

# **Business and Regulatory Impact Assessment**

## **Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill**

**August 2020**

## 1. Purpose and intended effect

### 1.1 Background

On 23 October 2018 in the Scottish Parliament, the Deputy First Minister offered an unreserved apology on behalf of the Scottish Government to all those who were abused as children in care, and committed to establish a financial redress scheme for survivors of historical abuse in care.

This announcement was in response to recommendations made by the InterAction Action Plan Review Group, a national group that includes survivor representatives, care providers, Social Work Scotland, the Scottish Human Rights Commission (SHRC), and the Centre for Excellence for Children's Care and Protection (CELCIS). The recommendations followed a survivor consultation in 2017, which received just over 180 responses; an engagement exercise to gather initial views from care providers and other relevant professional groups; and a review of available information about financial redress schemes in other countries.<sup>1</sup>

In recent years, the Scottish Government has put in place a range of measures to address historical child abuse. These include:

- the National Confidential Forum, established by the Victims and Witnesses (Scotland) Act 2014, which provides an acknowledgement function for survivors of abuse in care;<sup>2</sup>
- the Scottish Child Abuse Inquiry (SCAI) established in 2015, which investigates the nature and extent of historical abuse of children whilst in care in Scotland;
- Future Pathways, established in 2016, which provides personal outcome-focussed support to survivors of abuse in care;
- the introduction of the Apologies (Scotland) Act 2016, intended to encourage a change in social and cultural attitudes towards apologising; and
- the Limitation (Childhood Abuse) (Scotland) Act 2017, which removed the three year time limit on personal injury claims for damages in respect of childhood abuse.<sup>3</sup>

In 2019, an advance payment scheme opened to provide redress payments for survivors of historical in care abuse who are older or have a terminal illness. As of June 2020, payments have been made to over 400 applicants.

Findings published so far by the SCAI indicate widespread, serious systemic and societal failings over several decades in relation to children in the care of organisations investigated in its case studies to date. These investigations have

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<sup>1</sup> See *Consultation and engagement on a potential financial compensation/redress scheme for victims/survivors of abuse in care*, SHRC, InterAction Action Plan Review Group and CELCIS, 2018, p. 9, see [https://www.celcis.org/files/6615/3622/6805/Report\\_1\\_Executive\\_Summary\\_06.09.18.pdf](https://www.celcis.org/files/6615/3622/6805/Report_1_Executive_Summary_06.09.18.pdf).

<sup>2</sup> The Bill makes provision for the closure of the National Confidential Forum due to low take up in the 2018/19 financial year. The establishment of the financial redress scheme creates an opportunity to consider the current package of wider reparations that is available to survivors of historical child abuse in care. Please see the Bill's Policy Memorandum and Explanatory Notes for more details.

<sup>3</sup> Although, importantly, this provision only applies where the abuse took place after 26 September 1964, so survivors who were abused before this date are not able to make civil claims against their abusers given the law on prescription. This is discussed further in Section 1.3.1.

found that children were subject to physical, sexual, and emotional abuse and neglect. Care establishments were often places of fear, hostility, and confusion where feelings of isolation and vulnerability could be commonplace. Children who spoke up were often not believed. Many did not speak up because they were unable to, or they thought the abuse that they experienced was 'normal'<sup>4</sup>. For some, the abuse was part of a 'regime of punishment and control that was at the core of the institution in which they lived'.<sup>5</sup> For others, the conduct of individual perpetrators of abuse went undetected or unchecked. But for all who were abused, they were failed by the very systems in place to protect them.

## 1.2 Objective

The purpose of the redress scheme will be to acknowledge and provide tangible recognition of the harm suffered as a result of historical child abuse whilst residing in a relevant care setting in Scotland.<sup>6</sup> The redress scheme is intended as a collective, national response to historical abuse in care. Survivors expressed overwhelming support for the introduction of such a scheme in the consultation exercise carried out by CELCIS in 2017. The redress scheme will be open for applications for five years, although the Bill will provide for a power to extend that period.

In line with responses to the pre-legislative consultation, an underlying principle of the scheme will be that organisations which 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 – will be asked to provide financial contributions. These organisations include third sector organisations, secure care institutions, religious organisations, independent and grant-aided special schools, and local authorities. The Scottish Government will cover all administration costs and the costs of redress payments to survivors to the extent that these are not offset by financial contributions from third parties.

The aim is that financial contributions should be fair and meaningful within the context of the particular organisation in question: fair, because they will be assessed against the available evidence and the actual number of applications settled where the organisations are named, and meaningful, because they will represent a tangible acknowledgement of the harms of the past and contributing organisations will agree not to contest applications that have been settled by the redress body. Contributions will also be meaningful because by participating in the scheme, an organisation supports a survivor's access to a trauma informed and non-adversarial source of redress. Where Scottish Ministers agree that an organisation has made a fair and meaningful contribution, it will be added to a publicly-available 'contributor list'.

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<sup>4</sup> See for example – 2018 Scottish Child Abuse Inquiry Case Study no. 1: The provision of residential care for children in Scotland by the Daughters of Charity of St Vincent de Paul between 1917 and 1981, Evidential Hearings: 28 November 2017 to 30 January 2018.

<sup>5</sup> The National Confidential Forum, The first 18 months: what we have heard so far, December 2016, page 10: <https://www.nationalconfidentialforum.org.uk/media/46235/NCF1976-Report-Complete.pdf>.

<sup>6</sup> A 'relevant care setting' means 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, or a place in which a child resided while being boarded out or fostered. The full definition is provided in the Bill. Please see the Policy Memorandum and Explanatory Notes for more information.

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 on the contributor list. This approach to seeking financial contributions is grounded in the principles that the scheme must be developed in a way that is fair, open, transparent, and managed with integrity.

The redress scheme will contribute to the Scottish Government's objective of creating lasting change in the care system, as detailed in *The Government's Programme for Scotland 2019-20*. It is part of a wider raft of measures which aim to address historical child abuse in Scotland, as described in Section 1.1.

In England and Wales, the Independent Inquiry into Child Sexual Abuse (IICSA) was established in 2015 to consider the extent to which state and non-state institutions failed to protect children from sexual abuse and exploitation. The Inquiry has undertaken a focused investigation into accountability and reparations, concluding, amongst other matters, that further investigation is required into the potential for a redress scheme to offer accountability and reparation to victims and survivors of child sexual abuse.<sup>7</sup>

The UK Government has established a payment scheme for former British child migrants, people who were separated from their communities and sent abroad from England, Scotland, Wales, Northern Ireland, the Channel Islands or the Isle of Man as children as part of the UK Government's participation in Child Migration Programmes. Localised redress schemes for people abused in care as children are in operation in the London Borough of Lambeth and in Jersey. Most recently, in March 2020, the Historical Institutional Abuse Redress Board was established to receive and process applications for compensation in relation to historical child abuse in residential institutions in Northern Ireland.

Ireland ran a redress scheme for people who were abused as children while resident in industrial schools, reformatories and other institutions subject to state regulation or inspection between 2002 and 2011. Other European countries have delivered their own redress schemes including, Austria, Belgium, Germany, Iceland, the Netherlands, Norway, Sweden, and Switzerland<sup>8</sup>.

The European Union (EU) does not have any specific powers to legislate on the rights of the child, although it does issue relevant Directives, legal acts of the EU which require member states to achieve a particular result without dictating the means of achieving that result. These include the 2011 'Directive on combating the sexual abuse and sexual exploitation of children and child pornography', which sets minimum levels for criminal penalties, extends national jurisdiction to cover abuse by EU nationals abroad, and includes measures to prevent additional trauma from participating in criminal proceedings. The UK adopted this Directive in 2013. There is

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<sup>7</sup> 2019 IICSA Accountability and Reparations Investigation Report at page 104; <https://www.iicsa.org.uk/key-documents/14231/view/accountability-reparations-report-19-sep-2019.pdf>

<sup>8</sup> Daly K. (2017) Redress for Historical Institutional Abuse of Children. In: Deckert A., Sarre R. (eds) The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice. Palgrave Macmillan, Cham.

no provision for collective redress for victims of crime of any kind at European level, although the EU is exploring the possibility of introducing a European class action, similar to the US class action.

The UK is party to the European Convention on Human Rights (ECHR) which prohibits 'inhuman or degrading treatment or punishment' and provides for the right for an effective remedy before national authorities where this right has been violated. In relation to the ECHR, a number of areas that will be covered by the Bill may potentially engage relevant ECHR obligations such as Article 6 (right to a fair trial), Article 8 (protection of private life), Article 1 Protocol 1 (right to property) and Article 14 (prohibition of discrimination).

### **1.3 Rationale for Government intervention**

In developing a financial redress scheme, the Scottish Government aims to fulfil its moral obligation to survivors and address shortcomings in survivors' access to justice via the legal system. It also looks to further positive outcomes for Scotland as a whole, as outlined in the National Performance Framework.

#### **1.3.1 Moral and legal considerations**

Scotland has a moral imperative to address the wrongs of the past, while acknowledging that nothing can ever make up for the suffering that survivors have endured. Nonetheless, survivors have shared that redress is an important element of justice as it provides some degree of recognition and acknowledgement.

Many, but not all, survivors of historical abuse have the option of seeking justice through the civil courts. However, while doing so may be the preferred or best option for some survivors, for many this route has a number of barriers including the potentially distressing nature of the adversarial process, difficulties securing the level of evidence required for a court action given the length of time since the abuse took place, potential dissatisfaction with the outcome (with or without a financial settlement), and not necessarily receiving acknowledgement or an apology. A financial redress scheme provides an alternative to the current civil court process, one designed to be non-adversarial, faster, and sensitive to survivors' needs.

The Limitation (Childhood Abuse) (Scotland) Act (2017) ("the 2017 Act") provided the option of civil court action for significantly more survivors by removing the time bar on personal injury claims for damages in respect of childhood abuse (previously a claim had generally to be made within three years of the injury in respect of which the claim was laid or the survivor's 16th birthday). However, those who experienced abuse before 1964 remain affected by the law on prescription. Prescription has the effect of completely extinguishing an obligation to make reparation for personal injuries (and associated rights) after an uninterrupted period of 20 years had elapsed. The 2017 Act makes no change to that law and does not revive any obligations which had already been extinguished previously by operation of the law. This means that anyone whose abuse took place before 26 September 1964 continues to be unable to pursue a claim in court for that abuse. For those survivors,

a financial redress scheme may be the only way in which they can have their harm publically acknowledged and recognised.

As the work of SCAI progresses, the detailed nature of failings on the part of public and private institutions will become clearer but at this point it is evident that children who were in various types of care settings were often extremely vulnerable. Family circumstances including death, parental mental or physical health, poverty and other issues influenced a child being placed in care. The sense of isolation for children was often compounded by the physical settings where care was provided and contact with available parents or siblings at times not being supported or facilitated.

These children's additional emotional and developmental needs, including for affection and comfort, should have been recognised. Instead for many, the most basic physical needs of safety, security, food, and clothing were not met. The introduction of a financial redress scheme can go some way to recognising the times when those entrusted to look after our vulnerable children failed them and also further demonstrate a firm commitment to ensure mistakes of the past are not repeated.

The scheme is also not about apologising for care which was provided differently to care provided today. It is about acknowledging that children were abused and this resulted in huge suffering. Standards and expectations for the provision and oversight of care changed throughout the period covered by the scheme and have continued to evolve. Redress is not about condemning those who provided care in the past to the highest standards in line with legislation and policy of the time, doing their best to support and nurture children. Redress is about facing up to abuse suffered by children, about listening to them and acknowledging that what happened to them, tragically for some as a systematic part of their childhood, was abusive then, would be abusive now and should have been prevented.

Financial redress is about recognition and acknowledgement. While the financial payment is important, so too is how applicants are treated through the process and the broader support which will be offered to them. A statutory scheme allows for each of these elements to be considered, offers an alternative option for survivors and demonstrates public, united recognition and acknowledgment as a Government, a nation and a society.

The historical nature of the abuse in care settings means that many survivors are approaching the end of their life either through ill-health or age. Whilst the Inquiry is continuing to progress its important work, the provision of appropriate forms of redress for survivors does not need to wait until the Inquiry has concluded. It is clear that survivors have been failed and there is an imperative to act.

### **1.3.2 Scotland's National Performance Framework**

The Scottish Government's ambition for children and young people is that they grow up loved, safe and respected so that they realise their full potential. We know that for many of Scotland's most vulnerable children who were in care in the past the reality was utterly different. Many children were failed by the institutions and systems entrusted to look after them, often leaving them with lifelong consequences.

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Scotland is a country which fairly and compassionately supports those who have been harmed, and fully respects their rights to justice. Survivors of historical abuse in care have campaigned with dedication and perseverance for access to justice, improved accountability, and redress. Importantly, they want, and deserve, to be listened to, heard and believed. For too long, survivors of abuse were not acknowledged and the truth of their abuse neither accepted nor acted upon, for some compounding the effects of their childhood. The wrongs of the past must be addressed, financial redress is an important part of doing that.

This redress scheme is ambitious in its outcomes for survivors and ambitious in its vision for Scotland; as a nation that thoughtfully and compassionately responds to difficult truths and profound injustices and affirms the commitment to getting it right for every child, including those who are vulnerable, in the future.

Intervening to ensure survivors are able to access redress for the harm they have suffered helps to further the following outcomes in the National Performance Framework:

- People grow up loved, safe and respected so that they realise their full potential.
- People respect, protect and fulfil human rights and live free from discrimination.
- People live in communities that are inclusive, empowered, resilient and safe.

## 2. Consultation

### 2.1 Within Government

In preparing the Bill, the Redress, Relations, and Response Division, which sits within the Scottish Government's Children and Families Directorate, engaged with the following internal stakeholders:

#### *Scottish Government*

- Third Sector Unit, Directorate for Local Government and Communities
- Survivor Support Team, Directorate for Community Health and Social Care
- Civil Law and Legal System Division, Directorate for Justice
- Looked After Children Unit, Directorate for Children and Families
- Internal Audit – Director General Education, Communities, and Justice
- Local Government Policy and Relationship Unit, Directorate for Local Government and Communities
- Finance Business Partner – Education, Directorate for Financial Management and Health, Directorate for Financial Management
- Improvement, Attainment and Wellbeing Division, Directorate for Learning
- Children and Families Analysis Team, Education Analytical Services, Directorate for Learning
- Social Security Policy Team, Social Security Directorate
- Youth Justice and Children's Hearings Unit, Directorate for Children and Families
- Adult Social Care Policy Team, Directorate for Community Health and Social Care
- Directorate for Safer Communities
- Scottish Procurement and Property Directorate
- Scottish Government Legal Directorate (SGLD)
- National Records of Scotland (NRS)

#### *UK Government*

- Government Actuary's Department (GAD)
- Criminal Injuries Compensation Authority (CICA)
- Department for Work and Pensions (DWP)
- HM Revenue and Customs (HMRC)
- Department for Health and Social Care (DHSC)

#### *Northern Ireland Executive*

- Historical Institutional Abuse Implementation Branch, Strategic Policy, Equality and Good Relations Directorate, Executive Office
- Social Security Policy, Legislation and Decision Making Services, Department for Communities

All of the above stakeholders have been engaged from the early stages of formulation of the Bill. Colleagues have provided advice on both current and forthcoming policies and initiatives within their areas of expertise.

Officials working on development of the redress scheme have liaised with relevant policy teams as is necessary to consider eligibility, develop the redress scheme's



approach to non-financial redress, and ensure alignment with existing support services. Relevant policy teams include Survivor Support, Third Sector Unit, and Improvement, Attainment and Wellbeing.

Discussions are ongoing with DWP, HMRC, DHSC, the Northern Ireland Executive, and Scottish Government Social Security Policy to devise appropriate information sharing agreements to underpin application processing and make sure that applicants receiving means-tested social security benefits or other forms of public sector support will not have that support affected by their redress payment.

GAD, Scottish Government Finance, Children and Families Analysis, and Internal Audit have assisted by refining estimates of the number of people likely to be eligible to apply for the scheme, and in developing consideration of financial contributions to the scheme and the resultant financial implications both for the overall scheme and in relation to individual organisations.

In-depth discussions with the Third Sector Unit, the Procurement and Property Directorate, the Civil Law and Legal System Division, and the Scottish Government Legal Directorate enabled Provider Contributions Team colleagues to assess the viability of a range of potential provider contributions models and arrive at a practicable proposal to present to care providers.

Scottish Government Legal Directorate have had a key role throughout development of the Bill in ensuring policy is lawful and anticipates upcoming legislative changes.

## **2.2 Public Consultation**

A public consultation on the detailed design of a statutory financial redress scheme in Scotland, scheme administration issues, and high level views on financial redress as part of a package of wider reparations for survivors, was held between 2 September and 25 November 2019. 280 responses were received overall. Of these, roughly four out of five (82%) were from individuals, while the remainder (18%) were from organisations. Of the individuals who responded, around nine out of ten (91%) identified as a survivor of historical abuse in care. 11 responses were received from current or previous care providers; 13 from local authorities and public sector partnerships; 5 from other public sector bodies; 9 from the third sector, including survivor groups; 9 from legal sector organisations; and 4 from other organisational respondents.

A robust awareness raising and communications strategy was implemented with relevant organisations to help maximise survivor participation. An information phone line was set up to answer questions on the consultation context and process. Participants could take part in the consultation in a range of ways: by filling in the respondent form online; by returning a paper copy of the respondent form by post; or by providing free narrative written or email responses. In further efforts to reduce barriers, the Scottish Government facilitated seven consultation information sessions for survivors and relevant organisations working with survivors.

The responses have been published, where the Scottish Government has

permission to do so, at: [https://consult.gov.scot/redress-survivor-relations/financial-redress-historical-child-abuse-in-care/consultation/published\\_select\\_respondent](https://consult.gov.scot/redress-survivor-relations/financial-redress-historical-child-abuse-in-care/consultation/published_select_respondent).

In addition the Scottish Government has published an independent analysis report which is available at: <https://www.gov.scot/publications/financial-redress-historical-child-abuse-care-analysis-consultation-responses/>.

## 2.3 Business

The Scottish Government has contacted a large number of organisations which fall within the eligibility criteria for the redress scheme (as detailed in the Bill), including many which have been selected for investigation by the SCAI.<sup>9</sup> These organisations have been approached to initiate a programme of engagement concerning the statutory redress scheme and the potential to provide financial contributions. The following table details the organisations with which officials have held meetings since September 2019:

Organisation Type	Organisation Name
Grant Aided Special Schools	The Donaldson Trust
	Harmeny Education Trust
	Royal Blind
Third Sector Charities	The Aberlour Child Care Trust
	Balnacraig School
	Barnardo's
	Dean & Cauvin Young People's Trust
	Quarriers
	Sailors' Society
Secure Care	The Salvation Army
	Rossie Young People's Trust
	Our Lady of Charity of the Good Shepherd
	Kibble Safe Centre
Religious Organisations	Kenmure St Mary's Boys' School
	(Congregation of the) Poor Servants of the Mother of God
	The English Benedictine Congregation

<sup>9</sup> The list of organisations under investigation by the SCAI is available at <https://www.childabuseinquiry.scot/evidence/investigations/>.

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	CrossReach
	Daughters of Charity of St Vincent de Paul
	(Congregation of) Our Lady of Charity of the Good Shepherd
	The Salesians of Don Bosco UK
	Sisters of Nazareth

The Scottish Government has also held meetings with the following interested parties:

- Convention of Scottish Local Authorities (COSLA)
- Association of British Insurers (ABI)
- The Bishops' Conference of Scotland
- Conference of Religious in Scotland

Other extant organisations contacted by Scottish Government have chosen not to respond to meeting invitations at this time.

In the case of relevant organisations which no longer exist, Scottish Government intends to contact the administrator, successor organisation, or umbrella organisation, if one exists, in due course.

Scottish Government held an information event attended by 31 insurance industry representatives on 31 January 2020.

All meetings with organisations, during the consultation process and thereafter, have helped to inform the policy of the Bill.

### **3. Options Analysis**

The Bill covers a number of different areas in order to meet the policy objectives. The Policy Memorandum for the Bill provides further information on the policies and alternatives considered.

#### **3.1 Sectors and groups affected**

The following sectors and groups may be affected by this Bill:

- Survivors of historical abuse in care;
- Former and current care providers, which includes third sector organisations, secure care institutions, religious organisations, and independent and grant-aided special schools under the circumstances detailed in the eligibility criteria outlined in the Bill;
- Local authorities;
- Survivor support organisations (national and local providers of specialist counselling, therapeutic, or advice services);
- National Health Service (NHS) Boards;
- Police Scotland;
- National Records of Scotland (NRS);
- Scottish Courts and Tribunals Service (SCTS);
- Crown Office and Procurator Fiscal Service (COPFS);
- Criminal Injuries Compensation Authority (CICA);
- Scottish Prison Service;
- Legal sector; and
- Insurance industry.

#### **3.2 Options: Benefits and Costs**

This section describes the benefits and costs (disbenefits) of the different options considered by the Scottish Government in deciding to take forward the Bill.

##### **3.2.1 Option 1: Do nothing**

There are no changes to the law and Scottish Government does not launch a statutory financial redress scheme.

This option would have no cost implications or operational impact on business, the voluntary sector, public sector bodies, or the Scottish Government as it would be maintaining the status quo. Equally, there would be no benefits to any party in comparison with the current situation.

However this would mean that survivors would continue to have limited access to redress as discussed in Section 1.3.1 and Scotland would not move forward in its acknowledgment and recognition of the harms of the past or adequately respond to these profound injustices. Therefore, this is not considered a viable option.

### 3.2.2. Option 2: Create a statutory financial redress scheme

The Scottish Government introduces legislation to create a statutory financial redress scheme. The key aspects of scheme delivery from a business and regulatory perspective include:

- The Scottish Government seeking financial contributions from organisations which were responsible for the care of children at the time of the abuse.
- Scottish Government delivery or procurement of services for applicants, such as support to access records when applying to the scheme, and therapeutic support as an element of non-financial redress.
- Opportunity for applicants to receive independent legal advice on their application, with legal fees paid for by the Scottish Government.
- Set up of a new non-departmental public body (NDPB), Redress Scotland, to make decisions on redress applications and reviews, and the establishment of a new Scottish Government Division to administer the scheme.
- Requests made by the Scottish Government for records, documents, or other evidence from individuals and organisations such as care providers, local authorities, NHS Boards, Police Scotland, NRS, SCTS, COPFS, Scottish Prison Service, and CICA.
- Potential for increased demand upon survivor support organisations, trauma/counselling provision and NHS mental health services.
- Potential for increased volume of intelligence and investigations to be pursued by Police Scotland.

The high-level benefits, from a business and regulatory perspective, of establishing the scheme would include:

- Provide an alternative route to justice for survivors who are not able to, or who choose not to, pursue legal action due to a range of potential barriers.
- Creation of approximately 50 public sector jobs and an unknown number of potential jobs in the third sector and the legal sector.
- Potential financial boost to businesses in the geographical vicinity of the Scottish Government Division undertaking scheme administration and Redress Scotland (locations to be confirmed).
- Opportunity for the Scottish Government, care providers and others to acknowledge the harm that occurred at their institutions as part of a collective expression of recognition.
- Opportunity for the Scottish Government to build on progress to date and move towards a process of reconciliation with survivors of abuse in care.

There remains considerable uncertainties, but the overall cost of scheme, including payments to survivors and all implementation and delivery costs, is estimated at between £300m and £600m. The Scottish Government will cover all administration costs and the costs of redress payments to survivors to the extent that these are not offset by financial contributions from third parties.

Estimated costs to other bodies are as follows:

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- Cost to organisations responsible for the care of children at the time of abuse is dependent on voluntary financial contributions made.<sup>10</sup>
- Cost to local government is estimated to be £10 m to £17 m (not including potential contribution amount).
- Cost to survivor support organisations is unknown at this time. Financial implications will become clearer when the scheme is live and delivery of the scheme is developed further.
- Cost to NHS Boards of £1.5 m.
- Cost to Police Scotland estimated at £2.2 m.
- Cost to NRS of £0.09 m.
- Cost to SCTS at £0.06 m.
- Cost to COPFS estimated at £0.5 m.

More detail is provided in Section 12. The full costs associated with the Bill are detailed in the Financial Memorandum.

High-level non-financial costs include:

- Increase in workload for public services which come in to contact with the redress scheme (e.g. to fulfil subject access requests to provide supporting evidence for redress applications).
- Increased demand on survivor support services and NHS mental health services.

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<sup>10</sup> Survivors who accept payments through the redress scheme will waive their right to raise litigation against participating organisations. Therefore, by making financial contributions to the scheme, organisations should be able to mitigate the potential impact of legal action relating to historical abuse and crystallise financial risks arising from historical child abuse with respect to applicants to the redress scheme. This means that the cost of any financial contributions made by an organisation to the redress scheme should be offset against unknown costs organisations would incur in the courts if the redress scheme were not to be established.

#### **4. Scottish Firms Impact Test**

##### **4.1 Discussions with former and current care providers and local authorities**

The Scottish Government has held meetings with a wide range of Scottish and UK-wide organisations, including current and former care providers, to discuss potential proposals for the statutory redress scheme and their interests as prospective contributors.

Many potential contributors were largely supportive in principle of the intention to create a redress scheme and understood the moral and practical case for doing so. However, there are challenges to making contributions, in principle and in respect of practical and financial concerns.

##### *Financial impact*

Potential contributors to the scheme represent a wide range of organisations. This includes those which continue to provide care and other services to vulnerable children or others; those which no longer have a connection to the provision of care but which hold legacy responsibility for the past; and other organisations which hold residual responsibility for organisations which no longer exist in the form they did during the period covered by the redress scheme.

The range of organisations includes large and small scale bodies, with varying financial positions. Some potential contributors emphasised the challenge they faced in providing a financial contribution to the scheme at all given their ongoing financial position and potential need to prioritise and maintain current services. Some said that they may not have sufficient assets or reserves to draw upon, particularly taking into account outstanding liabilities including pension debt.

Some potential contributors said that they may be reliant on assistance from their insurance providers in order to make a contribution to the scheme. Concerns were expressed that such insurance assistance may not be forthcoming given that the redress scheme is not dependent on findings of liability (by contrast to litigation), and that insurance provision may not automatically consider contributions to the redress scheme to be an insurable loss (again as litigation may be under some policies), even if the overall costs would be lower in doing so.

The financial impact of civil court claims against contributors was also discussed, including the potentially high costs associated, with the volume of such claims. It was acknowledged by some potential contributors that the making of financial contribution to the redress scheme, thereby securing a waiver from civil action in respect of survivors who accept redress payments, may reduce costs and claims associated with future litigation.

Some potential contributors also suggested that a major risk of the scheme is the potential for an unexpectedly large number of applications. They felt that the financial impact on current service providers was likely to be underestimated. GAD has been carrying out analysis to help refine our estimates of the potential number of applications the scheme may receive. However, significant uncertainties remain

about how many applications the scheme may receive due to the nature of childhood abuse and the lack of data available on prevalence of abuse in specific care settings.

#### *Reputational damage*

Some organisations raised the concern that making a financial contribution might be seen as an acceptance of responsibility for historical abuse, negatively influencing those considering whether to make donations to the organisation, or whether to commission services. This could also result in a loss of faith in the organisation among current service users and their families even though current standards of care might be high (in turn, affecting the organisation's ability to fundraise).

Some organisations expressed concern at the level of contribution being perceived as too low and representing an evasion of responsibility for the past. The risk of the contribution being perceived as being too high was also raised, as not making financial sense in the circumstances of the organisation, and that relying on the traditional remedy of litigation, and meeting the costs thereof, would be preferable.

However, some potential contributors accepted the positive reputational benefit of participating in the redress scheme, recognising that acknowledging the harms of the past and contributing to the provision of redress to survivors could bring reputational benefit, in addition to being the right thing to do.

#### *Local economic impact*

Depending on the size of the care provider, it was noted that financial contributions could result in staff redundancies, thus affecting local employment. In addition, care providers are purchasers of local services (e.g. food, furnishings and other services) and therefore local businesses might also be affected by a reduction in a care provider's funding.

#### *Impact on other services*

If providers choose to make financial contributions towards a redress scheme, this could result in a reduction in the amount of budget available to develop and deliver any other services they provide.

#### *Workforce impacts*

Providers raised the potential for the redress scheme to have an impact on their workforce. Firstly, possible increases in workload for social workers and other local authority employees to support survivors to apply to the redress scheme, as survivors may need assistance with tracing and providing evidence, as well as writing application forms. Social workers might also need to arrange other support services for applicants. Secondly, there was the potential for staff redundancies due to budget cuts. Thirdly, there was a risk of additional negative psychological impacts on staff involved in supporting redress applications (for example, vicarious trauma and burnout), caused by being exposed to stories of abuse and neglect of children in care.



## 4.2 Development of proposals

Providers suggested a range of measures to assist in making contributions to the redress scheme:

- Taking into account current financial circumstances and provision of services by potential contributors.
- Ring-fencing vital funding which supports other areas of need.
- Facilitating engagement with the insurance industry in relation to the redress scheme.
- Revising legal restrictions on the proper use of charitable funds to make it possible for third sector organisations to contribute without losing their charitable status.
- Issuing a formal public statement that the payments made by organisations relate to historical issues that they accept and have learned from.
- Highlighting more generally the systems and procedures which currently exist to monitor service quality and standards.

All proposals have been given careful consideration in the process of formulating policy. Preliminary negotiations regarding financial contributions are currently being undertaken with a range of potential contributors. It would not be appropriate to provide details at this time.

The Scottish Government will take into account the views of care providers and other potential contributors when formulating the communication strategy for the statutory scheme.

## 5. Competition Assessment

The following questions have been considered in the drafting of this section:

- Will the measure directly or indirectly limit the number or range of suppliers?
- Will the measure limit the ability of suppliers to compete?
- Will the measure limit suppliers' incentives to compete vigorously?
- Will the measure limit the choices and information available to consumers?

For the purposes of this section, a 'consumer' is anyone who buys goods or digital content, or uses goods and services, either in the private or public sector, now or in the future.

### 5.1 Care providers

Current and former care providers will be asked to make voluntary financial contributions to the statutory redress scheme. It is also expected that they will provide access to records and information to survivors and the Scottish Government Division to support applications.<sup>11</sup>

Some care providers have highlighted that making a contribution could impact on current service provision or organisations' overall financial viability. Whether contributing to redress might result in reputational damage, making it more difficult to raise future funds was also discussed. These scenarios could run the risk of distorting the market by reducing the number or range of care providers or reducing their ability to compete for contracts.

However, organisations which do not participate in the redress scheme are still subject to significant financial risks arising from historical child abuse as a result of litigation. It may also be the case that, contrary to some providers' concerns, participating in the scheme could have reputational benefits for certain providers – especially those which are well-known and are subject to investigation by the SCAI.

Furthermore, it is intended that by making fair and meaningful contributions to the redress scheme, organisations will be able to secure a waiver to be signed by survivors accepting redress payments, thereby addressing their potential exposure to litigation in respect of historical abuse in respect of those survivors. In this way, the redress scheme might actually reduce financial risk for some providers, which could protect against major changes to the market.<sup>12</sup>

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<sup>11</sup> The Bill gives Scottish Ministers a power to compel information if necessary.

<sup>12</sup> While a court determination in respect of historical abuse could potentially have a near-immediate and cataclysmic effect on the finances of an organisation, such as services would no longer be deliverable, it may be possible to structure the making of a contribution to the redress scheme in a way which would not in itself jeopardise the financial viability of the contributing organisation. Doing so would maintain the level of contribution appropriate to the historical legacy of the organisation, while seeking to protect current service users. The risks of an organisation not contributing to the scheme, can therefore be argued as being more significant for consumers than those associated with an organisation making a contribution.

The Scottish Government is also seeking to mitigate the risk of undesirable changes to the market via the following measures:

- Designing contribution models to accommodate the diverse nature of providers and the nature of their responsibility for historical abuse.<sup>13</sup>
- Exploring options for fair and meaningful contributions to be made in a manner which would not have a disproportionate effect on the organisation's delivery of services or long-term financial stability, for example, through instalments.
- Making changes to the law concerning proper use of charitable funds via the Bill to ensure that charities are able to make a contribution.<sup>14</sup>
- Encouraging insurers to consider the making of contributions to the redress scheme as equivalent to meeting the costs of claims raised against the organisation and to support organisations to make contributions.

## 5.2 Legal sector

Survivors will be strongly encouraged to obtain independent legal advice before signing the waiver required under the redress scheme. Some survivors may also choose to obtain legal advice and assistance at other points of the application or review process. The Bill places a duty on the Scottish Ministers to pay legal fees reasonably incurred by applicants to the redress scheme. This includes applicants who are survivors of abuse and next of kin applicants.

Legal fees reasonably incurred may include advice on eligibility, types of redress payments, the application process and matters in connection with waiver and reviews. It is recognised that legal fees could be reasonably incurred in relation to applications that are ultimately unsuccessful or withdrawn. They do not include any fees incurred in connection with legal advice and assistance on whether to pursue litigation as an alternative to making an application for a redress payment.

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<sup>13</sup> It is envisaged that there will be at least two different types of contract depending on the data available to inform financial modelling. Some organisations will make an 'upfront' contribution, with a review mechanism proposed as part of the agreement in order to reflect volumes and levels of redress payments determined during the lifetime of the scheme. For organisations where there is insufficient data to apply financial modelling, the approach to contributions will centre on the payment of the accumulated costs of all determined applications where the organisation is named. In both scenarios the actual amounts paid out to applicants to the redress scheme will play a key role in the assessment of contributions, but the total amount provided will be considered as an overall contribution to the scheme – for the benefit of all survivors of abuse who receive redress payments.

<sup>14</sup> Many current and former care providers are legally classed as charities. Under current legislation this means that an organisation's funds can only be used to further its 'charitable purposes', as laid out in its constitution. It also means that a high proportion of its resources could be tied up in 'restricted funds' which can only be used for particular purposes. These issues may present a barrier to contributions being made by charities in some cases. The Bill will make a provision to clarify that contributing to redress is not contrary to any organisation's charitable purposes. To address the issue of restricted funds we have instructed a regulation making power, so that Scottish Ministers may by regulations make provision in relation to enabling a charity to use restricted funds in order to make a contribution to the statutory redress scheme. No charity will be compelled to make a contribution and the same applies to contributions from restricted funds; participation will be a matter for the charity. Therefore, there are no competition concerns linked to this particular set of provisions.

Fee requests must be submitted directly by the legal representative to the Scottish Government Division carrying out the administrative and processing functions of the redress scheme. Requests will then be passed to Redress Scotland for assessment and decision.

No legal fees will be paid where the request for legal fees has been determined by Redress Scotland to be without merit. This test relates to the request for legal fees and not an assessment on the application for redress (although an application submitted that was from the outset obviously ineligible may well indicate that the legal fees were not reasonably incurred).

Any legal firm will have the opportunity to offer advice to applicants and request fees from Scottish Government so there are no competition concerns.

### **5.3 Insurance industry**

Where care providers have appropriate insurance cover in place and wish to use their cover to contribute to the redress scheme, the Scottish Government expects insurers to engage appropriately. This presumption of engagement is on the basis that the redress scheme is a legitimate and robust alternative to court proceedings, which will extinguish liabilities which would otherwise be pursued through civil litigation.

The Scottish Government does not anticipate that the insurance industry is sufficiently exposed for the redress scheme to have any market-level effect so there are no competition concerns in this instance.

### **5.4 Survivor support organisations**

National and local providers of counselling, therapeutic and support services for survivors and community based advice centres may experience increased demand following the launch of the redress scheme. The Scottish Government is actively engaging with relevant organisations to understand current capacity in the system and will work to address any anticipated problems. It is not expected that there will be any implications for competition. The implications of increased demand for support services concerns survivors' wellbeing and these concerns are discussed in Section 6.4.

### **5.5 Local authorities**

The redress scheme may have a significant impact on the workload of social work departments (e.g. subject access requests from applicants to the scheme or survivors of abuse seeking support or assistance from local authority services) and may result in the need to reprioritise resources. The level of any financial contribution made to the scheme is also likely to have an impact on local authority budgets, depending on the level of the contribution, the financial position of the particular local authority in question, and the effect of making such a contribution on legal costs associated with claims raised against local authorities in respect of historic abuse. It

is not anticipated that there will be any direct implications for competition. However, Scottish Government will monitor indirect impacts via its ongoing partnership work with COSLA.

## **5.6 Justice System**

The redress scheme may have an impact on Police Scotland, the Scottish Courts and Tribunals Service (SCTS), the Crown Office and Procurator Fiscal Service (COPFS), and the Scottish Prisons Service as a result of requests for access to records to support applications and, potentially, increases in volumes of reported crimes. It is not anticipated that there will be implications for competition.

## **5.7 National Health Service (NHS) Boards**

The redress scheme may have an impact on NHS Boards as a result of increased requests for access to records to support applications and increases in demand on mental health services. It is not anticipated that there will be implications for competition.

## **6. Consumer Assessment**

The following questions have been considered in the drafting of this section:

- Does the policy affect the quality, availability or price of any goods or services in a market?
- Does the policy affect the essential services market, such as energy or water?
- Does the policy involve storage or increased use of consumer data?
- Does the policy increase opportunities for unscrupulous suppliers to target consumers?
- Does the policy impact the information available to consumers on either goods or services, or their rights in relation to these?
- Does the policy affect routes for consumers to seek advice or raise complaints on consumer issues?

For the purposes of this section, a 'consumer' is anyone who buys goods or digital content, or uses good and services, either in the private or public sector, now or in the future.

### **6.1 Redress applicants' access to legal advice**

Survivors will be strongly encouraged to obtain independent legal advice before signing the waiver required under the redress scheme. Some survivors may also choose to obtain legal advice and assistance at other points of the application or review process. The Bill places a duty on the Scottish Ministers to pay legal fees reasonably incurred by applicants to the redress scheme. This includes applicants who are survivors of abuse and next of kin applicants.

Legal fees reasonably incurred may include advice on eligibility, types of redress payments, the application process and matters in connection with waiver and reviews. They do not include any fees incurred in connection with legal advice and assistance on whether to pursue litigation as an alternative to making an application for a redress payment. It is recognised that legal fees could be reasonably incurred in relation to applications that are ultimately unsuccessful or withdrawn.

Fee requests must be submitted directly by the legal representative to the Scottish Government Division carrying out the administrative and processing functions of the redress scheme. Requests will then be passed to Redress Scotland for assessment and decision.

No legal fees will be paid where the request for legal fees has been determined by Redress Scotland to be without merit. This test relates to the request for legal fees and not an assessment on the application for redress (although an application submitted that was from the outset obviously ineligible may well indicate that the legal fees were not reasonably incurred).

Applicants to the redress scheme will have the opportunity to approach any legal firm of their choosing which should incentivise vigorous competition between firms and ensure a good service for applicants.

The Scottish Government will offer clear guidance to survivors in relation to the types of advice the redress scheme will fund so as to prevent circumstances where an applicant finds themselves liable for costs incurred over and above those paid for by the Scottish Government.

## **6.2 Redress applicants' legal rights**

The Bill provides that all payments made under the redress scheme (either fixed rate, interim or individually-assessed) will be conditional upon the applicant signing a waiver to relinquish their rights to continue or to raise a future legal action in respect of the same matters which have rendered them eligible for redress payments. This would cover potential rights of action against the Scottish Government and any other organisation which has made a fair and meaningful financial contribution to the redress scheme and has therefore been added to the contributor list at such time as the applicant signs the waiver.

Applicants will be entitled to independent legal advice funded by the Scottish Government before they take the decision to sign the waiver. If the applicant ultimately decides that they would prefer to pursue a case within the civil courts, they will be under no obligation to accept a redress payment and sign the waiver. In this regard, the redress scheme is an alternative to, and not a replacement for, existing avenues to seek redress for abuse.

## **6.3 Collecting of redress applicants' personal data for the purpose of processing redress applications**

When individuals apply to the redress scheme, they may need to provide personal data such as:

- Name
- Former names
- Current Address
- Postcode
- Date of birth
- National insurance number
- Contact telephone number
- Email address
- Proof of age (e.g. birth certificate, driver's license, passport)
- Proof of identity (e.g. passport, driver's license, government or medical correspondence)
- Proof of signature
- Evidence to support changes of name if different from when in care (e.g. marriage or divorce certificate)
- Details of previous payments relating to the abuse mentioned in the application, e.g. CICA or a previous court settlement
- Details of any serious criminal convictions.
- Documentary evidence of being in care and date/location of being in care
- Statement of abuse suffered

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- Supplementary evidence of abuse suffered (only for individually assessed applications and next of kin applications)
- Bank account details

If the applicant is a next of kin, someone with power of attorney for the applicant, a guardian, or an appointee we will require documentary evidence to support this status.

For a next of kin application, we may also require the following:

- Proof of the death of the deceased survivor
- Proof of relationship with the deceased survivor

Nominated beneficiaries may also need to provide evidence of:

- Proof of the death of the deceased survivor
- Evidence of nominated beneficiary's identity

The Bill gives Redress Scotland the power to prioritise applications, taking into consideration the health and age of the applicant.

Data submitted through the application form is required to allow the application to be assessed by Redress Scotland, which will then be able to make a decision on the appropriate redress payment for the applicant. Scottish Ministers will collect and store personal data via an application form – the development of which will be addressed in an operational Data Protection Impact Assessment during the scheme's implementation phase. A privacy notice will be included in the application form to ensure applicants understand how their data will be processed, shared and stored. Further information on the Data Protection implications of the Bill can be found in the Legislative Data Protection Impact Assessment.

### **6.4 Survivors' access to survivor support services**

Despite efforts to make the application process as supportive as possible, the nature of the redress scheme may present emotional and practical demands for many applicants. Therefore, national and local providers of survivor support, therapeutic services (psychological and counselling) and advice centres may experience increased demand following the launch of the scheme. It is challenging to estimate the level and pattern of need. Some survivors may require short term counselling or focused practical support, others access to longer term or more specialist complex therapies. Increased demand for services may influence waiting times and the range or type of services available.

Access to therapeutic services is key to ensuring applicants have support to address the impact of childhood abuse and to help manage the emotional impact of the application process. The Scottish Government is actively engaging with relevant organisations to understand current capacity in the system and work to address any anticipated problems. The ongoing impact of the redress scheme on support



organisations like these will be monitored as part of the Scottish Government's longstanding partnership work with the sector.<sup>15</sup>

### **6.5 Survivors' access to NHS mental health services**

The redress scheme may result in an increased number of survivors seeking support from NHS mental health services, either community based or specialist. It is not possible to produce estimates for the number of additional patients. Officials have made contact with colleagues working in health policy to explore the overall impacts of the scheme on NHS Boards.

### **6.6 People who use services run by organisations responsible for historical child abuse**

The Scottish Government recognises the need to consider the appropriate approach to seeking financial contributions to the redress scheme in the context of potential contributors' varying circumstances. Equally, those contributing will need to consider a full range of financial and operational factors, such as existing sources of income and assets, projected costs such as service delivery, potential civil litigation cases, and payment terms. Local authorities will need to consider their statutory requirements to provide a broad range of services for children and adults.

A number of organisations from which contributions are sought continue to provide much needed services. In an effort to make the delivery of the contribution fair, meaningful, and manageable for the scheme and the organisation, building on an assessment of the appropriate contribution focused on the organisation's legacy in respect of historical abuse, options will be considered for delivery of the contribution to be structured in a way which seeks to protect the provision of services. The fair and meaningful contribution must fundamentally recognise the past, seeking to make delivery of that contribution manageable allows the future to be considered.

The provision of fair and meaningful financial contributions therefore does not seek to directly affect the provision of services, but rather to offer an appropriate, proportionate and positive opportunity to address the harms of the past.

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<sup>15</sup> The percentage of eligible applicants to the redress scheme who are already accessing existing supports or services is unknown, including survivors already registered with Future Pathways. Another initiative, the Survivors of Childhood Abuse Support Fund, provides funding to 29 third sector and community based organisations over the period 2020-2024, many of who will provide services for survivors of abuse in care.

## **7. Test run of business forms**

New forms associated with the redress scheme will include:

- Agreements between care providers and Scottish Ministers regarding the sum and nature of financial contributions to the redress scheme.
- Form for organisations/individuals to complete when responding to requests for records, documents, or other evidence.
- Forms for lawyers to request payment of fees.
- Waiver for redress applicants to confirm that they accept the payment offered and they will not pursue a legal action against a care provider for the same injury for which they have applied for redress.
- Application form(s) for redress applicants.
- Forms for redress applicants to request reviews of determinations.

In line with best practice, all forms will be tested with potential end users to ensure they are straightforward to complete.

## **8. Digital Impact Test**

Careful consideration will be given to the opportunities afforded by use of digital technology in all aspects of redress implementation. Digital platforms and services will be used to promote efficiency wherever possible whilst ensuring that the redress scheme is accessible to survivors who are not digitally literate. All necessary data security measures will be put in place to ensure personal and sensitive information is handled confidentially. The redress implementation team will draw upon the expertise of the Scottish Government's Digital Directorate and Digital Assurance Team throughout the development of the scheme.

## 9. Legal Aid Impact Test

Legal Aid will have no direct role in the statutory redress scheme as Scottish Government will pay applicants' legal costs. Survivors will be able to approach any lawyer of their choosing at no cost to themselves, provided that the advice sought concerns eligibility, types of redress payments, the application process, and matters in connection with waiver and reviews.<sup>16</sup>

It is anticipated that the launch of the redress scheme may result in an increase in the volume of Legal Aid applications from survivors wishing to pursue civil cases against abusers. While some survivors will already be pursuing legal action regardless of the anticipated launch of the redress scheme, it is possible that others will wait for the final details of the scheme to be published in order to assess whether they would prefer to go to raise civil proceedings or apply for redress. It is also possible that some redress applicants will not be satisfied with the sum offered to them by the redress scheme and will choose instead to decline the payment and initiate civil proceedings. It is not possible to provide an estimate of the additional Legal Aid caseload at this time.

Agreement is being sought with the Scottish Legal Aid Board to disregard redress payments for the purposes of legal aid application means-testing. This will entail an update to operational guidance for legal aid application processing staff and an extra step to record the disregard when processing legal aid applications from individuals who have received redress payments.

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<sup>16</sup> The Scottish Government will not pay any fees incurred in connection with legal advice and assistance on whether to pursue litigation as an alternative to making an application for a redress payment.

## **10. Enforcement, sanctions and monitoring**

### **10.1 Enforcement in relation to obtaining evidence**

The Bill creates a power for the 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 the determination of an application for a redress payment. Relevant information might include information which demonstrates that the applicant was in care, or demonstrates that the applicant was abused whilst in care, or demonstrates the impact of that abuse on the applicant. The Bill also provides that Redress Scotland may direct the Scottish Ministers to exercise these powers.

It is likely that this power would only be used where all other requests by the survivor, or someone working with a mandate from the survivor, to obtain the information have failed. The default approach will be to seek the cooperation of those bodies which hold relevant information. However, having a robust and adequate framework to facilitate the provision of records where cooperation is not forthcoming, is essential to support survivors to apply for redress and to facilitate the assessment of applications.

The power is broad to ensure that it can be used to obtain relevant information and records from a wide range of sources. It would not be exercised in the absence of the agreement of the applicant. Where survivors do not want records to be obtained on their behalf but do want to submit those records with their application, they would obtain the documents themselves using existing means such as subject access requests.

To request documents using the power, the Scottish Ministers will issue a notice requiring a person or organisation to provide documents. That person or organisation will then be entitled under the legislation to appeal the notice on the grounds that they are either unable to comply with it or that it is not reasonable in all the circumstances to require them to comply with it. The notice can be thereafter confirmed, revoked or varied. Such reviews will be carried out by Redress Scotland to ensure independent oversight of the exercise of these powers.

The Bill also places beyond doubt that where the Scottish Ministers hold information required by Redress Scotland, the Scottish Ministers must comply with a request by Redress Scotland to provide that information.

In line with other redress schemes and the powers of statutory inquiries, failure to comply with a request for information will, in certain circumstances constitute a criminal offence capable of prosecution at summary level.<sup>17</sup> Any action taken to conceal, destroy, or alter evidence required by a notice to provide information may also constitute a criminal offence. Where a criminal offence is committed in relation to a notice to provide information by an organisation and a responsible individual

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<sup>17</sup> 'Summary level' prosecution procedure is used for less serious offences (with the charges set out in a complaint) and may ultimately lead to a trial before a sheriff or, in justice of the peace courts, before a bench of one or more lay justices.

within that organisation has facilitated the offence – either actively or via neglect – both the organisation and the responsible individual, such as a senior member of staff, could face prosecution.

The Bill provides for punishment upon conviction of imprisonment to a term not exceeding six months and/or a fine not exceeding level three on the standard scale.<sup>18</sup> The offence and the penalties are modelled on the Inquiries Act 2005.

In some circumstances, the Scottish Ministers may need to compel an individual or organisation based in England, Wales, or Northern Ireland to provide information. To provide for these situations, Scottish Ministers will pursue a Section 104 Order under the Scotland Act 1998 to ensure that the relevant powers have effect in the rest of the UK.

## **10.2 Monitoring and enforcement in relation to wider redress reporting activities**

The Bill requires certain organisations to report on their wider (i.e. non-financial) redress activities, such as providing emotional, psychological, or practical support for people who were abused as children; providing assistance to survivors to access historical records; providing assistance in tracing and reuniting families; or providing apologies to survivors. The intention of this provision is to provide an opportunity to organisations to demonstrate that they have actively tried to address the harms of the past on the basis that redress involves taking a range of actions to promote societal healing, not just making financial payments to survivors.

The organisations subject to the reporting duty will be all those which have agreed to contribute financially to the redress scheme. Scottish Ministers may also direct an organisation to report in circumstances where it has been cited in a redress application which has resulted in an offer of payment to a survivor.

Organisations which have a duty to report or which have been directed to report must provide a summary of their wider redress activities in relation to historical child abuse to Scottish Ministers following the end of each financial year.<sup>19</sup> Scottish Ministers will collate the information from the redress reports sent to them into a combined report for the year and publish it. The Bill also makes provision for Scottish Ministers to lay regulations requiring organisations to include a statement on wider redress activities in their annual reports or an equivalent document.

Where an organisation required to report has not carried out any wider redress activity, they will be required to submit a 'nil return' to explain why this is the case. Organisations which do not have a duty to report, and have not been directed to report, are able to report voluntarily, if they so choose.

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<sup>18</sup> The value of level 3 on the standard scale is currently £1,000 (at time of drafting in June 2020).

<sup>19</sup> The only exception will be where an organisation becomes subject to the duty to report or is named in a redress application which results in an offer of payment in the last three months of the financial year. In these circumstances, the information provided would not give a meaningful indication of the level of wider redress activity carried out throughout the year. In most cases, the organisation will instead be required to submit their first report following the end of the subsequent financial year.

In addition to situations in which an organisation has been named in a redress application which results in an offer of payment, Scottish Ministers may also direct an organisation to report where they consider that an organisation with a duty to do so has not fulfilled their obligations by the relevant deadline. If the Scottish Ministers consider that the person has failed to comply with a reporting direction, they may publish the fact that the person has failed to do so. The Scottish Ministers may revise or revoke a reporting direction.

### **10.3 Monitoring and enforcement in relation to receipt of funds from providers**

For an organisation to be included in the list of scheme contributors featuring on the waiver, Scottish Ministers must consider the proposed contribution and the evidence from which it was drawn and agree if it meets the principles for a fair and meaningful contribution.<sup>20</sup> Where it is agreed that the contribution meets these criteria, organisations will enter into binding agreements with Scottish Ministers.

The agreement will lay out the payment terms. It is envisaged that there will be at least two different types of agreement depending on the data available to inform financial modelling. For some organisations, a defined contribution will be sought, reflecting anticipated applications from survivors relevant to the organisation. As part of such a contribution, a review mechanism will be proposed as part of the agreement in order to reflect volumes and levels of redress payments determined during the lifetime of the scheme. For organisations where there is insufficient data to apply financial modelling, the approach to contributions may provide for the payment of the accumulated costs of all determined applications where the organisation is named. In both scenarios the contribution provided will be considered as an overall contribution to the scheme – for the benefit of all survivors of abuse who receive redress payments.

In circumstances where an organisation fails to fulfil their contractual obligations, Scottish Ministers will have the option of removing the relevant body from the contributor list, meaning that the organisation will not feature on future waivers signed by redress applicants receiving payment. The Bill also states explicitly that where a scheme contributor fails to pay the financial contribution which that contributor has agreed to pay to the Scottish Ministers, the contribution, or any part of it, which has not been paid is recoverable as a debt due to the Scottish Ministers. This means that Scottish Ministers may take legal action against the organisation in question to recover the monies owed.

### **10.4 Sanctions in relation to application fraud**

It is essential that the redress scheme is robust and credible to ensure that survivors, contributors and others can have confidence that the appropriate level of redress payments are being made to the right people. A balance needs to be struck between

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<sup>20</sup> Organisations will be asked to consider a financial contribution to the scheme based on an exercise modelling the potential number of applications relevant to them.

creating a scheme that treats survivors with compassion, dignity, and trust, and ensuring that a proportionate approach is taken to deterring and detecting fraudulent applications for redress. Care has been taken not to create onerous burdens on survivors and to retain flexibility in evidential requirements in order to properly recognise the difficulties arising from the often profoundly personal nature of the abuse, the fact that it is historical so evidence gathering opportunities are now restricted, and the limitations of record keeping by institutions in the past.

The application form will include a declaration as to the truth of the contents of the statement and as to the authenticity of any supporting documents. It will also include a warning that misleading statements or concerns over the authenticity of supporting documentation could potentially result in referral to the police for investigation, if fraud was suspected. As currently occurs within the Advance Payment Scheme, supporting documents submitted to confirm residence in an eligible setting will be verified in every case.

The Bill provides powers for the Scottish Ministers to recover any redress payments made as a result of error which includes errors in the determination of a redress payment which resulted in the determination being made incorrectly or on the basis of incorrect or misleading information. Although the exercise of the recovery powers will sit with Scottish Ministers in their general administration of the scheme, decisions that determinations have been materially affected by an error, including on the basis of incorrect or misleading information, will be made by Redress Scotland.

The Bill provides a process for these determinations to be reconsidered, for the applicant to be notified and be given the opportunity to make representations and for the outcome of the reconsideration to be reviewed. This creates a robust framework to recover payments made as a result of incorrect or misleading information whilst also recognising that there may be subtleties in reaching such a conclusion that require consideration by Redress Scotland.

Whilst a bespoke offence of making a fraudulent application to the scheme has not been created, such conduct could be investigated and prosecuted under the existing common law offence of fraud.

### **10.5 Enforcement in relation to payments made to applicants in error**

It is possible, although unlikely, that the redress scheme could make a payment to an applicant of an incorrect sum or make a payment where none was due at all due to an administrative mistake or an error in relation to the decision-making process. As described above, in these circumstances, the Bill provides for the Scottish Ministers to recover any monies over and above the amount which the applicant would have received if not for the error (in the form of a lump sum or instalments).

### **10.6 Monitoring and enforcement in relation to the waiver**

Applicants choosing to accept an offer of redress must sign a waiver relinquishing their rights to pursue legal actions against any organisations which appear on the



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contributor list at the time of signing. Scottish Ministers will not proactively share the personal details of any individual who has signed a waiver. However, where a scheme contributor is being pursued by an individual for damages, they may ask Scottish Ministers to confirm whether or not that particular individual has signed a waiver prohibiting them from pursuing the organisation in court.

The scheme contributor may only use the information or disclose it to a third party in order to bring the relevant legal action to a close. However, the Bill prohibits the contributor for using the information for any purposes which are inconsistent with the proper functioning of the redress scheme or which contravene data protection law.

## **11. Implementation and delivery plan**

### **11.1 Key milestones**

The Bill is expected to complete passage through Parliament by the end of March 2021.

Secondary legislation will also be required once the Bill enters into law, which will be brought forward over a period commencing immediately after Royal Assent. During Stage 1 of the Bill's passage through the parliamentary process, the Scottish Government intends to provide further detail about the likely content of regulations to be made under the powers in the Bill. Planning for implementation is underway and will proceed alongside parliamentary scrutiny of the Bill.

### **11.2 Post-implementation review**

The Scottish Government will review the legislation on an ongoing basis following enactment to ensure that it supports effective operational delivery of the scheme. Monitoring and evaluation of scheme delivery will be informed by the feedback of the Survivor Forum and other stakeholder groups.

The Bill gives Scottish Ministers the power to extend the application period for the scheme. A formal review will be carried out within five years of launch to assess whether or not an extension would be appropriate.

## 12. Summary and recommendation

### 12.1 Recommendation

The recommended policy option is to introduce primary legislation as set out in Section 3 above. This will achieve the Scottish Government's aims of:

- Acknowledging and responding to the harm that was done to survivors of historical child abuse in care in Scotland.
- Enabling care providers to acknowledge the harm that occurred at their institutions as part of a collective expression of recognition.

### 12.2 Summary costs

The Bill will give rise to one-off set up costs to the Scottish Government estimated at £1.6 m in 2020/21 and £1.1 m in 2021/22. Ongoing costs are estimated to amount to £408 m over five years, with £387 m falling on the Scottish Government and £21 m on other bodies. Contribution amounts have not been included within these costings as they are currently unknown. Any financial contributions received will be offset against the costs on the Scottish Government. Financial implications of the Bill are described in more detail in the Financial Memorandum that accompanies the Bill. Below is a summary of estimated costs.

#### *Estimated set up costs*

	<b>2020/21</b>	<b>2021/22</b>	<b>Total</b>
Direct set up costs to Scottish Government	£1.6 m	£1.1 m	£2.7 m

#### *Estimated ongoing costs*

	<b>2021/22</b>	<b>2022/23</b>	<b>2023/24</b>	<b>2024/25</b>	<b>2025/26</b>	<b>Total</b>
Direct ongoing costs to Scottish Government	£76.7 m	£76.7 m	£76.7 m	£76.7 m	£76.7 m	£387 m (including £3.5 m which will be spent in 2026/27 on counselling costs)
Ongoing costs to former and current care providers	Full extent is unknown due to uncertainties around contributions.					

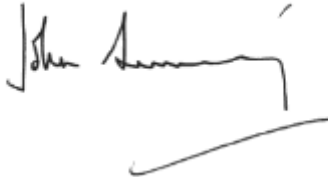
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Ongoing costs to survivor support organisations	Unknown until scheme is live / approach is developed further.					
Ongoing costs to local authorities (not including potential contribution)	£2.0 m - £3.4 m	£2.0 m - £3.4 m	£2.0 m - £3.4 m	£2.0 m - £3.4 m	£2.0 m - £3.4 m	£10.0 - 17.0 m
Ongoing costs to NHS	£0.3 m	£0.3 m	£0.3 m	£0.3 m	£0.3 m	£1.5 m
Ongoing costs to Police Scotland	£0.4 m	£0.4 m	£0.4 m	£0.4 m	£0.4 m	£2.2 m
Ongoing costs to National Records of Scotland (NRS)	£0.02 m	£0.02 m	£0.02 m	£0.02 m	£0.02 m	£0.09 m
Ongoing costs to Scottish Courts and Tribunals Service (SCTS)	£0.01 m	£0.01 m	£0.01 m	£0.01 m	£0.01 m	£0.06 m
Ongoing costs to Crown Office and Procurator Fiscal Service (COPFS)	£0.1 m	£0.1 m	£0.1 m	£0.1 m	£0.1 m	£0.5 m

**13. Declaration and publication**

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

A handwritten signature in black ink, appearing to read 'John Swinney', with a long horizontal flourish underneath.

Date: 13 August 2020

Minister's name: John Swinney

Minister's title: Deputy First Minister and Cabinet Secretary for Education and Skills

Scottish Government Contact point: Donald Henderson, Deputy Director of Redress, Relations and Response Division



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