

Children's Rights and Wellbeing Impact Assessment: Redress for Survivors (Historical Child Abuse in Care) Scotland Act 2021 and relevant secondary legislation

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Executive Summary

The Redress for Survivors (Historical Child Abuse in Care) Scotland Act 2021 establishes a financial redress scheme for survivors of historical child abuse in relevant care settings in Scotland, and, where eligible, their next of kin. The main purpose of the scheme is to acknowledge and provide tangible recognition of the harm suffered as a result of historical child abuse whilst residing in relevant care settings in Scotland.

The scheme also provides access to some non-financial redress elements - such as acknowledgement, apology and support, and it will sit alongside existing measures that the Scottish Government has put in place for survivors of historical child abuse.

Children under 18 will be eligible to apply to the scheme as next of kin on behalf of a deceased parent, who died on or after 1 December 2004 and was a survivor of child abuse in a relevant care setting. Some children may be eligible to apply to the scheme as survivors (17 year olds who were abused in care in their first year of life).

Children may also receive a payment as a nominated beneficiary. Applicants will have the choice to nominate a beneficiary as part of the application process. The beneficiary may be invited to take over the application and receive the payment if the survivor passes away part-way through the application process.

Background

The Deputy First Minister of Scotland made a statement to Parliament on 23 October 2018 in which he committed to establishing a financial redress scheme for survivors of historical abuse in care.¹

This commitment required new legislation and on 11 March 2021, the Scottish Parliament voted unanimously to pass the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill ("the Bill").

The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill received Royal Assent on 23 April 2021 and became an Act. The Deputy First Minister made a Ministerial Statement to parliament on 16 June 2021. During this statement he confirmed that it is the Government's intention to have the scheme open by the end of 2021.

A pre-legislative public consultation was conducted by the Scottish Government seeking views on the detailed design of the scheme. This was launched on 2 September 2019 and remained open for a period of 12 weeks. This received 280

¹ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11722&mode=html>

responses, with over 200 of the respondents identifying themselves as survivors. The responses to the public consultation and the independent analytical report of this, have been published and continue to inform policy decisions on the design of the redress scheme.

A formal consultation on the secondary legislation was not carried out and instead stakeholder views were obtained through a targeted engagement exercise with survivor organisations, representatives of the legal profession, care providers and others. A formal consultation was not considered appropriate given: previous consultations on the scheme, the significant scrutiny and evidence submitted on the waiver during parliamentary passage, the technical nature of the Regulations, and the timescales for delivery.

Scope of the CRWIA

Children and Young People Impacted

There are three different groups of children who may be impacted by the redress scheme. These are:

- Children who are eligible to apply to the redress scheme – either as a 17 year old survivor or as a next of kin applicant of a deceased parent who was a survivor of child abuse in a relevant care setting and where a spouse, civil partner or cohabitant has not applied or has been found to be ineligible.
- Children nominated as a beneficiary of a redress payment by a survivor.
- Children accessing services in the community.

The child applying to the scheme, as either a survivor or as a next of kin applicant, will need sufficient support throughout the application and payment process. We plan to do this by ensuring child applicants have an identified point of contact in the administrative body who can provide assistance and signposting to legal and financial advice throughout the application process and on receipt of payment, if necessary. We recognise the potential vulnerabilities for some child applicants, their particular needs and rights and the importance of ensuring their voice is heard, particularly when an adult is acting on their behalf. We will endeavour to promote rights and minimise the risk of harm and exploitation in our further scheme design and development of operating procedures. However, we recognise that a 16 year old, may exert their right, similar to adult applicants, not to take up any suggested supports.

Children nominated as a beneficiary may also receive a payment if elected by the applicant. Applicants will have the choice to nominate a beneficiary as part of the application process, and there is no minimum age limit for a nominated beneficiary. The beneficiary may be invited to take over the application by Redress Scotland following the panel's consideration of the issue. If the child takes over the application and completes the process then the child may receive a payment.

Section 51 ensures that children can receive their payment whilst protecting their best interests. This is facilitated by allowing the panel to authorise payments in alternative ways, including, if deemed appropriate, payment in instalments or deferring payment until the applicant reaches the age of 18.

The other group of children who may be indirectly impacted are those currently accessing services in the community. Relevant organisations may be faced with civil action on the part of survivors, the results of which could impact on the organisation through costs and damages, and upon services as a result. By making fair and meaningful financial contributions to the scheme, organisations may be able to mitigate the potential impact of action relating to historical abuse, and crystallise risk they may otherwise face.

In an effort to make the delivery of the contribution affordable and sustainable for the scheme contributor, whilst ensuring the contribution remains fair and meaningful, section 15(2) requires the Scottish Ministers to take in to account the circumstances which make a contribution affordable for an organisation, and any circumstances which may impact the ability of the organisation to continue to deliver their current services.

The provision of fair and meaningful financial contributions therefore does not seek to negatively affect the current provision of services, but rather to offer an appropriate, proportionate and positive opportunity to address the harms of the past. This is a complex area which is considered further in the Policy Memorandum, Financial Memorandum, revised Financial Memorandum and BRIA.

Evidence Base

We do not have access to sufficient data on the number of children who may apply to the scheme as either survivors, next of kin or as a nominated beneficiary, appointed by the survivor applicant to receive the payment if the survivor passes away part-way through the application process. This is due to the fact that we do not have strong evidence as to how many survivors of historical child abuse in care in Scotland there are. We have attempted to narrow down the potential number through various reports and modelling as mentioned below.

The Government Actuary's Department have conducted analysis to help refine our estimates of the potential number of applications we may receive. GAD estimates the number of applicants to the scheme to be around 2,500 to 8,000. Given remaining uncertainties around how younger survivors of abuse will participate in and respond to a redress scheme, the higher estimate is assumed, setting the current central projection of applicants to the scheme at 8,000. GAD's estimates show that we can expect to receive an estimate of 840-2490 next of kin applications. It cannot be predicted how many survivors will have disclosed their abuse to their next of kin, an important factor that may impact the number of next of kin applications the scheme receives. For this reason an estimate of 1,500 next of kin applications has been adopted. However, we do not have any further information on how many applications we may receive from those under the age of 18 due to the lack of data available. The difficulties in providing estimates extends to children who are appointed as nominated beneficiaries, as it cannot be predicted how many children will be nominated by the survivor.

We do not think the number of children who will apply to the scheme will be high, as it will only be available to children who are 17 who were abused in care in their first

year of life, to children who are nominated as beneficiaries, or a next of kin where an eligible survivor passed away after 1 December 2004, and where there is no spouse, civil partner, or cohabitant eligible to apply. Despite this lack of data, we recognise it is vital that we provide effective support for these children, regardless of the number who may apply.

We did not feel it was proportionate to carry out a large-scale consultation exercise with children and young people specifically as this issue is likely to impact a small number of children and the subject matter is one of a highly sensitive nature.

Instead we chose to engage with professionals who currently provide legal support to children and who understand the law of trusts. This has given us good insight into the kind of support children and young people may need when applying to the scheme. We have also considered the responses received to the pre-legislative consultation exercise, which highlighted the importance of support during the application process and the complexities surrounding next of kin payments and family relationships.

We have engaged with The Scottish Child Law Centre to gain an understanding of the standards our policy must meet when interacting with a child applying to the scheme. We gained an understanding of difficult legal situations previously faced by solicitors and advocacy workers who were representing children. Through this engagement we have learned what kind of support children will need in relation to accessing legal advice.

We have engaged with an academic on the subject of trusts. This engagement has been crucial in informing our understanding and policy on children applying to the scheme. To remain inclusive and responsible we included under section 51 of the Act, that payments may be made in full, in instalments or can be deferred until the applicant reaches the age of 18. To ensure there are appropriate safeguards in place, the panel will make decisions on the appropriate payment method. The applicant and children applying to the scheme will have the opportunity to receive appropriate independent legal advice at the point at which an offer of a redress payment is made and the waiver is signed.

We have learned from the approach taken by the Criminal Injuries Compensation Authority (CICA) in relation to payments made to children. CICA operate an advance payment system where they hold the payment awarded until the child reaches 18 years of age. They will allow advances for education or long term benefit, and will consider making a full payment to 16 or 17 year olds who are living independently. We have replicated this approach in sections 51(3)(b) and 51(4)(a) of the Act.

Children and young people's views and experiences

We did not feel it was proportionate to carry out a consultation exercise specifically with children and young people as this issue is likely to impact a small number of children and the subject matter is one of a highly sensitive nature.

We have used the research that was undertaken in the report, "Literature Review: Better Outcomes for Children and Young People Experiencing Domestic Abuse -

Directions for Good Practice” to inform us of the kind of support that children find useful and not useful. We recognise that not all children applying to the scheme will have been in an abusive home but we thought this research would represent a similar kind of support that would help children applying.

From this research we understand that children want a space where their voices and needs are heard and respected. They also find it useful to have one point of contact that does not change, which helps them to build trust and understanding with the one person. We have also learned from this research that children will have different experiences with support services, therefore we recognise that it is important to give children the choice, where possible. The administrative body will provide support to applicants. Operational guidance will refer to the distinct needs and rights of children.

We also utilised research that was carried out by Scottish Government colleagues who were developing a new benefit (Young Carers Grant) for those aged 16-18. We have used the learning from their user research sessions, which give us an idea of what makes an application accessible to young people. We will incorporate the findings of this research into the development of our own application forms and guidance.

Key findings

Children's Rights

The policy complies with UNCRC requirements and seeks to actively improve the wellbeing of children applying to the scheme, for those who are still in care, and for those accessing services currently in the community. We believe this policy will have a positive impact on children's rights as it will give children access to remedy for their own experience or on behalf of a deceased parent.

Article 3 of the UNCRC is relevant to the Act because we will seek to protect the best interests of child applicants whilst fulfilling their rights if they are eligible to apply for a redress payment as next of kin or as a 17 year old applying in their own right. We will also seek to protect the best interests of any child who is nominated as a beneficiary and successfully takes over an application on behalf of a deceased survivor throughout the application process.

We will ensure that all children are offered funded independent legal advice, if they choose to apply to the scheme, to make sure they are aware of their rights throughout the application process and the impacts of a redress payment. Section 51 of the Act ensures that children can receive their payment whilst protecting their best interests, by allowing the panel to authorise payments in alternative ways, including, if deemed appropriate, whole or part payment in advance of the child turning 18 years of age.

Safeguarding and inclusivity has been a key consideration in developing these provisions. Given the nature of the scheme and the potential additional vulnerabilities of the children who may apply, we will consider potential access to broader supports that may be necessary to support their application.

Article 5 is relevant to the Act as we will be engaging with those who are applying to the scheme on behalf of a child. This may happen where a child who is eligible for a next of kin payment does not have the legal capacity to apply themselves. The legal guardian, or other relevant adult legally responsible for the child, will represent the child's best interests in this instance. We will have safeguards in place to ensure consideration of the status of the adult, the context of their relationship with the child, and how they are ensuring the views and interests of the child are represented.

Article 12 is relevant to the Act in many ways. We are setting the age of those children who can apply on their own behalf as 16, matching the age at which the capacity to enter legal transactions is obtained, as is set out in the Age of Legal Capacity (Scotland) Act 1991. We felt that raising the age to 18 would limit the opportunity for children to represent themselves and their own views in this circumstance. To balance the risks, payments can be made in alternative ways, including full or part payment, or in instalments, to children under the age of 18 years. Where it is considered appropriate by the panel, an advance of the payment may be made to the child applicant.

We will require that those eligible and under 16 will need an adult to apply on their behalf. We will require that any adult applying on behalf of a child must seek the views and interests of the child. We will take account of the child's age and maturity and will, as far as possible, give the child an opportunity to express their views and have those views taken in to account. Issues of consent and rights for child applicants are central in our considerations, but this will be balanced with any consideration that a vulnerable young person who is, or may be, at risk of significant harm is offered support and protection. The UNCRC applies to anyone under the age of 18 and the National Child Protection Guidance (2014) provides guidance for older children who are vulnerable and potentially at risk.

With regard to Article 19, we recognise that those children applying in their own right as a survivor of in-care abuse will have and those applying as next of kin may have already experienced trauma and/or bereavement at a young age and that for some, there may be additional vulnerabilities. Some children may be care-experienced or looked after themselves at the time of application. It is essential that the scheme recognises the potential to identify potential risk of harm, including financial harm or other types of exploitation.

Where possible, the redress scheme will give the child choice throughout the application process, either directly or through the adult acting in their interests. We envisage that all applicants, including next of kin and nominated beneficiaries, will be provided with an identified point of contact within the administration to offer application advice through the process. The approach taken will include, where relevant, working closely with legal guardians and at times signposting to necessary support services, including legal and financial advice.

Contribution to Children's Wellbeing

We intend the redress scheme to contribute to a range of other measures relating to abuse in care, the care and protection of children and the development of services for children who may require to be cared for outwith their family. The Scottish Child

Abuse Inquiry and the National Confidential Forum have recorded survivors' testimonies to help contribute to the understanding of what went wrong in the past and identify areas requiring improvement. In addition to financial payments, the redress scheme will provide important non-financial elements such as acknowledgement and apology, building on the cultural change intended by the Apologies (Scotland) Act 2016.

The publication of the Care Review on 5 February 2020 reflected a full range of care-experienced views and going forward we would envisage that relevant learning from the redress scheme, from survivors of in care abuse, will play a part in developments for children in care now and in the future.²

We believe our Act will have a positive impact on the following Wellbeing indicators:

- Safe
 - Our scheme will be shining a light on the issue of historical child abuse in care, building on the ongoing work of the Scottish Child Abuse Inquiry. We hope that the lessons learned from this scheme and from survivors sharing their experiences will prevent this systemic failure from happening again to children in care. We will consider the age, stage and potential vulnerability of child applicants, minimising potential risk where it arises and where possible, and working closely with relevant legal guardians identified by applicants.
- Healthy
 - We recognise the holistic nature of children's needs and the need to consider age and stage of development. We will consider appropriate support needs through the application process, including legal and financial advice and access to emotional support.
- Respected
 - We are permitting children to apply to the scheme as survivors (where they meet the eligibility criteria) and next of kin, where no eligible spouse, partner or cohabitant is eligible, because we believe it is important that children have their voices heard, that they have autonomy, and that they have access to redress that they are eligible for. Where possible, we will promote choice through the process.
- Responsible
 - We want children to be involved in the decisions that affect them in relation to a survivor or next of kin payment and will endeavour to make sure they have access to the appropriate support and guidance to help inform their decisions. It is important that we balance the right to self-determination and the child's autonomy, whilst recognising that there is the potential for risk. This is why we are offering all applicants funding for legal advice to ensure they are as informed as possible about their options in regards to redress. We will also signpost to financial advice so that the child can access advice to help them manage their redress payment if they choose to apply and are successful.
- Included
 - We hope that by receiving a redress payment, the children applying to the scheme will be able to more actively participate in society through

² <https://www.carereview.scot/conclusions/independent-care-review-reports/>

acknowledgment of either their own experience, or of their parent's experience in care, and the societal and government recognition of the harm caused. The financial payment, may for some, provide options and choices that would otherwise not have been in place, creating a reduction in their socioeconomic inequalities.

Monitoring and review

The policy has been monitored throughout the parliamentary passage of the Bill, through the implementation of the Act and through the development of the secondary legislation. We will continue to engage with relevant experts representing children and young people to ensure the best support possible for all applicants, including those under 18.

Version	Details of update	Version complete by	Completion Date
v1.0	Introduction of Bill	Patsy Kay	13 August 2020
v2.0	Updates following Royal Assent including amendments made to the Bill throughout the parliamentary passage and to include and reflect the impact of the relevant secondary legislation.	Patsy Kay	20 October 2021

Act section	Aims of measure	Likely to impact on . . .	Compliance with UNCRC requirements	Contribution to local duties to safeguard, support and promote child wellbeing
Section 15: Statement of principles in relation to contributor list	<p>Considers if the contribution is affordable and sustainable for the scheme contributor, whilst ensuring the contribution remains fair and meaningful.</p> <p>This facilitates the protection of current services for children.</p>	<p>Children applying as a survivor, next of kin, or receiving payment as a nominated beneficiary.</p> <p>Children currently benefitting from care services.</p>	<p>Article 3</p> <p>Article 5</p> <p>Article 12</p> <p>Article 19</p>	<p>Safe</p> <p>Respected</p> <p>Responsible</p> <p>Included</p>
Section 51: Payments to children	<p>To ensure that children can receive their payment whilst protecting their best interests.</p> <p>This allows the panel to authorise payments in alternative ways, including full or part payment to children under the age of 18 years. It also allows early payments to be made to the child where considered appropriate by the panel.</p>	<p>Children applying as a survivor, next of kin, or receiving payment as a nominated beneficiary.</p>	<p>Article 3</p> <p>Article 5</p> <p>Article 12</p> <p>Article 19</p>	<p>Safe</p> <p>Respected</p> <p>Responsible</p> <p>Included</p>

Section 89: Provision of support to persons in connection with an application	To give all applicants access to support through the application process	Children applying as a survivor or next of kin, or receiving payment as a nominated beneficiary.	Article 3 Article 5 Article 12 Article 19	Safe Respected Responsible Included
Section 90: Provision of support to certain persons eligible for a payment	To give applicants the opportunity to access non-financial redress, including access to therapeutic support	Children applying as a survivor	Article 3 Article 5 Article 12 Article 19	Safe Respected Responsible Included
Section 92: Duty on Scottish Ministers to pay certain legal fixed fees in connection with applications	To give all applicants access to funding for appropriate independent legal advice (subject to fixed fee payment limits)	Children applying as a survivor or next of kin, or receiving payment as a nominated beneficiary	Article 3 Article 5 Article 12 Article 19	Safe Respected Responsible Included
Section 93: Duty on Scottish Ministers to pay fees over and above the fixed fees for legal work in exceptional cases	To give all applicants access to additional funding for legal advice, over and above that encompassed by a fixed fee, where there are exceptional or unexpected circumstances.	Children applying as a survivor or next of kin, or receiving payment as a nominated beneficiary.	Article 3 Article 5 Article 12 Article 19	Safe Respected Responsible Included

CRWIA Declaration

Authorisation

Policy lead

Patsy Kay – Legislation Team Leader, Redress, Relations and Response Division

Date

20 October 2021

Deputy Director or equivalent

Donald Henderson - Deputy Director, Redress, Relations and Response Division

Date

20 October 2021



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