

Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill – Stage 2 submission - Waiver

8 February 2021

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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Introduction

1. The Scottish Human Rights Commission (the “Commission”) has considered the breadth and weight of evidence presented to the Education and Skills Committee at Stage 1 of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill (the “Bill”). We believe it may be helpful to reiterate, and build upon, our human rights analysis in relation to the waiver provisions in advance of the Committee’s consideration of the Bill at Stage 2.

Human rights considerations

2. The effect of the waiver is to require survivors to give up a legal right in order to receive a redress payment through the scheme. The Commission made clear in written and oral evidence at Stage 1 its view that it appears disproportionate to exclude recipients of financial redress through the scheme from pursuing civil justice altogether.
3. Child abuse, which includes sexual abuse and serious physical or emotional abuse or neglect, are breaches of the human right to be free from torture or other cruel, inhuman or degrading treatment.¹ Anyone who has been subjected to such abuse has a right to access justice and to an effective remedy.²
4. As the Commission set out in its Stage 1 evidence, the right to an effective remedy includes:
 - Access to relevant information concerning violations and reparation mechanisms;
 - Equal and effective access to justice;
 - Adequate, effective and prompt reparation for harm suffered.
5. The right to reparation includes compensation, restitution of rights, rehabilitation, disclosure of the truth in a public forum and guarantees of non-recurrence. More than one avenue is often required to achieve all of the different aspects of the right to

effective remedy. The Commission has long stated that it does not believe that limiting access to a particular remedy (in this case civil justice) in order to pursue another remedy (redress) is best practice. The pursuit of a civil action is important for a variety of reasons unrelated to compensation, including for the opportunity to air matters in a public forum and for a finding of liability by a court.

6. International standards do not preclude the exhaustion of more than one avenue to obtain fair compensation. Further, General comment No. 3 of the UN Committee against Torture deals with the implementation of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 14 provides that states must ensure victims of acts of torture³ can obtain redress and have enforceable rights to fair and adequate compensation, including the means for as full rehabilitation as possible. The Committee against Torture has stated that collective or administrative reparation schemes should not render individual rights to remedy ineffective⁴ and that judicial remedies should always be available to victims, irrespective of other remedies available.⁵ The Education and Skills Committee further heard evidence at Stage 1 detailing the Irish perspective on comparable schemes, highlighting a case currently before the UN Committee against Torture where they found a waiver did not preclude the applicant from pursuing action against the State arising from abuse she had suffered.⁶
7. The Commission reiterates that the human rights framework also provides that institutions responsible for conduct (including private entities) should contribute to reparations packages to the extent to which they are accountable.⁷ The results of the consultation undertaken by CELCIS on behalf of the Scottish Government in 2018 are clear that the vast majority of survivors who responded felt that those bodies who were responsible for abuse should contribute to any redress scheme.
8. The stated policy intent behind the waiver is to incentivise contributions to the scheme from providers. In designing the

scheme in this way, the issues of waiver and provider contributions have become inextricably linked. An alternative off-setting model was proposed by the Commission and a number of other stakeholders at Stage 1. The alternative model would mean that survivors retained the right to pursue civil justice after receiving a redress payment but any final court award could be off-set against the amount awarded under the scheme. The Commission still believes it is regrettable that waiver and provider contributions have been linked in this way, as it places survivors in the extremely difficult position of having to choose between receiving provider contributions through the scheme and retaining their future legal rights to pursue those responsible for their abuse in the civil courts.

9. At the core of a human rights based approach is the principle of participation, namely that people must be involved in decisions which affect their rights. The InterAction process proceeded on the basis that the views of survivors were of central importance in seeking to achieve access to justice and remedies for survivors. Deliberations on the Bill must continue to be led and informed by the views and perspectives of survivors.

Amendments at Stage 2

10. Should the waiver provisions remain, the Commission notes that the Scottish Government has sought to strengthen the operation of the waiver by bringing amendments at Stage 2. The Commission questioned at Stage 1 whether it was appropriate to allow applicants to sign waivers before they were aware of what level of individually assessed payment they would be offered. Similarly, the Commission called for a mechanism to be introduced whereby organisations who do not make agreed upon contributions cannot benefit from a waiver. The Commission welcomes that the Scottish Government has sought to address these points.
11. The Commission notes that the waiver provisions, should they remain, will apply to scheme contributors and the Scottish

Ministers. The effect of this is that the state will benefit from a waiver. The Commission takes into account the reasons put forward by the Scottish Government in support of including a waiver, namely the need to incentivise providers to contribute to a national scheme. The Commission also notes the challenges presented to this reasoning heard in Stage 1 evidence. Should waiver provisions remain, the Commission believes the Bill would be significantly strengthened if the waiver did not apply to the state. The state bears ultimate responsibility for human rights violations and the right to pursue the state should always remain available to survivors, regardless of whether they have received a payment through the redress scheme.

12. The Commission hopes the above input is helpful in advance of Stage 2 deliberations.

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¹ As protected by a range of international human rights laws including Article 3 ECHR; Article 7 ICCPR. See also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

² Article 13 ECHR. The procedural element of Article 3 ECHR, which requires effective investigations into allegations of treatment contrary to Article 3 ECHR, also requires an “effective, adequate and accessible remedy” by which the victim may be awarded compensation if appropriate. See, for example, *Gafgen v Germany*, 22978/05, 30 June 2008.

³ For the purposes of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1 provides that the term “torture” means “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” General Comment no. 3 (2012) confirms that Article 14 is applicable to all victims of torture and acts of cruel, inhuman or degrading treatment or punishment (paragraph 1).

⁴ Committee against Torture, General comment No. 3 (2012), at paragraph 20.

⁵ Ibid at paragraph 30.

⁶ Letter from Dr M O'Rourke, Irish Centre of Human Rights, to the Education and Skills Committee of the Scottish Parliament, dated 1 October 2020. Referencing the case of *Elizabeth Coppin v Ireland*, 14 January 2020.

⁷ Van Boven Principles, IX, para 15.