

Human Rights Impact Assessment (HRIA): Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 and relevant secondary legislation

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Title of legislation: Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 and relevant secondary legislation made under or in consequence of the Act.

Minister: Deputy First Minister and Cabinet Secretary for Covid Recovery

Lead official: Donald Henderson, Deputy Director (Redress, Relations and Response Division)

Directorate / Division / Team: Directorate for Children and Families – Redress, Relations and Response Division – Divisional Development and Legislation Unit

New policy or revision to an existing policy: New policy

Version	Details of update	Version complete by	Completion Date
v1.0	Introduction of Bill	Jennifer Stenton	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

1. Introduction

1.1 Purpose of Assessment

The purpose of this report is to present and assess any potential Human Rights issues arising as a result of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 and the relevant secondary legislation made under or in consequence of the Act.

The secondary legislation included within this assessment is:

- The Redress for Survivors (Historical Child Abuse in Care)(Form and Content of Waiver etc.) (Scotland) Regulations 2021*
- The Redress for Survivors (Historical Child Abuse in Care)(Reimbursement of Costs and Expenses) (Scotland) Regulations 2021
- The Redress for Survivors (Historical Child Abuse in Care)(Payment of Legal Fees) (Scotland) Regulations 2021
- The Redress for Survivors (Historical Child Abuse in Care)(Exceptions to Eligibility) (Scotland) Regulations 2021*
- The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 (Consequential Provisions) Order 2021**
- The Redress for Survivors (Historical Child Abuse in Care) (Payments Materially Affected by Error) (Scotland) Regulations 2021*

* Subject to the approval of the instrument by the Scottish Parliament under affirmative procedure

** This instrument, made under section 104 of the Scotland Act 1998, is subject to procedure in the UK Parliament.

1.2 Policy Aims of the Act

The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act (“the Act”)¹ seeks to establish a financial redress scheme for survivors of historical child abuse, and, where eligible, their next of kin. The purpose of the scheme is to acknowledge and provide tangible recognition of harm as a result of historical child abuse in relevant care settings in Scotland. The scheme will also provide 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.

The design of the redress scheme has been guided by engagement and consultation with survivors and others to ensure that it is trauma-informed and takes the needs of survivors into consideration as far as possible.

The Scottish Government is committed to seeking financial contributions to the cost of the scheme from those who were responsible for the care of children at the time of the abuse whether providing care directly or otherwise involved in the decision making processes and arrangements by which the child came to be in care in the place where the abuse took place. The scheme provides an opportunity for those

¹ <https://www.legislation.gov.uk/asp/2021/15/contents>

bodies and organisations to meaningfully participate in the national, collective endeavour to recognise the harms of the past.

1.3 Background

The InterAction Review Group was established to oversee the Scottish Human Rights Commission InterAction on Historical Abuse of Children in Care. The InterAction Plan Review Group is a national stakeholder group which includes representation from survivors, survivor organisations, the Scottish Human Rights Commission, the Scottish Government, the Centre for Excellence for Looked After Children in Scotland (CELCIS) and providers from all sectors. When this work concluded in October 2014, with commitments to implement the Action Plan on Justice for Victims of Historical Abuse of Children in Care, the Review Group continued with a revised remit and membership in order to monitor and review the implementation of the commitments to the Action Plan.

Following an extensive survivor consultation and engagement exercise conducted in 2017, in partnership with CELCIS, the Review Group made recommendations for the establishment of a financial redress scheme. In light of these recommendations, on 23 October 2018, the Deputy First Minister made a statement to Parliament committing to establishing a financial redress scheme for survivors of historical child abuse in care in Scotland.

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 Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill received Royal Assent on 23 April 2021 and became an Act. The first set of commencement regulations was laid in Parliament on 11 June 2021, bringing into force some provisions of the Act on 28 June 2021 in preparation for the opening of the scheme.² 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.

The advance payment scheme was launched on 25 April 2019 in accordance with the Review Group's recommendation that arrangements should be put in place to allow priority groups of survivors, those with a terminal illness or applicants aged 70 years and over, access to financial redress. In December 2019, the age criteria was lowered to those aged 68 and over. The advance payment scheme will remain open until the statutory redress scheme is operational.

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 responses, with over 200 of the respondents identifying themselves as survivors. The responses to the public consultation and the independent analytical report of

² [The Redress for Survivors \(Historical Child Abuse in Care\) \(Scotland\) Act 2021 \(Commencement No. 1\) Regulations 2021 \(legislation.gov.uk\)](#)

this, have been published and continue to inform policy decisions on the design of the redress scheme.

A formal public 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 necessary or appropriate given: previous consultations on the scheme, the significant scrutiny and evidence submitted during parliamentary passage, including in relation to the waiver, the largely technical nature of the secondary legislation, and the timescales for delivery.

1.4 Description of the Act

The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 (“the Act”) makes provision for a financial redress scheme to acknowledge and provide tangible recognition of harm suffered as a result of historical child abuse whilst residing in a relevant care setting in Scotland.

The key design and delivery features of the redress scheme established by the Act will be:

- **Independent decision making:** a Non Departmental Public Body, Redress Scotland, is created to independently assess and decide applications for redress.
- **Administration and processing:** A division of the Scottish Government will carry out the administration of the scheme, the processing of applications and the making of redress payments.
- **Eligibility:** the scheme is for survivors of historical child abuse in relevant care settings in Scotland. Historical in this context means abuse which took place before 1 December 2004.
- **Time period:** the scheme will be open to accept applications for a period of whichever is the longer of five years, or two years following the publication by the Scottish Child Abuse Inquiry of its final report. However, there is a potential that opening period can be extended beyond this.
- **Payment structure:** the scheme will adopt a combination payment approach and offer survivors the choice to apply for a fixed rate redress payment or an individually assessed redress payment.
- **Assessment:** the level of each individually assessed redress payment will be determined following consideration of the nature, severity, frequency and duration of abuse along and all other relevant facts and circumstances. An assessment framework will be published as guidance to provide transparency and consistency in decision making.
- **Evidence:** the scheme will be robust and credible to ensure that survivors, providers and others can have confidence in its processes and outcomes. This will be achieved through the production of comprehensive guidance on evidentiary matters, transparency in the appointment process of decision-makers with suitable skills, knowledge and expertise, as well as the statutory safeguard of a reconsideration process to allow fraud to be dealt with.
- **Waiver:** redress payments will be conditional upon the applicant signing a waiver relinquishing their right to continue or raise civil actions in respect of

the abuse, against the Scottish Government or those organisations that have made fair and meaningful financial contributions to the scheme.

- Contributions: Financial contributions to the redress scheme are sought from those organisations responsible for the care of children at the time of the abuse, whether providing care directly or otherwise involved in the decision making processes and arrangements by which the child came to be in care. In making a contribution to the scheme, scheme contributors must acknowledge the wrongfulness of, and the harm caused by, the historical child abuse which took place in relevant care settings.
- Charities: the Act makes provision to enable charities to participate in the redress scheme.
- Legal costs: subject to appropriate limits, the legal costs for all applicants will be funded by the redress scheme.
- Next-of-kin: a restricted category of next of kin of deceased survivors will be eligible to apply for the fixed rate redress payment where the survivor died on or after 1 December 2004.
- Non-financial redress: the scheme will offer access to acknowledgment, apology and support in addition to redress payments.

In relation to the European Convention on Human Rights (ECHR) , a number of areas that will be covered by the Act may potentially engage relevant provisions of the ECHR such as Article 6 (right to a fair trial), Article 1 of Protocol 1 (protection of property), Article 8 (right to respect for private and family life), and Article 14 (prohibition of discrimination). In particular, the following policy aspects arising from the Act are likely to have an impact on Human Rights:

- Eligibility criteria for the redress scheme
- Treatment of applicants with serious previous convictions
- The process for determining applications under the scheme
- The provisions on waiver
- The independence of the decision-maker
- Evidence and the provision of information in support of applications

2. Human Rights PANEL Principles (underlying principles in applying a human rights based approach)

2.1 Participation

Everyone has the right to participate in decisions which affect their human rights. Participation must be active, free, meaningful and give attention to the issues of accessibility, including access to information in a form and a language which can be understood.

2.1.1 Who are groups or individuals most likely to be affected by the proposal?

Survivors of historical child abuse in care in Scotland are the group who are most likely to be affected by the Act. This policy will have a positive impact on those who

meet the eligibility of the scheme but may have a negative impact on those who do not because of the restricted eligibility criteria in terms of time period and relevant care settings.

The redress scheme will also have an impact on organisations which contribute to the scheme. Organisations which contribute will be, to a degree, protected from litigation. However, the making of financial contributions will affect their financial position.

2.1.2 What methods would you use to ensure that those affected by the policy are involved in decisions that affect their human rights, in an active and meaningful way?

The Scottish Government's work on financial redress is being informed by the following:

- Engagement with survivors throughout the development of the redress scheme. Initially the InterAction Review Group was established to oversee the Scottish Human Rights Commission InterAction on Historical Abuse of Children in Care. Membership of this group includes survivors of abuse, survivor organisations, Scottish Government, CELCIS, Social Work Scotland and a provider association (EtCS - Educating through Care Scotland) and the Scottish Human Rights Commission (SHRC).
- SHRC's role in facilitating the InterAction ensured that human rights were at the heart of the process. This group facilitated collaboration and inclusiveness across stakeholders in order that the InterAction could take place in an atmosphere of respect, dignity and support. When this group concluded in October 2014, with commitments to implement the Action Plan on Justice for Victims of Historical Abuse of Children in Care, the Review Group continued with a revised remit and membership in order to monitor and review the implementation of the commitments to the Action Plan. These stakeholders remain integral to redress and the development and delivery of the statutory redress scheme.
- Following an extensive consultation and engagement exercise conducted in 2017 in partnership with the Centre for Excellence for Looked After Children in Scotland (CELCIS) (in which over 180 responses were received), they made recommendations for the establishment of a financial redress scheme.
- In the 2019 Pre-Legislative Public Consultation on Financial Redress for Historical Child Abuse in Care, the Scottish Government sought to obtain views on the detailed design of the scheme. 280 responses were received to this Consultation, with over 200 respondents identifying themselves as survivors. Independent analysis of all consultation responses has concluded and a report on this was published on 23 March 2020. This analysis has helped shape the policy of the scheme.
- A targeted engagement exercise with survivor organisations, representatives of the legal profession, care providers and others was carried out during the

development of the secondary legislation under the Act. A formal public consultation was not considered necessary or appropriate given: previous consultations on the scheme, the significant scrutiny and evidence submitted, including in relation to the waiver during parliamentary passage, the technical nature of the Regulations, and the timescales for delivery. The feedback gathered from this has been taken in to consideration in the development and drafting of the secondary legislation.

- The Act requires that the Scottish Ministers must establish a Survivor Forum through which survivors' voices and experiences will continue to contribute to the way the redress scheme is delivered and how applicants are supported.
- The opening of the redress scheme will see the closure of the advance payment scheme. The Act enables Redress Scotland to prioritise applications based on an applicant's health and age. The UN Human Rights Committee is clear that 'remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person ...' (General Comment No. 31, Human Rights Committee, 26 May 2014 at para. 15).
- Survivors who experienced abuse prior to 26 September 1964 are unable to access remedies through the civil courts process due to the legal prescription of relevant civil rights of action. The redress scheme will provide remedy and a route to redress where there was previously none for this group of survivors.
- Moreover, the redress scheme will provide an alternative for those survivors who either cannot, or do not wish to access the civil court system. It will give them an option for remedy which does not involve them having to go through civil court processes, which are adversarial by nature.

2.2 Accountability

Accountability requires effective monitoring of human rights standards as well as effective remedies for human rights breaches. For accountability to be effective there must be appropriate laws, policies, institutions, administrative procedures and mechanisms of redress in order to secure human rights.

2.2.1 Who is responsible for making sure that human rights are respected, protected and fulfilled?

- The Scottish Government and Redress Scotland (the independent decision making body established by the Act) are responsible for ensuring that human rights are respected, protected and fulfilled throughout the redress process. It is recognised too that care providers and institutions have human rights responsibilities in demonstrating accountability and the redress scheme that we have designed will allow them the opportunity to meet these responsibilities.
- Section 13 of the Act requires that the Scottish Ministers, Redress Scotland, scheme contributors and other relevant persons must, in exercising functions conferred on them under or by virtue of this Act, have regard to the principle

that applicants and potential applicants to the scheme should be treated with dignity, respect and compassion.

- The redress scheme has been designed respecting the right to remedy and redress. In establishing a financial redress scheme for survivors of historical child abuse in care we are contributing to the Scottish Government's National Outcomes, in particular to "Respect, protect and fulfil human rights and live free from discrimination".
- Financial redress is part of a suite of measures that the Scottish Government has taken in order to recognise the abuse suffered by children in care in the past. This includes public apologies from Scottish Ministers, changes to law through the Limitations (Childhood Abuse) (Scotland) Act 2017, and the creation of the Scottish Child Abuse Inquiry.

2.2.2 What sources of evidence (qualitative and quantitative) are you aware of that would help to inform the policy?

The Scottish Government's work on financial redress is being informed by the following qualitative data:

- The Review Group, whose membership includes survivors (some representing groups and others independent), a care provider representative, Social Work Scotland, the Scottish Human Rights Commission, CELCIS and the Scottish Government, continues to inform the work on financial redress, by contributing to our understanding of the issues facing survivors and the importance of all elements of redress and reparation.
- The advance payment scheme was launched on 25 April 2019, implementing the Review Group's recommendation that arrangements should be put in place to allow priority groups of survivors access to financial redress. The advance payment scheme is open to survivors of abuse in care in Scotland before December 2004 who either have a terminal illness or are aged 68 years or over (the age threshold was initially 70 years but was lowered on 4 December 2019). Advance payments have been made to more than 650 survivors as of September 2021. Relevant learning from this scheme has helped shape the redress scheme.
- The consultations and targeted engagement exercises mentioned previously in the document provided us with qualitative and quantitative data from survivors, providers and other stakeholders on the design of the scheme.
- CELCIS also undertook an initial engagement exercise with service providers and a review of relevant international redress schemes (2017).
- Alongside the redress scheme, a Survivor Forum will require to be established to provide a mechanism by which survivor feedback on the delivery and operation of the redress scheme can be heard and help shape improvement.

- The Scottish Government has seconded staff from CELCIS in order to learn from their expertise in the area of historical abuse and survivor engagement.
- Members of the Scottish Government Redress Division have communicated with and met international counterparts in redress to learn and share knowledge and experience including lessons learned.

The Scottish Government's work on financial redress is being informed by the following quantitative data:

- The advance payment scheme for those who suffered abuse in care in Scotland before December 2004 and either have a terminal illness or aged 68 years or over (the age threshold was initially 70 years but was lowered on 4 December 2019) has provided quantitative data that has helped shape the redress scheme.
- Modelling for financial redress for survivors of historical abuse in care has been carried out by the Government Actuary's Department (GAD). GAD's analysis refines the estimates of the potential number of applicants to the redress scheme by taking in to consideration the following: refined mortality assumptions, the experience of the advance payment scheme, the claims experience of other redress schemes; and the distribution of claims across other schemes. Additionally, they have assisted with contributions modelling and have provided estimates for the number of next-of-kin applications the scheme may receive.
- Modelling has also been carried out by the Division of Education Analytical Services (EAS) within Scottish Government.
- In attempting to quantify the number of survivors with learning disabilities, various sources of evidence have been considered including the results of the CELCIS Consultation 2017, the Scottish Consortium for Learning Disability (2014) and the Scottish Commission for Learning Disability (2018).
- For those survivors with physical or mental health conditions, information from the Scottish Government Scottish Health Survey 2017 and the Children's Social Work Statistics 2016-2017 has been considered.
- With regard to race and religion, Scotland's Census 2011 from the National Records of Scotland has been considered.

2.2.3 Are there procedures in place for staff or service users who feel that their human rights have been or are in danger of being breached to hold the organization to account?

- Section 9 of the Act requires that the Scottish Ministers must use their best endeavours to ensure that applicants and potential applicants to the scheme have the opportunity to make informed decisions. To do this, the Scottish Ministers must provide all applicants with a "Summary of Options" at key points in the application process. This document must set out the key rights

an applicant has in regards to the redress scheme and other important information that the applicant should be aware of to make informed decisions.

- The Scottish Ministers will establish a Survivor Forum to provide a mechanism by which survivor feedback on the process of applying for redress can be heard. This will help us monitor, evaluate and improve the survivor experience of the scheme, ensuring it is fit for purpose.
- The Act provides applicants with a right of review in respect of the decision making panel of Redress Scotland in relation to various decisions made by them. This includes a decision to refuse an application for redress on the basis that the applicant does not satisfy the eligibility criteria; a decision that in light of a relevant previous conviction, it would not be in the public interest for an applicant to receive a redress payment; and in relation to an application for an individually assessed redress payment, a determination that a survivor's evidence merits only a fixed rate redress payment, or whereby a survivor requests a review of the payment level offered.
- The Scottish Government will meet the costs of independent legal advice (subject to certain payment limits) for all applicants to the scheme, including next of kin applicants and nominated beneficiaries, to ensure they are aware of their rights throughout the application process. This will help to prevent misunderstanding, empower applicants in their decision-making, and prevent a breach of rights due to a lack of knowledge and awareness of those rights from the applicant's perspective. Further details on the payment of legal fees can be found in the relevant SSI. Provision has also been made for reimbursement of other costs and expenses associated with an application. Further detail on the reimbursement of costs can be found in the relevant SSI.

2.3 Non-discrimination and equality

All forms of discrimination (such as age, gender, sexual orientation or ethnicity) in the realisation of rights must be prohibited, prevented and eliminated. It also requires the prioritisation of those in the most marginalised or vulnerable situations who face the biggest barriers to realising their rights.

2.3.1 Have individuals or groups who are more vulnerable to human rights breaches been identified?

Many applicants applying for redress may be vulnerable due to the nature of the scheme itself; for survivors of historical child abuse in care. However there are certain groups that may be particularly vulnerable:

- It is anticipated that there will be a large number of older people applying to the scheme.
- There is the potential for a small number of applicants to the scheme to be under the age of 18 years.
- There is the potential for children applying to the scheme as next-of-kin.

- It is also likely that there will be applicants with disabilities including disabled people, people with learning disabilities and mental health issues.
- The impact of childhood abuse and neglect is individual but also lifelong and may for some manifest in mental health issues, substance misuse and can be one of many background factors contributing to homelessness.

2.3.2 How might the policy impact on these individuals or groups?

The policy of the redress scheme will have the following impact:

- With regard to age, the advance payment scheme was set up on 25 April 2019 and is for priority applicants, those who are aged 68 years and over or who are terminally ill. Originally the advance payment scheme was open to applicants aged 70 and over, but this was reduced to 68 years on 4 December 2019 following a review. It is intended that the advance payment scheme will continue until the redress scheme is operational. The 2021 Act enables Redress Scotland to prioritise applications based on an applicant's health and age.
- Consideration has been given to how the scheme might treat applications from children. The Act (section 51) contains provisions which give Redress Scotland the power to make directions about the making and management of a payment to a child under the age of 18. A direction may, for example, be made which requires the payment to be made in instalments or that the payment should be retained until the child turns 18. To allow for the individual circumstances of a child to be taken in to consideration, children who have received only part or none of their payment will be able to apply for an advance of their payment. Redress Scotland will then decide if this is appropriate.
- It is important to understand the legal, financial and emotional impacts of a redress payment. It is recognised that appropriate support should be in place for children applying to the scheme. Engagement has taken place with the Scottish Child Law Centre on the legal capacity of the child and the kind of support required to fully support a child throughout the process of applying for redress.
- Within the survivor population it is recognised that there will be some with protected equality characteristics. For example, applicants are likely to be required to produce proof of identity, including any name change which has occurred since their time in care. This may impact on those who are transgender in the additional information that they may be required to provide. It is important that the administrative body are aware of this and are supportive of those who may need to provide additional evidence.
- Applicants who have a disability may have different requirements for making an application. Various support mechanisms will be put in place to ensure that all applicants, regardless of their disability, will have an equal and fair

opportunity to apply. In order to better understand what proactive support can be put in place for those with disabilities, engagement is taking place with relevant experts.

- It is not envisaged that this policy will impact on the religious beliefs of survivors or their families, as the redress scheme is open to all eligible survivors regardless of their beliefs.
- It is not anticipated that this policy will impact upon survivors because of their ethnicity. The scheme is open to all eligible survivors, regardless of their ethnic background. However, it is noted that campaigners state that because of policy to encourage the settlement of Scottish Gypsy Travellers which ran from the 1940s to 1980s, families were threatened with having their children removed from them and taken into care. Data on children in care from this background for the purpose of the redress scheme is unknown.
- Similarly, it is unlikely that this policy will have any impact on people as a result of their sexual orientation, pregnancy or maternity status, and marriage and civil partnership status.
- Furthermore, it is not anticipated that this policy will impact on men and women in different ways. The scheme will not exclude anyone from support or advice. Emotional and practical support to apply is available to all scheme applicants, as set out under section 89 of the Act. Survivor applicants eligible for a redress payment can access non-financial redress, including access to therapeutic support, as set out under section 90 of the Act.

2.3.3 Can you identify any actions that you could recommend that would lessen the negative impact of the policy?

In order to lessen any negative impact that the redress scheme may have:

- One of the principles of the scheme is to make it as accessible as possible for all. It is anticipated that many applicants will require support to apply to the scheme. The nature and level of support required will vary and the scheme will need to be flexible to accommodate this. This could include access to counselling, literacy/practical support, help to find records, and financial advice. Emotional and practical support to apply is available to all scheme applicants, as set out under section 89 of the Act. Survivor applicants eligible for a redress payment can access non-financial redress, including access to therapeutic support, as set out under section 90 of the Act.
- The Adults With Incapacity (Scotland) Act 2000 (which the Act does not affect) provides a legal framework for safeguarding the welfare and managing the finances of adults (people aged 16 or over) who lack capacity due to mental illness, learning disability, dementia or a related condition, or an inability to communicate. For individuals that meet this criteria, welfare guardianship, financial guardianship and power of attorney can be in place. Advice is being provided by the Mental Welfare Commission, Office of the Public Guardian and other groups to consider what this means for applicants

applying, particularly ensuring their rights and understanding through the process.

- In addition to financial redress, and in common with other schemes elsewhere, access to non-financial redress will be offered such as, therapeutic support acknowledgement and apology.
- Engagement is continuing with Deaf Scotland and People First Scotland about developing alternative forms of application forms and communications. It is envisaged that different versions of the application form will be supplied on request.

2.4 Empowerment

Individuals and communities should understand their rights, and be fully supported to participate in the development of policy and practices which affect their lives.

2.4.1 What information will those affected by the policy need in order to be able to effectively influence the decision?

- As mentioned previously in the document, section 9 of the Act requires that the Scottish Ministers must use their best endeavours to ensure that applicants and potential applicants to the scheme have the opportunity to make informed decisions. To do this, the Scottish Ministers must provide all applicants with a “Summary of Options” at key points in the application process. This document must set out the key rights an applicant has in regards to the redress scheme and other important information that the applicant should be aware of to make informed decisions.
- Engagement has taken place with survivors, survivor groups and other stakeholders throughout the development of the redress scheme. This has been done through participation in the Review Group, through the public consultation (including focused engagement with survivor organisations) and through discussions on contributions with providers. Many survivors have opted to be kept up to date on developments in the redress scheme via a Scottish Government mailing list.
- Work will continue with Communications colleagues in order to raise awareness of the scheme. This will include targeting organisations that have contact with or work directly with survivors which will in turn allow people to realise their rights and access effective remedy.
- A Survivor Forum will be established by the Scottish Ministers to provide a mechanism by which survivor feedback on the delivery and operation of the redress scheme can be heard. This will help to monitor, assess and improve the survivor experience of the scheme, ensuring it is fit for purpose.
- The redress scheme will ensure that survivors have a meaningful opportunity to obtain independent legal advice at various points in the process but particularly at the point at which an offer of a redress payment has been made

and before signing the waiver. The redress scheme will fund legal fees reasonably incurred by all applicants, including next of kin applicants and nominated beneficiaries, ensuring that there is no financial penalty for applicants to the scheme. These fees will be subject to certain limits which are set out in secondary legislation, though there is scope under section 93(3) of the Act to pay additional sums there justified by exceptional or unexpected circumstances. Any legal advice obtained by the applicant must be provided by solicitors chosen by the applicant, who are independent of Scottish Government, the public body and any organisation which benefits from the waiver. As will be reinforced in the section 9 summary of options, applicants who are offered a payment under the scheme will be strongly encouraged to seek legal advice, particularly before signing any waiver. Subject to Parliament's approval the form and content of the waiver is set out in secondary legislation.

- Offering choice to survivors will be integral to every element of the redress scheme. Survivor views have been drawn upon to design the proposed scheme guiding principles, in particular treating applicants with fairness and respect and 'offering choice wherever possible'. These principles will help empower those considering applying. There will be the choice to apply for a fixed rate payment initially and then later to choose to apply for an individually assessed payment, or to go straight for an individually assessed payment. Furthermore, there will be the choice to pause an application at any point prior to a formal offer of redress payment being made. It will be the choice of the survivor on whether to take up the offer of legal advice, financial advice, and non-financial redress.

2.5 Legal

A human rights based approach requires the recognition of rights as legally enforceable entitlements and is linked in to national and international human rights law.

2.5.1 What are the possible human rights impacts of the proposal? Which rights might be engaged? If they are qualified rights, is any interference necessary to achieve a legitimate aim, and proportionate – that is the minimum necessary interference?

It must be noted that this scheme has been set up on an exceptional basis, in respect of a particular historic event, namely historical child abuse in relevant care settings. It is being set up voluntarily, outside the framework of the state's regular social security legislation, and in the nature of an extraordinary and one-off basis.

Notwithstanding the exceptional nature of this redress scheme, there are various provisions of the redress scheme that could be argued as potentially engage relevant rights and obligations safeguarded by the ECHR:

- The eligibility criteria for the redress scheme
- The treatment of applicants with previous convictions for serious offences
- The process for determining applications under the scheme

- The provisions on waiver
- The independence of the decision-maker
- Evidence and the provision of information in support of applications
- Engagement with organisations on obtaining fair and meaningful contributions to the funding of the scheme

2.5.2 What is the nature of those rights (are they absolute, qualified, limited or to be fully realised progressively?)

Eligibility criteria

The Act (sections 18 to 22) sets out the eligibility requirements, the satisfaction of which will enable scheme applicants to receive a redress payment. These provisions are further supplemented by the Redress for Survivors (Historical Child Abuse in Care) (Exceptions to Eligibility) (Scotland) Regulations 2021 which, subject to Parliament's approval, provide that that an application for a redress payment may not be made to the extent that it relates to abuse that occurred when a person was resident in a relevant care setting for the purpose of being provided with short-term respite or holiday care, under arrangements made between their parent or guardian and another person.

Depending on the circumstances, this could result in a redress payment being considered as a right falling within the ambit of Article 1 of the First Protocol ECHR (protection of property) and Article 6(1) ECHR (right to a fair trial) and, in turn, falling within the ambit of Article 14 ECHR (prohibition of discrimination). These are qualified rights.

ECHR obligations, so far as engaged, require that eligibility must link rationally to the overall purpose of the scheme and decisions to exclude any particular group must be proportionate.

As noted above, it is recognised that not all survivors of child abuse will be eligible for a payment under this scheme. Consideration has been given to whether the eligibility criteria is compatible with article 14 ECHR, and whether the relevant criteria is consistent with basic fairness.

Broadly the scheme aims to cover children who were "in care" because their immediate or extended families were unable to look after them on a day to day basis and, in consequence, the children required to be placed in an institutional or other public care setting (such as, for example, a children's home), as well as children who were subject to some form of intervention by a public authority or a voluntary organisation exercising functions in relation to the safeguarding or promotion of the welfare of the child or the protection or furthering of the child's interests.

Consistent with those aims and its underlying purpose, the scheme is not therefore intended to cover for example, kinship (family) care or private fostering arrangements, or short-term health care respite or holiday care arrangements where children were not considered to be "in care" wholly out with the family environment or as a result of an intervention by a public authority or such a voluntary organisation. Nor will the scheme cover children abused in private boarding schools unless those

children were placed there and the costs were met by (a) a local or an education authority (for example, in exercise of functions in relation to meeting the educational needs of a child), or (b), a voluntary organisation exercising functions relating to the welfare of the child (for example, if the child was already in care, by the child's existing care provider).

For the purpose of the redress scheme "child" is defined to mean a person under the age of 18 years (other than in relation to a reference to a child of a deceased person in the context of an application for a next of kin payment).

To be eligible to apply, the abuse must have occurred before 1 December 2004, the date of the then First Minister Jack McConnell's public apology in Parliament, when Scotland began to face up to the harm done to children in care in the past.³ Since that time a number of significant changes and improvements have been made, and the regulatory framework which exists today is very different to that of the past. "Abuse" includes sexual, physical and emotional abuse, and abuse which takes the form of neglect. This definition is based on the Limitation (Childhood Abuse) (Scotland) Act 2017. It is expressly stated that "physical abuse" includes corporal punishment to the extent that, at the time it was administered, it was not permitted by or under any enactment or rule of law.

For the purpose of the scheme, as set out in section 20 of the Act, "relevant care setting" means (first) a residential institution in which the day-to-day care of children was provided by or on behalf of a person other than a parent or guardian of the children resident there, and (second) a place, other than a residential institution, in which a child resided while being boarded-out or fostered. This does not, however, include situations where the child was boarded-out or fostered with a relative or guardian, or under arrangements made with a person other than a public authority or a voluntary organisation exercising functions in relation to the safeguarding or promotion of the welfare of the child or the protection or furthering of the child's interests.

"Residential institution" is in turn defined to mean a children's home, a penal institution, a residential care facility, school-related accommodation, and secure accommodation. Each of these individual categories is then generally defined in section 21, where appropriate taking account of situations not intended to fall within the scheme. As noted above, the Redress for Survivors (Historical Child Abuse in Care) (Exceptions to Eligibility) (Scotland) Regulations 2021 except from the scheme abuse which occurred while a person was being provided with short-term respite or holiday care, under arrangements made between their parent or guardian and another person.

Being "resident" in a relevant care setting includes a reference to being absent from that setting while under its care (whether within or outwith Scotland). This ensures that children who were resident in a relevant care setting but who were abused outwith that setting (for example, on a day excursion) would be eligible to apply to the redress scheme in respect of that abuse.

³ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=4546&mode=pdf>

We consider that the categories of those who are not eligible under the scheme are rationally connected with the overall purpose of the scheme, and it is proportionate not to include these groups. Overall the Scottish Ministers have given careful consideration to the restrictions and exclusions of certain survivor groups to ensure the eligibility criteria set out in the Act appropriately reflect this purpose. The policy in relation to the Act was subject to a pre-legislative consultation exercise and responses to that consultation were also carefully analysed as part of that process. As noted above, a further targeted engagement exercise with survivor organisations, representatives of the legal profession, care providers and others was also carried out in relation to the potential exercise of the power in section 23 of the Act in relation to exceptions from eligibility under the scheme.

Where the abuse survivor died on or after 1 December 2004, provision is made under the redress scheme for a next of kin payment to certain members of the deceased abuse survivor's immediate family. The purpose of those payments is tied to the underlying entitlement of the abuse survivor and acknowledges the fact that the latter died before having had the opportunity to receive a redress payment for which they would have been eligible under the redress scheme. 1 December 2004, was the date of the then First Minister Jack McConnell's public apology in Parliament, when Scotland began to face up to the harm done to children in care in the past.⁴ From that date, the Scottish Government considers that survivors and their families may have formed reasonable expectations that a financial redress scheme would be established by the Scottish Ministers for such abuse survivors.

Eligibility for next of kin payments is restricted to the following two categories of immediate family members of the abuse survivor (in order of preference) and to the level of a fixed rate redress payment: (a) a spouse, civil partner or cohabitant, or (b) any surviving child (which includes any stepchild or a person who was treated by the abuse survivor as that person's child).

This policy reflects the purpose of the next of kin payment which is recognition of the abuse suffered by the deceased, not recognition of the impact of that abuse on the next of kin as an individual. It is therefore considered to be consistent with the overall aim of the redress scheme and to be proportionate.

There may be some circumstances in which it may be contrary to the public interest for a survivor, next-of-kin, or nominated beneficiary with a conviction for a serious offence, to receive a redress payment. It is important to note however, that there is no automatic "blanket" exclusion of applicants with previous convictions for serious criminal conduct.

Accordingly, potentially eligible applicants under the redress scheme (including nominated beneficiaries taking over applications from deceased abuse survivor applicants) with unspent convictions for certain serious offences (murder, rape or other violent or sexual offences which resulted in a sentence of imprisonment of more than 5 years), will not automatically be entitled to a redress payment. A decision-making panel of Redress Scotland will have to consider on a case by case basis, by reference to defined criteria set out in section 60 of the Act (which include

⁴ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=4546&mode=pdf>

the nature of the offence, the sentence imposed, the length of time since the offence, any subsequent rehabilitation activity and any other matter the panel considers relevant), whether it would be contrary to the public interest to make a redress payment to such a person. In the case of an adverse determination, the applicant will have a right of review to be determined by members of the decision-making panel who were not involved in the original decision.

The restriction pursues a legitimate aim that applicants with serious criminal convictions should be precluded from being automatically entitled to a financial redress where it may be contrary to the public interest for such applicants to benefit from public funding by means of a redress payment.

However, non-financial support will still be available, even where a redress payment is not made. This is consistent with the overall aim of the redress scheme which is redressing the harms of the past. It is considered that the provisions are a proportionate means of pursuing the legitimate aim of using most of the redress money towards blameless individuals so that the financial element is potentially restricted for those with serious criminal convictions.⁵

In conclusion, the Scottish Government has given careful consideration to the restrictions and exclusions of certain survivor groups. As summarised above, following careful consideration of the relevant issues and criteria, it is considered that the criteria is consistent with the principles intended to underpin the redress scheme, and with the scheme's main purpose. Account has been taken of the relevant human rights considerations in making these decisions, and following careful analysis, the criteria has been assessed as being proportionate. The policy in relation to the Act was subject to a pre-legislative consultation exercise and responses to that consultation were also carefully analysed as part of that process. As noted above, a further targeted engagement exercise was then carried out on proposals for secondary legislation. Therefore, the eligibility provisions cannot be said to be manifestly without reasonable foundation.

The provisions on waiver

The Act contains a requirement that applicants, prior to receiving any redress payment, will have to agree in writing to discharge any current claims against the Scottish Ministers and other bodies which financially contribute to the scheme, and abandon any right to raise any future claims on any legal basis whatsoever in respect of abuse which is eligible under the scheme. The Scottish Ministers are required to maintain and publish a list of financially contributing bodies and the date on which an organisation became a contributing body to the scheme.

The form and content of the waiver will be set out in secondary legislation.⁶ However, whilst this is primarily a technical provision in implementation of section 47 of the Act, it is in the interests of fairness and transparency to all applicants and scheme

⁵ See for example *A v Criminal Injuries Compensation Authority* [2018] ECWA Civ 1534.

⁶ See [The Redress for Survivors \(Historical Child Abuse in Care\) \(Scotland\) Act 2021 \(Form and Content of Waiver etc.\) Regulations 2021 \(legislation.gov.uk\)](#)

The Scottish Government therefore considers that there is no constraint or undue compulsion for an applicant to waive their right of access to a court in respect of the abuse suffered.

Where an applicant signs and returns a waiver, the Act provides that the Scottish Ministers or other contributors cannot be pursued for a contribution towards damages awarded against another wrongdoer, and that therefore the waiver is robust in ensuring that legal costs will not have to be incurred in defending such claims in future. The Scottish Government considers that A1P1 ECHR is unlikely to be engaged and, in any event it is entirely proportionate and justifiable to the legitimate aim of the effectiveness of the redress scheme, that a redress scheme contributor will not be required to provide “double compensation” through being drawn in to an action against a third party wrongdoer. There is however provision in the Act (section 16) to enable the Scottish Ministers to revoke the waiver with retrospective effect where a scheme contributor has been removed from the contributor list for failing to make the financial contributions it has agreed to.

Section 48 of the Act requires Scottish Ministers to report on the effectiveness of waiver. The report should consider the impact of waiver on applications for redress, as well as the effectiveness of waiver in encouraging contributions to the scheme. This will ensure that the effectiveness of the waiver can be monitored throughout the lifetime of the scheme.

The independence of the decision-maker

Redress Scotland, a new non-departmental public body, will be established by the Act to determine (via decision-making panels) applications for redress payments, reviews, and requests for legal fees.

Although Redress Scotland will be accountable to the Scottish Ministers in terms of financial scrutiny, it will be operationally independent of Ministers in relation to the exercise of its decision-making functions under the Act and this is specifically enshrined in the Act. Whilst generally, the Scottish Ministers will be under a duty to provide administrative support to Redress Scotland to enable the latter to perform its functions under the Act and will have a number of specific administrative functions conferred on it (for example, in relation to the submission of applications to Redress Scotland and the notification of decisions from Redress Scotland), these are clearly separable from the decision-making functions and serve to facilitate and support the application process and do not cut across the independence of Redress Scotland in relation to its decision-making functions.

Application to Redress Scotland under the redress scheme provides an alternative to the current civil court process. It is designed to be non-adversarial, faster and sensitive to survivor’s needs given that the redress scheme is not about establishing legal liability for the consequences of abuse, and survivors have the alternative option of seeking justice through the civil courts if they are looking to determine liability and obtain compensation, rather than applying for financial redress under this scheme.

All members of the decision-making panel will be appointed by the Scottish Ministers through a merit-based appointment process. Members may only be appointed where they have such skills, knowledge and expertise as the Scottish Ministers consider relevant to the carrying out of the functions of Redress Scotland. Whilst it is intended that this will include legally qualified members sitting on decision-making panels, a range of skills and experience beyond that will also be reflected in the make-up of the panels – in particular, professionals with relevant skills and experience in the field of emotional and psychological trauma. Members will be appointed for a renewable period of between three and five years (which ties in with the anticipated duration of the scheme). The Act also provides for early termination of membership of Redress Scotland members only on limited grounds. Moreover, the decision-making functions of Redress Scotland cannot be delegated.

The Scottish Government considers that the Act provides sufficient safeguards in relation to the appointments and terms and conditions of membership of Redress Scotland to ensure that the panel would be independent and impartial for the purposes of Article 6(1) ECHR so far as engaged.

In any event it is considered that the provision of a full right of review under the Act to a differently constituted panel rather than providing a separate right of appeal to a Court is not incompatible with Article 6(1) ECHR.

Evidence and provision of information in support of applications

There is a balance to be struck between creating a scheme that treats survivors with compassion, dignity and respect while ensuring that a proportionate approach is taken to deterring and detecting fraudulent application for redress. Engagement with care providers has shown that the ability to encourage financial contributions to the redress scheme will, to some degree, depend on an ability to satisfactorily demonstrate the credibility of the scheme, its evidential requirements and processes for assessing that evidence.

The determination of applications to the redress scheme under section 36 of the Act will follow the standard of proof applicable in relation to civil proceedings, namely, the balance of probabilities. Without prejudice to that, the Act also provides that the starting point for Redress Scotland, when considering an application, is that the information provided by the applicant is to be presumed to be true and accurate to the best of the applicant's knowledge and belief.

Applicants to the scheme will require to provide some form of supplementary information which confirms that they were in a relevant care setting. A wide range of supplementary information will be acceptable and experience from the advance payment scheme has so far shown that it will usually be possible to obtain such supplementary information but in exceptional cases this may not be possible. In those cases, particularly where there are known record-keeping issues, Redress Scotland will have discretion to decide to make a redress payment.

For individually assessed payments, applicants will be required to provide detailed information about the abuse they suffered and will be required to provide supplementary information in support of this aspect of their application. This could be

supporting information relating to the type of abuse which occurred, or information such as a psychological report, in relation to the particular impact of the abuse on the applicant consistent with their application. The scheme will provide funding for psychological reports if no such report is already available.

The Act (section 79) creates a power for Scottish Ministers, in their capacity as administrators of the redress scheme, to compel any individual or body to provide them with specified information or other evidence for the purposes of determining a redress application, as well as a power (section 80) to obtain information about previous payments, and a failure to comply with such requests may constitute an offence. Similar provisions are being included in an Order under section 104 of the Scotland Act 1998, to enable the obtaining of information from organisations based in other parts of the UK (underpinned by criminal offences) or in other circumstances where the exercise of powers under sections 79 and 80 of the Act would be outside the Scottish Ministers' devolved competence.

The Act also provides for information sharing between Redress Scotland and Scottish Ministers as the administrators of the redress scheme. This will only be necessary to enable performance of functions conferred under or by virtue of the Act, or otherwise necessary for or in connection with the operation of the redress scheme.

Moreover, under the Act, the Scottish Ministers or Redress Scotland will be able to share information with third parties. This will only be allowed where the disclosure is necessary for limited purposes, namely for verification and authentication purposes, or the provision of documentation, information, objects or evidence (including a written statement) by the third party in relation to an application, or the provision by the third party of details of a relevant payment that has been made to an application or which an applicant is entitled, or for the determination by the third party as to whether civil proceedings commenced against the redress scheme contributor have been commenced in contravention of a waiver.

Any information sharing must be compliant with relevant rules of law, such as, data protection law, the law of confidentiality and Article 8 ECHR. The information sharing provisions of the Act specify that the provisions of the Act should not be exercised in a manner which would be in contravention of relevant data protection law.

Article 8 ECHR is potentially engaged in respect of information sharing however sufficient safeguards have been built into the Act provisions to ensure that any interference with the right to privacy is proportionate, that these provisions are ECHR compliant, and that the applicant's right to confidentiality is protected.

The Act provisions clearly set out the circumstances in which information can be shared, with whom, and for what purpose. The need for only necessary levels of information sharing is emphasised throughout the provisions.

In addition, where a notice to provide documents is issued to any person, the Scottish Ministers will have control over the terms of the notice, and they will be able to specify what exactly is required, and is necessary, in order to assist the application process. This should minimise the risk that a person will overshare potentially

sensitive information with Scottish Ministers or Redress Scotland decision-making panels. Moreover, by way of an additional safeguard, a person who is required by a notice to provide documents must do so in a redacted form if the documents contain information about another person which is irrelevant to the determination of the application to which the notice relates, and the disclosure of that information would breach an obligation of confidence.

There are similar safeguards being included in an Order under section 104 of the Scotland Act 1998.

As such, it is considered that the information sharing provisions of the Act are compatible with Article 8 of the ECHR.

Engagement with organisations on obtaining fair and meaningful contributions to the funding of the scheme

The Act requires Scottish Ministers to publish a statement of the principles by which “fair and meaningful” financial contributions to the redress scheme will be determined. However, there is no compulsion to make a contribution. If agreement between a person wishing to contribute and Scottish Ministers cannot be reached, there is no obligation on either party to make or accept a payment that is not “fair and meaningful”. However, the waiver will only be extended to those organisations where it is agreed that the contribution is indeed “fair and meaningful”.

The Scottish Ministers will not accept a contribution which, in Ministers’ opinion, is not considered fair and meaningful. The possibility of gaining the benefit of a waiver, in respect of applicants to the redress scheme, in return for a “fair and meaningful” contribution, does not in the Scottish Government’s view amount to a “possession” within the meaning of A1P1 ECHR.



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