



Law Society  
of Scotland

# Stage 1 Briefing

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

15 December 2020



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Civil Justice committee, Charity Law sub-committee and Mental Health and Disability sub-committee have the following comments to put forward for consideration at the Stage 1 debate on the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill<sup>1</sup> which is scheduled to take place on Thursday 17 December 2020.

We previously gave evidence on the Bill to the Education and Skills Committee on 7 October 2020.

The purpose of the Bill<sup>2</sup> is to:

- create a time limited scheme to provide financial redress to survivors of historical child abuse in care in Scotland, or, in some circumstances, their next of kin.
- establish a Non-Departmental Public Body, 'Redress Scotland', to deliver independent decision-making on applications for financial redress.
- provide eligible survivors of abuse access to elements of non-financial redress including emotional and psychological support.

The Bill enables the Scottish Ministers to accept 'fair and meaningful' financial contributions to the scheme from third parties in exchange for the extension to those third parties of waivers, granted by the recipients of redress payments, of rights to continue or raise subsequent civil actions such as actions for damages.

Our comments relate to:

- contributions to the redress scheme, where there needs to be more detail around both what a 'fair and meaningful' contribution would be and the statement of principles

<sup>1</sup> <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/redress-for-survivors-historical-child-abuse-in-care-scotland-bill/introduced/bill-as-introduced-redress-for-survivors-historical-child-abuse-in-care-scotland-bill.pdf>

<sup>2</sup> Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill Explanatory Notes at para 5, <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/redress-for-survivors-historical-child-abuse-in-care-scotland-bill/introduced/explanatory-notes-redress-for-survivors-historical-child-abuse-scotland-bill.pdf>

- financial contributions by charities, where alternative approaches may be required to avoid compromising the independence of and confidence in the sector
- the waiver, which we believe will significantly prejudice the interests of the survivor and expose them to the costs of legal action up to that stage
- and accessibility and support for adults with incapacity

## Contributions to the redress scheme

Section 12 of the Bill places a requirement on the Scottish Ministers to keep, maintain and publish a list of organisations who currently carry out, or have in the past carried out, functions in relation to the safeguarding, protection or care of children, and who are making fair and meaningful financial contributions to the scheme (“scheme contributors”).

Section 13 requires the Scottish Ministers to prepare and publish a statement of principles on which they will determine whether a contributor should be included in, or removed from, the scheme contributor list.

Many organisations which currently carry out, or have in the past carried out, functions in relation to the safeguarding, protection and care of children and are therefore potential scheme contributors will be charities.

Concerns regarding the implications of the Bill for charity law have been highlighted by OSCR in its written response to the Call for views on the Bill<sup>3</sup> and subsequent evidence to the Education and Skills Committee.<sup>4</sup> We share these concerns.

The Bill sets up a tension between the aims of the scheme – appropriate redress for the survivors of abuse – and well-established principles of charity law. It will be for the Scottish Parliament to decide how the tension is resolved, but the question of policy is whether the imperatives of the scheme justify the setting aside of principles of charity law. The underlying concern must be that if fundamental principles of charity law are set aside in this case, a precedent will be set which will make them easier to set aside in the future. Our comments on specific provisions of the Bill are set against that background.

In terms of section 12, scheme contributors are those who, in the opinion of Ministers, are making or have agreed to make a fair and meaningful financial contribution towards the funding of redress payments under this Act. The term ‘fair and meaningful financial contribution’ provides little certainty as to what is to be expected of a contributor, and the supporting papers for the Bill, including para 108 the Financial

<sup>3</sup> OSCR written evidence to the Education and Skills Committee of the Scottish Parliament, [https://www.parliament.scot/S5\\_Education/General%20Documents/20200930OSCR.pdf](https://www.parliament.scot/S5_Education/General%20Documents/20200930OSCR.pdf)

<sup>4</sup> Meeting of the Education and Skills Committee of the Scottish Parliament, 4 November 2020, <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12922&mode=pdf>

Memorandum,<sup>5</sup> offer limited additional guidance. Much is left to the discretion of the Scottish Ministers. It would be helpful to have much clearer objective criteria for the assessment of potential contributions.

Similarly, section 13 affords significant discretion to the Scottish Ministers in preparing the content of the statement of principles. Consideration should be given to incorporating such principals into statute, in order to ensure appropriate parliamentary scrutiny and to provide certainty for potential scheme contributors. Without further specification, potential scheme contributors will be left with very difficult decisions over whether to contribute or not.

## Financial contributions by charities

Section 14 provides that financial contributions made by charities will be treated as:

- being in furtherance of the charity's charitable purposes and consistent with the charity's constitution,
- providing public benefit
- not being contrary to the interests of the charity, and
- being within the powers exercisable by the charity trustees of the charity.

Section 15 allows the Scottish Ministers to make regulations regarding charities' use of restricted funds to make financial contributions to the redress scheme.

We have significant concerns regarding sections 14 and 15 of the Bill as presently drafted, and about the implications of these provisions for charity law.

It is a fundamental principle of charity law that the wishes of donors should be respected and that funds should not be diverted from the purposes for which they were given except under strict safeguards.<sup>6</sup>

OSCR has highlighted the special importance of this principle in relation to section 15 and restricted funds<sup>7</sup> but it applies equally to the general funds of a charity.

The effect of section 14(a) of the Bill would be to add a purpose to a charity's constitution – the purpose of contributing to the scheme – without application of the usual safeguards. We are concerned that this would over-ride a key principle of charity law. We would suggest that further consideration should be given to alternative approaches within the scope of the existing list of charitable purposes,<sup>8</sup> the ability of many

<sup>5</sup> Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill Financial Memorandum, <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/redress-for-survivors-historical-child-abuse-in-care-scotland-bill/introduced/financial-memorandum-redress-for-survivors-historical-child-abuse-in-care-scotland-bill.pdf>

<sup>6</sup> Hence the development of the cy-pres doctrine in the common law and now the protections for donors in ss 16 and 39-43D of the Charities and Trustee Investment (Scotland) Act 2005 ("the 2005 Act").

<sup>7</sup> OSCR written evidence to the Education and Skills Committee of the Scottish Parliament at 2.2, [https://www.parliament.scot/S5\\_Education/General%20Documents/20200930OSCR.pdf](https://www.parliament.scot/S5_Education/General%20Documents/20200930OSCR.pdf)

<sup>8</sup> Section 7 of the 2005 Act

charities to vary their purposes with consent from OSCR<sup>9</sup>, and where necessary the cy-pres doctrine in the common law (namely, that where a charitable trust's purposes are impossible or cannot be fulfilled for whatever reason, the funds should be reapplied to purposes as close as possible to the trust's original goals).

Section 14(b) can be seen to run contrary to two aspects of the charity test under the 2005 Act. First, it would override the provision in section 8(1) of the 2005 Act that '[n]o particular purpose [here, the purpose of contributing to the scheme] is ... to be presumed to be for the public benefit.' Secondly, it would reduce the scope of OSCR's normally very wide discretion, under section 8 of the 2005 Act, in its holistic assessment of whether a body provides public benefit under the charity test.

Section 14(c) provides that financial contributions made by charities will be treated as not being contrary to the interests of the charity. The question of whether making a contribution to the scheme is in the interests of a charity is in principle one to be decided by the charity trustees. It is a fundamental principle of charity law that charities are independent entities and independent of government in particular.<sup>10</sup> Charity trustees must exercise their functions in controlling and managing the administration of their charity with that principle in mind. They do so within the framework of charity trustee duties provided by sections 66-68A of the 2005 Act and are subject to the supervision of OSCR, which may intervene in the event of misconduct (including mismanagement), but within that framework the charity trustees enjoy a wide discretion in operational matters. This provision of the Bill would intrude on that discretion, and so on the principle of independence. It might also authorise a contribution to the scheme which was manifestly not in the interests of the contributing charity.

Whilst we recognise that the Bill seeks to address "potential legal barriers to charities being able to contribute, if they choose to do so"<sup>11</sup> we are concerned that in doing so the Bill may undermine key principles of charity law and have an adverse impact on charity governance and public confidence in the charity sector.

## The Waiver

Sections 45 and 46 of the Bill relate to the waiver. Section 45(1) provides that, in order to receive a redress payment under the scheme, an applicant must agree to abandon any relevant civil proceedings, and to waive their right to raise such proceedings in the future.

<sup>9</sup> Section 16 of the 2005 Act

<sup>10</sup> See sections 7(4)(b) and 66(1) of the 2005 Act.

<sup>11</sup> Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill Policy Memorandum at para 286, <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/redress-for-survivors-historical-child-abuse-in-care-scotland-bill/introduced/policy-memorandum-redress-for-survivors-historical-child-abuse-in-care-scotland-bill.pdf>

We are concerned that the existence of a waiver which requires the survivor of abuse to abandon civil proceedings which they have already embarked on is fundamentally flawed and will significantly prejudice the survivor.

Unless the survivor is in receipt of civil legal aid without having to pay any contribution, they will face financial penalties for abandoning a court action:

- Firstly, the survivor is likely to have to account to their own solicitor for all fees, VAT and outlays incurred in pursuing the civil action up to the point of abandonment. If the action has been ongoing for some time these costs may run into tens of thousands of pounds, especially if counsel is involved. It would fall upon the survivor to pay these costs.
- Secondly, where the survivor does not have the ability to pay this puts the legal adviser in the difficult position of having to consider suing the client they were trying to help. It would also put the legal adviser in a conflict situation if they were asked to advise on the merits of making an application under the redress scheme, or asked to advise on whether the client should accept an offer under the scheme.
- Thirdly, the word “abandon” has a specific legal meaning in this context – it would require the survivor to offer to pay their opponent’s court expenses to discontinue the court action.
- Fourthly, it is our view that requiring a survivor to waive their civil rights in the Scottish courts in return for a payment which is likely to be significantly lower than they might achieve in court will lead to vulnerable individuals making the wrong choices because they are tempted into accepting a quick resolution. Survivors should be protected from undue pressure, but we are concerned that the waiver provisions of the Bill will have the opposite effect.

The waiver provisions of the Bill should be removed. It should be left for the survivor to be able to discuss with their legal adviser whether it is in their interests to terminate existing court proceedings or carry on with those proceedings. If proceedings have not been commenced, it should be open to the survivor to commence a civil action for damages even if they have received an award under the redress scheme, subject to the proviso that a survivor would require to pay back any redress award if successful in court to avoid being doubly compensated.

## **Accessibility and support for adults with incapacity**

Section 49 of the Bill applies to applicants who have been offered a redress payment and who are:

- under the age of 16 years;
- an adult with incapacity (within the meaning of section 1(6) of the Adults with Incapacity (Scotland) Act 2000) in relation to the management of the redress payment; or
- whose ability to manage a redress payment is otherwise impaired.

Section 49(2) allows a panel determining an application or a review to give directions relating to the payment and management of the redress payment for the benefit of the applicant, where considered appropriate.

We welcome the recognition that many of those seeking redress may, for a variety of reasons, require support to access the redress scheme and that some of those seeking redress may be adults with incapacity within the meaning of section 1(6) of the Adults with Incapacity (Scotland) Act 2000 in relation to some or all aspects of making and processing an application for a payment. It is important that appropriate support is made available to ensure that adults with incapacity are not excluded from the redress scheme. It is the experience of practitioners in analogous procedures, such as applications for criminal injuries compensation, that some individuals have required substantial support at all stages including initiating and processing claims. Failing other arrangements, this can be achieved by making a specific appointment for the purpose under an intervention order. Accordingly, whilst it is helpful that section 49 makes provision for a panel to give directions relating to payment and management of a redress payment, it is important that appropriate support is available at all stages of the redress process. This may include ensuring that appropriate mechanisms are in place to facilitate the appointment of a guardian or intervener under the Adults with Incapacity (Scotland) Act 2000 to allow an application to the redress scheme to be made on an adult's behalf. Panels should be explicitly subject to the same obligations as other judicial and quasi-judicial bodies to make such arrangements, including such reasonable accommodations, as may be necessary to avoid disadvantage to, or discrimination against, such applicants, including ensuring that appropriate appointments under the Adults with Incapacity (Scotland) Act 2000 are made where necessary. Scottish Ministers in conducting the scheme, and appointed panels, should be required to act in accordance with the principles in section 1 of that Act (including any statutory modifications thereto) and in accordance with relevant human rights principles.

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