have any views on whether the length of time in care should be factored into the Stage Two assessment?

If so, how?

We do not believe that the length of time in care should be factored into the Stage Two assessment. The length of time in care does not affect the impact of the abuse on the survivor. A lesser time in care does not mean a lesser impact on the survivor. There is no logical link between the two.

Again, survivors are not being compensated for their time in care, they are being compensated for being abused in care.

Q20) Do you have any views on the balance the assessment should give to different types of abuse (physical, emotional, sexual, neglect)?

We believe that the balance between the types of abuse should be equal.

Q21) What are your views on which factors in relation to the abuse and its impact might lead to higher levels of payment?

We believe that as a starting point, the nature of the physical abuse could be factored in when determining the level of payment – for example, penetrative rape would attract a

higher level of payment than touching over clothing. There are other schemes of this type that the Scottish Government could have regard to, to determine a common sense approach to the hierarchy of physical acts – for example crimes of a greater severity, which attract longer sentences, will lead to higher levels of payment.

However, there must be flexibility to take into account the psychological impact of the abuse, which may lead to a higher level of payment overall. The psychological impact of the abuse must be factored in.

Q22) Do you think:

- **The redress payment is primarily for the abuse suffered?**
- **The redress payment is primarily for the impact the abuse has had**
- **Both the abuse suffered and the impact it has had should be treated equally**

We believe that both the abuse suffered and the impact it has had should be treated equally.

Q23) How do you think the scheme should ensure all parties are treated fairly and that the assessment and award process is sufficiently robust?

The criteria to ensure that the assessment and award process is sufficiently robust should be for the new public body to decide.

There should also be a clear appeals process.

Q24) Do you agree that anyone who has received a payment from another source for the abuse they suffered in care in Scotland should still be eligible to apply to the redress scheme?

Yes. The redress scheme should be an additional means to compensation, and should result in the survivor having increased choice about their options for redress. Claimants should not be restricted to only one method through which they access redress – it is important that the survivor has choice between going down the civil route and the redress scheme route, and the option to pursue the other route must not be barred because the survivor has already received redress through one route.

In order to address any concerns about double compensation, any payment from one source, should be offset against the payment received from another source.

Q25) Do you agree that any previous payments received by an applicant should be taken into account in assessing the amount of the redress payment from this scheme?

Yes.

Q26) Do you agree applicants should choose between accepting a redress payment or pursuing a civil court action?

We do not agree with this. As above, the redress scheme should increase choice, not reduce it. Any concerns about double compensation should be addressed through offsetting awards. Any suggestion that the applicant should choose between accepting a redress payment or pursuing a civil court action also takes away the rights and options that a survivor already has. There is no requirement at present that an applicant, by accepting a criminal injuries compensation scheme payment, is prevented from bringing a subsequent civil claim.

The idea that at a very early stage and with the very limited information, a solicitor will be in a position to advise an applicant of whether they should pursue a claim through the civil court or the redress scheme is unworkable and unrealistic. The advice given would be crystallised at that moment in time. Advice to pursue a redress payment may be given for example because there is a lack of evidence to pursue a civil claim. However, further evidence may become available with other survivors making the decision to speak out, which may result in a criminal prosecution. At that stage, a civil claim would be viable. We would even argue that requiring solicitors to provide such advice will be likely to lead to an increase in professional negligence claims, particularly if non specialist solicitors were consulted. The choice between the redress scheme and civil compensation may not be financially motivated. The survivor will make the decision about what they are able to do at the time, and which option they feel will be able to deliver what they want it to deliver. However, a waiver of a future civil claim does not appear to be aligned with the range of actions introduced by the Scottish Government to support survivors.

Q27) We are proposing that the redress scheme will be open for applications for a period of five years. Do you agree this is a reasonable timescale?

There should be no fixed timeframe for applications. Five years is too restrictive, and a timescale gives the impression that the issue of abuse in care has been fixed and is no longer a problem. This is not the case. The Scheme should be unrestricted in time, similar to the Criminal Injuries Compensation Scheme.

Q28) Should provision be made by the redress scheme administrators to assist survivors obtain documentary records required for the application process?

Applicants should be able to put in their application, and the institution should be required to provide relevant documentary records. However, if this is not accepted, there should be assistance from redress scheme administrators.

Q29) In your view, which parts of the redress process might require independent legal advice?

- **In making the decision to apply**
- **During the application process**
- **At the point of accepting a redress payment and signing a waiver**

Survivors should be entitled to obtain legal advice at any stage of the process – from making the decision to apply, to obtaining the redress payment. As above, there should not be a requirement that survivors should be required to sign a waiver, relinquishing their right to pursue a civil claim once they have accepted a redress scheme payment.

It is for the benefit of the scheme administrators that those applying or considering applying through the scheme should have access to legal advice. Legal representatives will act as gatekeepers to ensure that only those who are eligible to apply will do so. It is short sighted to believe that limiting access to legal advice in any way will reduce costs.

Q30) How do you think the costs of independent legal advice could be best managed?

Regard should be had to how the costs of legal advice are calculated in existing redress schemes. It must be borne in mind that these cases are not “quick wins” – time and care must be taken with these incredibly vulnerable people, to ensure that they receive a satisfactory resolution to their claim.

Q31) What are your views on our proposed approach to allowing surviving spouses and children to apply for a next of kin payment?

We agree that where the survivor has passed away, spouses and children should be able to apply for a next of kin payment. However, “next of kin” is currently not a recognised legal term, and any family relation could argue that they fall within the definition of “next of kin”. It would be helpful if the Scottish Government could clarify who exactly would be eligible for a “next of kin” payment, to avoid creating confusion.

Q32) We are considering three options for the cut-off date for next-of-kin applications (meaning that a survivor would have had to have died after that date in order for a next-of-kin application to be made) Our proposal is to use 17 November 2016.

- 17 December 2014 – the announcement of the Scottish Child Abuse Inquiry
- 17 November 2016 – the announcement of the earlier consultation and engagement work on the potential provision of financial redress
- 23 October 2018 – the announcement that there would be a statutory financial redress scheme in Scotland

What are your views on which date would be the most appropriate?

We believe this is a question that only survivors can answer.

Q33) We propose that to apply for a next-of-kin payment, surviving spouses or children would have to provide supporting documentation to show that their family member met all the eligibility criteria.

What forms of evidence of abuse should next-of-kin be able to submit to support their application?

We query what information surviving spouses and children would actually have access to.

Q34) What are your views on the proportion of the next-of-kin payment in relation to the level at which the redress Stage One payment will be set in due course?

We do not have comments on this question.

Q35) We think those bearing responsibility for the abuse should be expected to provide financial contributions to the costs of redress. Do you agree?

We agree. Those responsible should contribute to the costs of redress.

Q36) Please tell us about how you think contributions by those responsible should work. Should those responsible make:

- An upfront contribution to the scheme
- A contribution based on the number of applicants who come forward from their institution or service
- Another approach to making a financial contribution to the redress scheme costs?

Regard should be had to other schemes in relation to how contributions should be made. The Scottish Government must work with the responsible organisations to develop a system whereby those responsible make contributions to the funding of the scheme.

Q38) Should the impact of making financial contributions on current services be taken into account and if so, how?

The Scottish Government should have regard to current services to ensure that these are not affected. The redress scheme must be properly funded, and it is correct that a contribution should be sought from those responsible – but it is important that funds are not diverted away from current services.

Q39) What other impacts might there be and how could those be addressed?

We have no comments on this.

Q40) How should circumstances where a responsible organisation no longer exists in the form it did at the time of the abuse, or where an organisation has no assets, be treated?

We have no comments on this.

Q41) What is a fair and meaningful financial contribution from those bearing responsibility for the abuse?

We have no comments on this.

Q42) What would be the most effective way of encouraging those responsible to make fair and meaningful contributions to the scheme?

We have no comments on this.

Q43) Should there be consequences for those responsible who do not make a fair and meaningful financial contribution?

If yes, what might these be?

We have no comments on this.

Q44) In addition to their financial contributions to the redress scheme, what other contributions should those responsible for abuse make to wider reparations?

As above, once an applicant has filed their application, the burden should be on the institution or organisation to provide all the relevant documents they have. Survivors should be consulted on the other contributions those responsible for abuse should make.

Q45) Do you agree that the decision making panel should consist of three members?

We agree.

Q46) Do you agree that the key skills and knowledge for panel members should be an understanding of human rights, legal knowledge and knowledge of complex trauma and its impact?

We agree.

Are there other specific professional backgrounds or skills you feel are essential for the decision making panel?

Q47) We propose that a Survivor Panel be established to advise and inform the redress scheme governance and administration, ensuring survivor experience of the application process is considered as part of a culture of continuous improvement. Do you agree?

We agree that the Survivor Panel should inform the redress scheme governance and administration to ensure survivor experience of the application process continues to be revisited and considered.

Q48) Do you agree that the financial redress scheme administration should be located in a new public body?

We agree.

Q49) Do you have any views as to where the public body should be located and what it should be called? What factors should be taken into account when deciding where the public body should be?

We suggest that the public body should be located in either Edinburgh or Glasgow, as these locations are the easiest to access from across the whole of Scotland. It is sensible for the body to be centrally located.

Q50) How can survivors be involved in the recruitment process for these posts?

How should survivors be selected to take part in this process?

Relevant charities should be involved in the recruitment process, and the charities can help survivors to be involved in the recruitment process. It is really for the supporting organisations themselves to agree with the Scottish Government how this would work in practice.

Q51) What are your views on bringing together the administration of other elements of a reparation package such as support and acknowledgement with financial redress? What would be the advantages? Would there be any disadvantages, and if so, how might these be addressed?

The current support available is very confusingly located, and often survivors are not aware of their rights and what support is available to them. Survivors must be made aware that financial redress will not be their only means of support- there should be a range of other services available to them, that they should be able to access easily. Bringing together the administration of all elements will make it easier to access the range of support available. A central gateway should signpost to all of the elements of support available. One part of this support should be that people should be signposted to independent legal advice from the outset, so that they are able to make informed choices.

Q52) Do you agree that it would be beneficial if the administration of these elements were located in the same physical building? What would be the advantages? Would there be any disadvantages, and if so, how might these be addressed?

It is for the Scottish Government to determine whether the administration should be located in the same physical building, but regardless, there should be central signposting to all services available.

In our experience, many survivors would welcome the opportunity for wider reparations to be available, but what exactly these wider reparations should be is a matter for others to comment on.

Q53) Should wider reparation be available to everyone who meets the eligibility criteria for a financial redress scheme?

Yes.

Q54) Should there be priority access to wider reparation for certain groups, for example the elderly and ill?

We do not have comments on this question.

Q55) If a person is eligible for redress, should they have the same or comparable access to other elements of reparation whether they live in Scotland or elsewhere?

We do not have comments on this question.

Q56) To allow us more flexibility in considering how acknowledgement is delivered in the future, we intend to include provision in the redress legislation to repeal the sections of the Victims and Witnesses (Scotland) Act 2014 which established the National Confidential Forum.

Do you have any views on this?

Q57) Do you have any views on how acknowledgement should be provided in the future?

Q58) Do you think a personal apology should be given alongside a redress payment?

Q59) Do you think there is a need for a dedicated support service for in care survivors once the financial redress scheme is in place?

A dedicated support service is essential, yet this should not be to the detriment to the in care survivor's access to independent legal advice.

Q60) Do you have any initial views on how support for in care survivors might be delivered in Scotland, alongside a redress scheme?

We are not best placed to comment on this question, aside from the points we have raised above about the need for support services and a single entry point for all services with helpful signposting for survivors to all of the services available to them.

About APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for almost 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have more than 3,000 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 barristers, legal executives, paralegals and some academics.

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