

**Education, Children and Young People Committee**  
**The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 –**  
**Secondary Legislation**

**INTRODUCTION**

1. The Committee has been asked to consider five secondary instruments related to the Redress Scotland Act. The Act sets up a scheme to make financial payments ('redress payments') to survivors of historical child abuse in care in Scotland. In some circumstances where the survivor has died, these can be paid to their partner or children. The Act sets up a new independent public body, Redress Scotland, to make decisions about payments. The scheme replaces an interim scheme called the advance payment scheme. The Act allows organisations involved with residential care of children in the past to pay financial contributions to the scheme. In return, survivors who accept a redress payment from a contributing organisation will have to agree not to take legal action against these organisations or the Scottish Government.
2. The five instruments before the committee are:
  - [The Redress for Survivors \(Historical Child Abuse in Care\) \(Scotland\) Act 2021 \(Form and Content of Waiver etc.\) Regulations 2021](#) – Affirmative Instrument
  - [The Redress for Survivors \(Historical Child Abuse in Care\) \(Exceptions to Eligibility\) \(Scotland\) Regulations 2021](#) – Affirmative Instrument
  - [SSI 2021/313: The Redress for Survivors \(Historical Child Abuse in Care\) \(Payment of Legal Fees\) \(Scotland\) Regulations 2021](#) – Negative Instrument
  - [SSI 2021/312 The Redress for Survivors \(Historical Child Abuse in Care\) \(Reimbursement of Costs and Expenses\) \(Scotland\) Regulations 2021](#) – Negative Instrument
  - [SSI 2021/333: The Legal Aid and Advice and Assistance \(Miscellaneous Amendment\) \(Scotland\) \(No. 2\) Regulations 2021](#) – Negative Instrument
3. This briefing is intended to help members consider the secondary legislation, and provide a brief overview of the parliamentary passage of the Act and developments since Royal Assent. [SPICe produced a briefing](#) ahead of Stage 1 which may be useful for further background on the Bill.

**THE REDRESS ACT – PARLIAMENTARY PROCESS**

4. The Education and Skills Committee was assigned as the lead committee for consideration of the Bill, and published its [Stage 1 report on 9 December 2020 \(an easy read summary is also available\)](#). The report did support the general principles of the Bill, noting that 'The Committee believes that, whilst there are

some fundamental issues with the calculation of 'fair and meaningful' contributions and the waiver, the Bill does provide a straightforward, easy to access scheme for victims/survivors'. In terms of the operation of the waiver scheme, the Committee made a number of observations and recommendations:

- Proposed changes to charity law, designed to make it easier for care providers to participate in the scheme, were also identified as problematic, with many stakeholders pointing out that charitable trustees would always need to act to safeguard the future viability of the charity, something that appeared to be at odds with the modelling in the Financial Memorandum.
  - From the evidence heard, the Committee is unclear whether insurance providers would commit to making a payment to the scheme in the absence of liability for abuse being established.
  - Care providers wishing to contribute to the scheme will almost certainly have to make any payments from their own funds. This is likely to act as a further disincentive for organisations to participate, particularly given that civil action, with its higher evidential requirements and establishment of liability, is likely to give rise to an insurance payment, whereas an application to the redress scheme is not.
  - The waiver itself proved unpopular with victims/survivors, many of whom viewed it as restricting their right to choose civil litigation in future. Many highlighted the need for victims/survivors to make an informed choice about signing the waiver, particularly where they might feel compelled to take a redress payment due to difficult financial circumstances.
  - The Committee recommended that the Scottish Government considered removing the waiver and find another way to avoid making double payments to victims/survivors, such as an offsetting approach which would allow the victim/ survivor to pursue a civil case, and if successful any Redress payments already made could be deducted from the compensation awarded by the court.
5. The Scottish Government [responded to the Committee's report on 16 December](#). In response to the concerns raised about the waiver scheme, the Scottish Government noted that;
- The Scottish Government have sought to make the waiver fair. Crucially, the waiver only applies to those organisations that make a fair and meaningful contribution.
  - where a survivor's care provider did not contribute to the redress scheme, the survivor would be entitled to receive a redress payment and then also to pursue litigation and, if successful, they would be entitled to keep both payments
  - applicants for individually assessed payments (as opposed to those who qualify only for the fixed payment) would only be asked to sign a waiver when they know what their full award has been assessed.

- On considering the evidence the committee has heard, we will commit to bring forward amendments at Stage 2 to increase the 12 week acceptance period to 26 weeks/6 months, and the 4 week review request period to 8 weeks.
  - We have tried to minimise this risk (of a provider defaulting after securing a waiver) as much as possible in the design and structure of contributions (by allowing providers to be removed from the contributor list; by having the power in Section 12(8) of the Bill to pursue contributions agreed but unpaid as a debt due to the Scottish Government; and to demonstrate good faith, by seeking an initial, albeit not full (to assist affordability), payment before an organisation is placed on the contributor list).
  - Section 89 of the Bill makes clear that funding for legal advice earlier in the process is also provided, which means all survivors who apply to the scheme will have access to free legal advice throughout the process, should they wish to take this up. Applicants and potential applicants will be made aware of this.
6. The Bill was subject to a number of amendments at Stage 2, including:
- The introduction of the principle that applicants and potential applicants are to be treated “with dignity, respect and compassion” by those involved with the redress scheme (section 11A).
  - Giving the Scottish Ministers the power to remove an organisation from the list of scheme contributors where the organisation has failed to make the financial contribution agreed to (section 13A).
  - Removal of section 15 of the Bill which would have allowed the Scottish Ministers to make regulations permitting charities to use “restricted funds” to pay into the scheme (these are charitable funds which can only be used for a particular purpose specified by the donor).
  - Extending the application period for applications for redress to the longer of either five years from the point the Act comes into force or two years from the point where the Scottish child abuse inquiry has published its final report. The Scottish Ministers must also carry out a review of whether this period should be extended (section 31 of the Act).
  - The introduction of a legal presumption that any information provided by the applicant in respect of the application is true and accurate to the best of the applicant’s knowledge and belief (section 34(2A))
  - An increase to the maximum level of redress payment from £80,000 to £100,000 (section 38).
  - Increasing the time period in which applicants can accept an offer of a redress payment from twelve weeks to six months (section 47).
  - Giving applicants for redress the right to have access to any evidence obtained by Redress Scotland in determining their application with the exception of information that would be likely to identify any person other than the applicant, or which would contravene data protection legislation –

the aim being to ensure that applicants are able to access the full picture of their time in care as children (section 78A).

- The requirement on the Scottish Government to set up a forum for survivors (section 93A). The Scottish Government had committed to do this in the Policy Memorandum, but this commitment was not a statutory one in the Bill itself.

7. At Stage 3, further amendments were agreed including:

- The introduction of a new provision (section 9 of the Act) aimed at improving the information and guidance on the redress scheme which will be available to survivors.
- The introduction of an obligation on scheme contributors to acknowledge the wrongfulness of, and the harm caused by, the historical child abuse when making contributions to the scheme (section 14(1)(c) of the Act).
- The introduction of a requirement on the Scottish Ministers to consider the “sustainability” of an organisation’s services when determining whether a proposed contribution to the scheme is a "fair and meaningful financial contribution" (section 15(2)(b)(ii))

8. Various amendments proposing changes to the waiver procedure were not agreed to at Stage 3. The Parliament did, however, agree to amend the Bill at Stage 3 so that the Scottish Ministers are under an obligation to lay a report before the Scottish Parliament on the operation of the waiver procedure 18 months after the waiver procedure comes into force. This report has to include an assessment of the impact of the waiver on applications for redress payments and the effectiveness of the waiver in encouraging bodies to become scheme contributors (see section 48 of the Act).

## **DEVELOPMENTS SINCE ROYAL ASSENT**

9. Since the Act received Royal Assent, the Scottish Government has published two information notes setting out developments in relation to the Redress Scheme.

10. In [May 2021 the Scottish Government stated](#) they were working to develop statutory guidance on how the law would work, how those involved can ensure they comply with the law and how some of the processes would operate. This guidance will be published, but no timescale was given for this publication. The Scottish Government are also working with clinical psychologists and other experts to develop the assessment framework, which will also be published to give applicants an understanding of how their circumstances may match to payment levels. The Scottish Government is also working with the UK Government to secure a Section 104 order (which will provide that that Act can be applied in the rest of the UK), and to ensure arrangements for benefits, tax and social care entitlement disregards are in place prior to the scheme commencing. This update also includes a pledge from the Scottish Government to publish details of what a ‘fair and meaningful contribution’ to the waiver scheme will look like.

11. In [July 2021 the Scottish Government published an](#) update on the establishment of Redress Scotland and the Scottish Government Redress Division. The Government Division will provide application forms and support for those applying, while Redress Scotland as an independent body will make decisions on applications.
12. On the 21<sup>st</sup> September, [the Herald reported that no money had yet been contributed to the Redress Scheme](#) in exchange for a waiver. The Scottish Government noted that:

“Discussions regarding participation in the scheme have been ongoing for some time and are at an advanced stage. No money has been received from contributing organisations yet as discussions are about securing contributions to the scheme in advance of it opening to applications.”

### **THE OPERATION OF THE WAIVER SCHEME**

13. The [Policy Memorandum](#) notes that “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 and those organisations that have made fair and meaningful financial contributions to the scheme.” Note – the waiver will only apply to an individual applicant where the organisation involved in their experience of abuse has contributed to the scheme, so it is not certain that all applicants will be asked to sign a waiver.
14. The waiver is offered as an incentive to those who bear historic responsibility for the abuse to contribute to the scheme, as by removing the potential civil liability relating to the abuse (at least in so far as the victims/ survivors elect to sign the waiver) this could increase certainty about the overall exposure, and remove a barrier to organisations contributing. This assumes that any payment would have to come from an organisation’s own funds however, and does not account for the role that insurance companies might pay. If an organisation expects that their insurance will cover any civil liability, then they do not have a financial incentive to contribute via the waiver scheme.
15. The Scottish Government also noted in the Policy Memorandum that they understood it was important to survivors that financial contributions were received from those organisations ultimately responsible for the abuse.
16. The Scottish Government note that the Redress scheme is designed to be an alternative to civil litigation, but that it may not be the preferred approach for all applicants, and that the creation of the Redress scheme does not prejudice the ability of survivors to pursue action through the courts, but that the waiver scheme will be necessary to ensure that no double payments are made for the same abuse.
17. The [Financial Memorandum](#) contained a wide range of potential costs associated with the Bill, and there is considerable uncertainty about the level of costs that will ultimately be borne by the Scottish Government. This uncertainty comes from not knowing exactly how many victims/ survivors there are and how many will apply to the scheme, but also due to the uncertainty around what

contributions will be received from organisations which bear historic responsibility for the abuse. It sets a central estimate of a total cost to the Scottish Administration and other bodies of £390.49 million, of which the vast majority (£299m) relate to redress payments. This estimate is based on 8,000 applicants and 1,500 next of kin applicants.

## QUESTIONS

18. Members may wish to ask the Deputy First Minister (DFM):

- Whether there is any update on the criteria to determine what is a 'fair and meaningful' contribution to the waiver scheme
- Whether the DFM can provide an update on contributions to the scheme, and whether any waivers are expected to be in place when the scheme opens to applications.
- The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 (Form and Content of Waiver etc.) Regulations 2021 include a prescriptive form of wording for the waiver which some applicants may find difficult to understand. Can the DFM clarify what assistance will have been made available to applicants at this stage to ensure they can make an informed decision on signing the waiver?
- What would happen in a situation where a survivor initially signed the waiver and received a payment through the Redress Scheme, but then additional evidence came to light which might mean that award could be materially higher, or that the applicant might have been better served in taking action through the courts?
- The Bill was amended at Stage 2 to include a provision that allowed the Scottish Government to remove an organisation from the contributors list where that organisation had failed to make the contribution due. What would happen if this occurred after the Redress scheme had opened, and some applicants had already signed a waiver in respect of that organisation?
- The Act was amended at Stage 3 to include a requirement that the Scottish Government report on the operation of the waiver 18 months after the Redress Scheme has begun. If this report were to identify deficiencies, would there be any possibility to address these for applicants who had already signed a waiver and perhaps received a Redress payment by this point?

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