



Law Society  
of Scotland

## Stage 3 Briefing

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

March 2021



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We have the following comments to put forward for consideration in advance of the Stage 3 debate on the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill, which is scheduled to take place in the Scottish Parliament on Thursday 11 March 2021.

The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill<sup>1</sup> was introduced by the Cabinet Secretary for Education and Skills, John Swinney MSP, on 13 August 2020. The Education and Skills Committee was designated as the lead committee and we gave evidence on the Bill to the Education and Skills Committee on 7 October 2020.<sup>2</sup> The Stage 1 report of the Education and Skills Committee was published on 9 December 2020.<sup>3</sup> We note the Scottish Government's response to the Stage 1 Report.<sup>4</sup> The Bill passed Stage 1 on 17 December 2020. The Bill was considered at Stage 2 by the Education and Skills Committee in February 2021 and the committee considered and finalised the Stage 2 amendments on 17 February 2021.

The purpose of the Bill<sup>5</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.

1 <https://beta.parliament.scot/bills-and-laws/bills/redress-for-survivors-historical-child-abuse-in-care-scotland-bill>

2 <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12885>

3 <https://sp-bpr-en-prod-cdnep.azureedge.net/published/ES/2020/12/9/5fcdb1c2-0e09-11eb-b9ed-000d3a23af40-3/ESS052020R5.pdf>

4 [https://www.parliament.scot/S5\\_Education/General%20Documents/20201216SG\\_response\\_to\\_Stage\\_1\\_report.pdf](https://www.parliament.scot/S5_Education/General%20Documents/20201216SG_response_to_Stage_1_report.pdf)

5 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>

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;
- 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;
- applicants with convictions for serious offences, where we are concerned that the provisions of the Bill create an arbitrary distinction within the redress scheme and fail to recognise the impact of Adverse Childhood Experiences;
- offences of failure to provide evidence and of tampering with evidence, where we are concerned that the standard for commission of an offence by an individual is too low;
- payment of legal fees, where we are concerned about the lack of certainty and the potential for additional bureaucracy and consequent delays, as well as the impact on access to justice and of legal aid clawback provisions;
- guidance, where we highlight the importance of guidance to the smooth operation of the scheme and call for a comprehensive and high-profile publicity campaign to support implementation.

## 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 exercise, or have in the past exercised, functions in relation to the safeguarding or promotion of the welfare of children or the protection or furtherance of their interests, 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>6</sup> and subsequent evidence to the Education and Skills Committee.<sup>7</sup> We share these concerns.

<sup>6</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>7</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>

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. 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. We note the draft statement of Fair and Meaningful Principles published by the Scottish Government.<sup>8</sup> However we have previously<sup>9</sup> called for consideration to be given to incorporating such principles 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.

We have significant concerns regarding section 14 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>10</sup>

<sup>8</sup> [https://www.parliament.scot/S5\\_Education/General%20Documents/20201102DraftFairAndMeaningfulPrinciplescontainspotentialdistressingcontent.pdf](https://www.parliament.scot/S5_Education/General%20Documents/20201102DraftFairAndMeaningfulPrinciplescontainspotentialdistressingcontent.pdf)

<sup>9</sup> Law Society of Scotland, Stage 1 Briefing- Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill, 15 December 2020, <https://www.lawsco.org.uk/media/370141/20-12-14-civ-char-mhdc-redress-bill-stage-1-briefing.pdf>

<sup>10</sup> Hence the development of the cy-près 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”).

The effect of section 14(2)(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 have previously<sup>11</sup> suggested that further consideration should be given to alternative approaches within the scope of the existing list of charitable purposes,<sup>12</sup> the ability of many charities to vary their purposes with consent from OSCR,<sup>13</sup> and where necessary the cy-près doctrine in the common law.

Section 14(2)(b) can be seen to run contrary to two aspects of the charity test under the Charities and Trustee Investment (Scotland) Act 2005 (“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(2)(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>14</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.

Further, the effect of section 14(2)(c) would be to provide that, whatever the circumstances of a particular charity, a contribution to the scheme would not be contrary to the charity's interests, even if, for instance, it severely depleted reserves, or otherwise significantly compromised the charity's ability to serve its current and future beneficiaries. Removing the barriers to contributions should not absolve charity trustees from making a proper assessment of whether a contribution to the scheme would be appropriate in the light of the full range of relevant factors, including application of the waiver arrangements to the specific circumstances of their charity. In particular, charity trustees, should still be required, when deciding whether to make a contribution, to act with due care and diligence<sup>15</sup> and to respond appropriately to any relevant conflicts of interest.<sup>16</sup> The effect of section 14(2)(c) of the Bill would be to negate these duties. Retention of these duties would not constitute a barrier to a charity's making a contribution to the scheme if

11 Law Society of Scotland, Stage 1 Briefing- Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill, 15 December 2020, <https://www.lawscot.org.uk/media/370141/20-12-14-civ-char-mhdc-redress-bill-stage-1-briefing.pdf>

12 See section 7 of the 2005 Act, esp section 7(2)(n), (p).

13 Section 16 of the 2005 Act

14 See sections 7(4)(b) and 66(1) of the 2005 Act.

15 Section 66(1)(b) of the 2005 Act

16 Section 66(1)(c) of the 2005 Act

that were appropriate in the light of the charity's full circumstances and interests but would ensure that charity trustees carried out a proper assessment before any contribution were made.

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>17</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.

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.

<sup>17</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 have called for the waiver provisions of the Bill to be removed.<sup>18</sup> 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.

### **Applicants with convictions for serious offences**

Sections 58 and 59 require a panel, in cases where the applicant or nominated beneficiary has been convicted of a serious offence, to determine whether it would be contrary to the public interest to make a redress payment and- if so- preclude the applicant or nominated beneficiary from being offered a redress payment.

This potentially creates an arbitrary distinction within the redress scheme, as those who commit serious crimes in adulthood - especially sexual crimes and crimes of violence - have often themselves been the victims of abuse in childhood. The impact of Adverse Childhood Experiences (ACEs) have been recognised by the Scottish Government.<sup>19</sup> A survivor's ability to be considered eligible for a redress payment does not in any way condone or excuse their criminality in later life – such criminality is and should be dealt with via the criminal justice system. However, such criminality does not diminish the impact of abuse on the survivor, and it is to that aspect focus should be made. Potential exclusion from the redress scheme risks compounding the impact of both criminal justice punishment and childhood abuse.

A sentence of five year's imprisonment in section 58(1) is arbitrary: why one person should be sentenced to five years depends on so many factors and does not take account of the previous convictions, mitigating factors and even sentences falling within an acceptable range of sentences for that type of offence. It makes no allowance for section 196 of the Criminal Procedure (Scotland) Act 1995 – sentence discounting so they may lose their right to redress because they choose to go to trial and lose any sentence discount; a further factor in compounding the effects of criminality and factors such as ACE.

### **Offences of failure to provide evidence and of tampering with evidence**

Section 81 makes provision for individual culpability where an organisation commits an offence under section 80. We are concerned that this may impose too low a standard for the commission of an offence.

<sup>18</sup> Law Society of Scotland, Stage 1 Briefing- Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill, 15 December 2020, <https://www.lawscot.org.uk/media/370141/20-12-14-civ-char-mhdc-redress-bill-stage-1-briefing.pdf>

<sup>19</sup> <https://www.gov.scot/publications/adverse-childhood-experiences-aces/>

## Payment of legal fees

Sections 88A-88E of the Bill as amended at Stage 2 make provision for payment of legal costs incurred in certain circumstances.

The Bill requires an application to be made to Scottish Ministers for payment of legal costs and for that application to be assessed by Redress Scotland. The sections are vague and give no certainty as to what will constitute the prescribed or additional fees. Much of the detail is left to secondary legislation.<sup>20</sup> We are concerned that this approach does not provide for sufficient scrutiny or engagement.

If all fees are to be on an itemised (time and line) basis this will impose an avoidable layer of bureaucracy and will inevitably result in an assessment period having to be undertaken with resultant delays before the solicitor is informed of what level of costs have been approved. There is also the potential for the assessed figure being unacceptable, leading to challenge and protracted reviews.

We consider that a simple fixed scale of costs should be applied for all successful claims in line with the Scottish Compulsory Pre-Action protocol for Personal Injury Claims. The scale is designed to be inflation proof so if redress awards increase in the future there would be no need to vary the table of fees. It is used by all Personal Injury practitioners in Scotland as well as all compensators.

The adoption of this table will allow an easy calculation to be made in all cases. To simplify matters even further it is suggested that any award made under the Redress scheme is automatically accompanied by an offer to pay costs to a representative in accordance with the scale to avoid the need for any costs application or assessment process.

Further details regarding the Scottish Compulsory Pre-Action protocol for Personal Injury Claims are contained in Annex A to this briefing.

We would suggest that the application of prescribed and additional fees should be confined to those cases which do not, for whatever reason, result in a Redress award being made and accepted. Where an award is made and accepted, a fixed scale model is more appropriate.

Section 88E provides for restriction on additional legal fees. We are concerned that this provision may have a negative impact on access to justice. The proposed wording of section 88E(2) will prevent a solicitor entering into a Success Fee Agreement with a survivor and charging a Success Fee for the work which is undertaken. This is contrary to the terms of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. The majority of solicitors who undertake personal injury work do so under Success Fee Agreement arrangements, which provide for a fee to be paid in the event of success, but no fee, or a lower one, if the action is lost. The only alternative funding methods are legal aid (with extremely limited eligibility criteria) or private fee paying. The effect of section 88E is therefore to significantly limit the

<sup>20</sup> Section 98 of the Bill provides that regulations made under sections 88C(4) and 88D(5) will be subject to the negative procedure. In the case of regulations under section 88C(3), section 98(4) of the Bill provides that regulations which add to, replace or omit any part of the text of an Act are subject to the affirmative procedure, and otherwise are subject to the negative procedure.

funding options available to survivors seeking legal advice. It is anticipated that the vast majority of survivors would decline to proceed with an application if a solicitor could only accept instructions at the outset on a private fee paying basis, due to the potential costs involved. In addition, the existence of this subsection creates a disincentive to a survivor to do anything other than proceed with a civil claim for damages, and could create a conflict situation with the solicitor when advising on the best options for the client. We have significant concerns about the inclusion of this section in the Bill.

We note the terms of section 88E(3) as it relates to legal work done in connection with advice and assistance on whether to pursue litigation as an alternative to an application for a redress payment. However, we would welcome further clarification on interaction with existing funding mechanisms for legal advice, including where a survivor may already have instructed a solicitor and potentially entered in to a Success Fee Agreement. We also highlight the impact of legal aid clawback provisions. If advice is provided through the legal aid scheme, where there is ultimately a recovery or preservation of property, the costs of that assistance can be recouped from the claimant. This includes either property recovered or preserved through the proceedings (whether concluded under legal aid or not) or “under any settlement to avoid them or to bring them to an end” (section 17(2B) of the Legal Aid (Scotland) Act 1986). It may be that an agreement reached under this Bill would be considered as such a settlement and we would appreciate clarification on this point. We also note that it is possible for Scottish Ministers to lay regulations under this section to disapply this effect.

## **Guidance**

Section 97 provides that Scottish Ministers may issue guidance. As this guidance will be central to the smooth operation of the redress scheme, it would be helpful to have further clarification as to how and when this guidance will be drafted.

We would also suggest that a comprehensive and high-profile publicity campaign will be required to ensure that survivors are aware of the scheme and the options available to them in seeking redress. We would invite information from the Scottish Government as to how they intend this to be undertaken. It should take into account the groups who are likely to be representative of those making such claims.

### **For further information, please contact:**

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## Annex A

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### Scottish Compulsory Pre-Action protocol for Personal Injury Claims<sup>21</sup>

The CPAP Scale of fees is in 3 parts as follows:

1. Base Fee in all cases £546
  2. Plus 3.5% of the total amount of agreed damages up to £25,000; (maximum £875)
- Plus
3. A. 25% of that part of the agreed damages up to £3,000;  
B. 15% of the excess of the agreed damages over £3,000 up to £6,000;  
C. 7.5% of the excess of the agreed damages over £6,000 up to £12,000;  
D. 5% of the excess of the agreed damages over £12,000 up to £18,000;  
E. 2.5% of the excess of the agreed damages over £18,000; and

VAT is paid in addition.

So, by way of an examples:

A £10000 award would result in costs being paid at a level of £2396 plus vat (£546 + £350 + £750 + £450 + £300).

A £20000 award would result in costs being paid at a level of £3246 plus vat.

A £40000 award would result in costs being paid at a level of £3921 plus vat (b is capped at 3 ½% of £25000 i.e. £875)

An £80000 award would result in costs being paid at a level of £4921 plus vat.



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