

# REDRESS FOR SURVIVORS (HISTORICAL CHILD ABUSE IN CARE) (SCOTLAND) BILL

## Frequently Asked Questions – Bulletin 1

### Provider Contributions and the Choice between Redress and Civil Court

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This paper is the first in a series being produced by the Scottish Government to help answer common questions arising about elements of the Redress Bill. Each bulletin will provide a brief overview of the relevant topic and outline answers to some of the queries that have been raised. A number of other papers are available and can be accessed from the [website](#) or you can email [redress@gov.scot](mailto:redress@gov.scot) or phone 0808 169 9740.

#### Overview

The redress scheme will be an alternative to court action for survivors of historical abuse. The scheme sets out to be a national collective response for the harms of the past, acknowledging and recognising the abuse that children in care in Scotland experienced. The scheme looks to organisations to acknowledge the abuse that took place in their care and play their part for survivors by contributing to redress payments for them.

The scheme will not be the same as the court process, it aims to be faster, non-adversarial and focussed on the needs of survivors. The scheme aims to offer recognition and justice to survivors in a different form than the traditional adversarial court process does.

Encouraging organisations to contribute to the scheme means that they have an opportunity to respond to survivors without requiring survivors to go to court and without disputing decisions taken by Redress Scotland.

Redress Scotland will offer redress payments to survivors reflecting the abuse they experienced. The scheme will encourage organisations to acknowledge the reality of abuse in their care by making fair and meaningful contributions to the scheme and in doing so reassure survivors that they are facing up to their responsibilities.

Legal action cannot be raised in respect of abuse which occurred wholly before September 1964, so for these survivors the redress scheme will provide a route where otherwise there would be none - allowing survivors the opportunity to obtain financial redress.

For others, the redress scheme provides a choice where otherwise there would be none. Survivors who experienced abuse after September 1964 already have the opportunity of going to court following legal changes introduced by the Scottish Government to remove the 'time bar'. The right to take civil action remains for these survivors. The scheme offers an alternative route to justice. It will be a faster

process with more support to apply, and it will operate in a trauma informed way. The Scottish Government will pay for all applicants to receive legal advice if they wish to take it. Provider organisations will not have an opportunity to challenge applications and decisions will be made by an independent body, Redress Scotland.

A redress scheme with the participation of organisations provides an opportunity to collectively address failures in the past. It reflects the views of survivors who told us they want financial contributions from all those they view as responsible for the abuse. A redress scheme without waiver and provider contributions would mean that traditional adversarial justice would remain the only mechanism to seek acceptance of responsibility from organisations.

### **What does the Bill say about applicants having to choose between redress and going to civil court?**

- The Bill says that all applicants offered a redress payment will have to sign a 'waiver' if they want to accept the payment.
- By accepting a payment and signing the waiver, they will be legally agreeing not to start or continue any civil legal action about the abuse, against the Scottish Government or organisations who have made fair and meaningful financial contributions to the scheme.
- The waiver does not affect any previous court action which has been taken, but any financial award from previous action for the same abuse will be deducted from a redress payment made under the scheme.
- The waiver does not prevent anyone from taking legal action against an organisation which is not named on the contributor list and has not made a fair and meaningful contribution to the scheme.

### **Will the Redress Scheme 'silence' survivors?**

- No. There will be no 'non-disclosure agreement' or other arrangement which prevents survivors from talking publicly or privately about their abuse after receiving a redress payment. This would include talking to the Scottish Child Abuse Inquiry.
- Some survivors may want to have 'their day in court' and talk about what happened to them. The redress scheme provides an alternative for those who do not want to do that and who choose a different route providing written information which will not be seen or contested by those who were responsible for their care or carried out the abuse.
- The waiver would not affect any criminal proceedings or rights to report anyone for criminal acts.

### **Why does the Scottish Government think that survivors should have to make a choice?**

- We know that the majority of survivors want organisations to make financial contributions – as well as the Scottish Government.

- Contributing to the scheme means there is public acknowledgement by the organisations that abuse took place in their care.
- If there was no waiver, it is very likely that organisations would make no contributions or very small contributions because they would need to keep money aside for future court cases, and could not afford to do both. It would also make it far less likely that insurers would support contributions being made by organisations.
- The purpose of the waiver is not to allow organisations to reduce or escape liability, it is to encourage organisations to acknowledge historical abuse in their care, and to play a part in the collective national endeavour to face up to the harms of the past by recognising survivors and contributing to the scheme.
- Waiver encourages contributions to be made to the redress scheme even though there are no findings of liability, there is no opportunity for organisations to challenge or defend applications and there is a different approach to evidence and assessment than would be taken in court.
- It offers organisations a degree of certainty over costs, which can be redirected to the redress payments themselves.
- If survivors retain the right to try their cases in court, it takes away from the ability of the redress scheme to offer an alternative route to financial payment. Instead organisations may choose to delay payment to any survivor until, as currently happens, the facts have been tested and proved to their satisfaction which often means in court, and damages assessed by a judge.

### **What have survivors said about waiver?**

- The Scottish Government was clear in the public consultation which took place from September to November 2019, that it proposed to include a waiver as part of the redress scheme and views were sought on this proposal.
- The consultation said *“Many redress schemes in other countries have required applicants to choose between accepting a redress payment and pursuing remedies in the civil courts. We are proposing to take the same approach. In other words, an applicant should find out how much they would receive by way of a redress payment and take legal advice before deciding whether to accept it, or reject it and pursue an award in the civil courts instead. This will commonly require the signing of a waiver at the point of accepting a redress payment, which means the applicant would give up their right to raise an action in court in respect of their experience in care.”*
- In answer to the question “Do you agree applicants should choose between accepting a redress payment or pursuing a civil court action?”, 56% of individuals responding and 60% of organisations responding said they agreed.
- The consultation also underlined support for having responsible organisations contribute to the cost of the scheme with 94% of respondents (individuals and organisations) agreeing that those bearing responsibility should be expected to provide financial contributions to the cost of redress

## **When would survivors have to sign a waiver and give up their rights to go to court?**

- Not until an applicant wants to accept a payment being offered by Redress Scotland. The individual would then have an opportunity to take independent legal advice before deciding whether to accept or reject the offer. Legal advice, up to an appropriate limit, will be funded by the Government and the survivor does not have to pay.
- Those applying for an individually assessed redress payment, may be offered an initial payment of £10,000 before the outcome of the full assessment is known. Survivors would be asked to sign a waiver at this point and would be encouraged to take legal advice before doing so. The survivor does not have to accept this initial payment and could choose to wait until the full award is known before signing the waiver.
- Survivors who are already in the process of taking legal action do not have to stop now.
- Survivors who are awarded a payment through the courts will have that amount deducted if they later successfully apply for redress after the scheme opens. Even if the money received in court is more than the redress payment they would receive, they can still apply to the redress scheme for non-financial redress such as apology, acknowledgement and therapeutic support.

## **How will it be decided if a provider is on the waiver or not?**

- Scottish Ministers will decide if an organisation is offering a fair and meaningful financial contribution and will add those organisations to the waiver. Contributions will be fair as they will ultimately reflect the actual number of payments made where the organisations are named.
- Contributions will be meaningful because by agreeing to participate in the scheme, contributing organisations will be taken to have accepted the decisions made on applications by Redress Scotland. This means they will not contest settled applications.
- The list of who is contributing to the scheme will be public. This means that there is public acknowledgement by the organisations that abuse took place in their care.

## **How will 'fair and meaningful' be worked out and what information will be made public about that?**

- Scottish Government will ask organisations to make a financial contribution to the scheme based on an estimate of the potential number of applications and redress payments which may apply to them. The estimates use information from a variety of sources including information submitted to the Scottish Child Abuse Inquiry, the Advance Payment Scheme and information from the organisations themselves.

- There will be a review mechanism in place as part of the agreement to make adjustments to contributions if application numbers are significantly lower or higher than anticipated.
- For smaller organisations where we do not have enough information to estimate the potential number of applications or redress payments, we will ask for contributions when we know how many applications have been determined where the organisation is named. These organisations will also need to make an initial contribution to the scheme in order to be on the waiver.
- We consider the amount contributed by providers as a contribution to the overall scheme, for the benefit of all survivors of abuse who receive redress payments.

**What if a provider promises to contribute to the scheme but then doesn't? Will that make the waiver invalid?**

- An organisation may be removed from the public list and waiver if Scottish Ministers decide it is no longer appropriate for them to remain on the list – for example if the organisation has defaulted from the agreement to pay a fair and meaningful contribution.
- The removal of an organisation from the list will not however change waivers that were signed before they were removed.
- Where an organisation fails to pay the financial contribution that it has committed to, the Bill says this becomes a debt due to the Scottish Ministers. This means that the Scottish Ministers may take action, including court action, to recover the debt to ensure the contributions are paid.
- However, mindful of the risks that providers might commit to paying a contribution but then do not, Ministers will look for sufficient upfront contribution to demonstrate to all concerned that there is good faith and to cover applications in advance.

**Did the Scottish Government consider a process where a survivor could get a redress payment which included a contribution from a provider but without signing a waiver? If they did that and went to civil court afterwards, the redress payment could be automatically deducted from the court settlement to avoid double payment.**

- It is true that double payment for the same abuse could be avoided by making sure that payments made by the redress scheme are deducted from any future court award. This can be called 'offsetting'.
- However, 'offsetting' in cases where there are lots of bodies who have each contributed to the scheme, would be complex to administer and would increase administration costs. The Redress Scheme will not be making findings of liability or deciding how much of the abuse each organisation is responsible for.
- Offsetting does not encourage providers to contribute to the scheme in the same way as waiver. Providers may still face costly litigation and will have to

keep money aside to defend or settle those actions rather than directing it into redress payments.

- Offsetting therefore is likely to keep the onus on the survivor to raise and win an action in order to get providers to pay. There are risks to survivors in terms of delay, the uncertainty and challenge of court.
- If survivors want organisations to acknowledge abuse and make financial payments in respect of that abuse, waiver is the key to getting them to pay now, without lengthy and potentially distressing court processes that we know some survivors either cannot or do not want to go through.

### **Do other redress schemes make survivors choose between redress and civil court?**

- Many other redress schemes, including Lambeth, Northern Ireland and the Republic of Ireland, include waivers or similar provisions which prevent survivors from accepting redress payments and pursuing civil actions. In this way, redress is seen to be an alternative route to financial payment rather than something that can be sought in addition to damages from civil actions.

### **Isn't this a U turn by Scottish Government? Why is there no waiver for the Advance Payment Scheme?**

- Advance payments are fully funded by the Scottish Government with no contributions from provider organisations.
- We wanted to open the scheme as soon as possible for older and terminally ill survivors. For that reason this scheme was set up using common law powers on the basis that there was an urgency, in the public interest, to make redress to survivors who may not have lived long enough to benefit from an upcoming statutory scheme. Given the discretionary nature of the Advance Payment Scheme, making payments on an ex gratia basis to a defined group of survivors, we chose not to require a waiver for that Scheme.
- The Scottish Government has never said that the same position would apply to the statutory redress scheme. In announcing the opening of the Advance Payment scheme, the Deputy First Minister said *“Our next key step is to develop proposals for the statutory redress scheme. No decisions have yet been taken.”*