

This document relates to the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill (SP Bill 79) as introduced in the Scottish Parliament on 13 August 2020

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

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill introduced in the Scottish Parliament on 13 August 2020.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 79–EN);
- a Financial Memorandum (SP Bill 79–FM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 79–LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy Objectives of the Bill

Overview

4. 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. For many of Scotland's most vulnerable children who were in care in the past the reality was utterly different. Many children in care in Scotland were not treated with love or with respect and, rather than being kept safe, they were exposed to danger and abused by those responsible for their care. Many children were failed by the institutions and systems entrusted to look after them, often leaving them with lifelong consequences.

5. Scotland is a country which fairly and compassionately supports those who have been harmed, and fully respects their rights to justice.

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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 was 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.

6. The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill (“the Bill”) seeks to establish a financial redress scheme for survivors of historical child abuse in care in Scotland. The purpose of the scheme is to acknowledge and provide tangible recognition of harm as a result of historical child abuse in various care settings in Scotland. The scheme provides elements of accountability, justice, and financial and non-financial redress for those who wish to access it. The Bill seeks to put in place a scheme which treats survivors with dignity and respect and which faces up to the wrongs of the past with compassion.

7. It is recognised that, on its own, a financial redress payment does not, and cannot, meet all the needs of all survivors. The Bill provides survivors access to some elements of non-financial redress such as acknowledgement and therapeutic support. The redress scheme established by the Bill will also sit alongside other measures in place to support survivors of historical child abuse including apology.

8. A redress scheme has to work for survivors, and it therefore has to be designed and delivered with survivors’ needs and expectations at the forefront. The design of Scotland’s statutory redress scheme has been strongly influenced by engagement and consultation with survivors. The development of the scheme has benefitted from the views of survivors, those who work to support them, other professional groups and organisations, and the experience and lessons of others who have implemented redress schemes to develop a survivor-focused approach to providing redress. Engagement with survivors will continue, including the establishment of a non-statutory Survivor Forum to ensure the needs and perspectives of survivors are reflected in the implementation of the redress scheme and the approach to supporting applicants.

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9. The Scottish Government is committed to seeking financial contributions from those 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. Those organisations have a historically significant opportunity to participate meaningfully in this national collective endeavour to recognise the harms of the past. Seeking contributions from those organisations is consistent with the views expressed by survivors. The 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.

10. 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.

The Need for Redress

11. 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.

12. 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. These include 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.¹ Shaw (2007) highlighted that access to records and to information about their past circumstances and identity, can be hugely

¹ Independent Inquiry Child Sexual Abuse Accountability and Reparations Investigation Report, September 2019 available at <https://www.iicsa.org.uk/key-documents/14231/view/accountability-reparations-report-19-sep-2019.pdf>

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challenging for many survivors of abuse in care.² 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 scheme is not about establishing legal liability for the consequences of the abuse; redress serves a different purpose.

13. 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 generally had to be made within three years of the injury in respect of which the claim was laid or the survivor’s 16th birthday).

14. However, those who experienced abuse before 1964 remain affected by the law on prescription. Notwithstanding the provisions of the Prescription and Limitation (Scotland) Act 1984 or the 2017 Act, anyone whose abuse took place before 26th September 1964 and whose claim prescribed before the law changed in 1984 is unable to pursue a personal injuries claim in court for that abuse. For some survivors, a financial redress scheme may be the only way in which they can have their harm publicly acknowledged and recognised.

15. As the Scottish Child Abuse Inquiry (SCAI or “the Inquiry”) 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 ill-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.

16. 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

² Shaw, T 2007 Historical Abuse Systemic Review Residential Schools and Children’s Homes in Scotland 1950 to 1995, <https://dera.ioe.ac.uk/7215/1/0054353.pdf>

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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 Scotland's vulnerable children failed them and also further demonstrate a firm commitment to ensure the mistakes of the past are not repeated.

17. It is important to acknowledge that throughout the period of time covered by the redress scheme provided for in the Bill, many children in care across Scotland were well-treated, protected and loved. Children in a wide variety of settings, involving a wide range of providers of care, were cared for to the highest standards, including in some settings where sadly that was not the experience for other children.

18. The redress scheme seeks to recognise and acknowledge those who were abused in care and provide a form of tangible recognition of that abuse. The redress scheme does not proceed on the basis that all experiences of the care system in the past were inherently negative or abusive.

19. 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.

20. 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.

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21. 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.

22. Given the historical, systemic failings around the treatment of children in care in Scotland, and the nature and scale of abuse suffered, it is right that Scotland establishes a financial redress scheme which has survivors at its heart.

The Survivor Voice

23. From the outset, it is important to acknowledge the valuable contribution that survivors themselves have made to the national journey of confronting the harms of the past. The progress that has been made in addressing this would not have been possible had it not been for the tireless advocacy of survivors of abuse in care. Survivors have shared their time, energy and personal experiences with the determination that they would be heard, that they would be believed and that the abuse they suffered in childhood, and the enduring impact this has had on their lives, would not be forgotten. Their bravery has ensured that Scotland is a better and safer place for children.

24. In recent years there has been much focus and effort to engage with survivors to understand and address the harm caused by historical child abuse in care in Scotland. Survivor engagement has been key to early discussions on redress.

25. The InterAction Action Plan Review Group (the “Review Group”), a national stakeholder group, took forward work instructed by the Scottish Government in 2016 and, in partnership with the Centre for Excellence for Looked After Children in Scotland (CELCIS), developed and delivered a national survivor consultation in 2017, which received just over 180 responses.³ The differing views of survivors have been listened

³ The Review Group monitors the Scottish Human Rights Commission (SHRC) Action Plan on Justice for Historic Abuse of Victims of Children in Care. This is a national group that includes survivor representatives (some of whom represent survivor organisations), representation from care providers, Social Work Scotland,

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to. The views from the 2017 survivor consultation were used as a foundation to inform thinking on the areas that were further explored in the pre-legislative consultation. The Review Group continues to provide insight and support, including helping to promote awareness about the on-going work. The valuable contribution of the Review Group to this intense and challenging work and the dedication of its members over the past 10 years cannot be under-estimated. The Review Group's drive to meet its remit and deliver on its core principle of ensuring that survivor views are heard, has been unwavering.

26. The Scottish Ministers will establish a Survivor Forum through which survivors can contribute to the continuous improvement of the delivery of the redress scheme, to ensure the scheme does all it can to make the process as straightforward as possible for applicants and that they are well supported. Further consideration is being given as to how a broad range of views can be gathered including using technology to ensure participation from across Scotland and beyond. The Survivor Forum will not, however, have any part in the independent decision-making process nor any sight of, or involvement in, individual redress applications.

Background

The Nature and Extent of Historical Child Abuse in Care in Scotland

27. There has been growing recognition over time about the nature and extent of historical child abuse in care establishments in Scotland. The nature of abuse can be direct, including emotional, sexual or physical abuse, and it can relate to policies, practice or systemic or organisational failures. It is recognised that children in care settings can be particularly vulnerable to abuse due to the potential for targeting by perpetrators, systemic or power issues, and the issues that brought them into care.⁴

the Scottish Human Rights Commission, the Scottish Government and the Centre for Excellence for Looked After Children in Scotland (CELCIS), now the Centre for Excellence for Children's Care and Protection.

⁴ Radford, L et al (2017) The abuse of children in care in Scotland: A research review, University of Lancaster

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28. Despite this increased awareness, there are significant challenges with estimating the numbers of children who were in care establishments, boarded-out or fostered in the past, and with how many children experienced abuse in those settings. The limited information that is available is affected by the way in which records were kept and statistics recorded in the past. Research into the prevalence of abuse in care settings is also limited. Furthermore, the secrecy, shame and other psychological barriers resulting from child abuse mean that disclosures of abuse can take years, if they occur at all.

29. In 2015 the Scottish Child Abuse Inquiry began its work to, amongst other things, investigate the nature and extent of the abuse of children whilst in care and consider whether changes in practice, policy or legislation are necessary in order to protect children in care in the future.⁵ It is publishing the findings of case studies, which detail the extent and nature of physical, sexual and emotional abuse and neglect based on testimonies from survivors. So far these have found that certain 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'.⁶ 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".⁷ 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.

30. The Inquiry is adding significantly to what is known about the numbers of children in particular care settings, as well as evidence of the abuse and experiences of children in care and how that has affected the lives of so many. Prior to the Scottish Child Abuse Inquiry, there were

⁵ <https://childabuseinquiry.scot/>

⁶ 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

⁷ 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>

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other inquiries in Scotland relevant to abuse in care: the Edinburgh Inquiry into Abuse and Protection of Children (published 1999); The Fife Council Independent Inquiry (published 2002); and the Independent Inquiry into Abuse at Kerelaw Residential School and Secure Unit (published 2009)⁸. The findings and recommendations from these inquiries and from reviews such as Skinner (1992), Kent (1997) and Shaw (2007) highlighted a range of issues and concerns, ultimately leading to significant changes to the care and protection of children in Scotland.

The Response to Historical Abuse in Care

31. The statutory financial redress scheme will form part of a wider package of measures which have previously been put in place, many of which will continue to play a vital role. These include:

- the apology on behalf of the Scottish people made by the then First Minister on 1 December 2004, and the apology on behalf of the Scottish Government made by the Deputy First Minister on 23 October 2018;
- the National Confidential Forum, which provides an acknowledgement function for survivors of abuse in care, established by the Victims and Witnesses (Scotland) Act 2014;
- the establishment of the Scottish Child Abuse Inquiry in 2015;
- Future Pathways, established in 2016, which provides personal outcome-focussed support to survivors of abuse in care;
- the passing 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.

32. In addition, there were a number of actions and developments following the apology in 2004 by the then First Minister Jack McConnell.

⁸ Marshall K, et al 1999 Edinburgh's Children -The Report of the Edinburgh Inquiry into Abuse and Protection of Children in Care: Black and Williams 2002 Frizzel E (2009) Independent Inquiry into Abuse at Kerelaw Residential School and Secure Unit

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These included the launch of a National Strategy for Survivors of Childhood Abuse (2005), and a 'Historical Abuse Systemic Review: Residential Schools and Children's Homes 1950–1995' which was carried out in 2007 by Tom Shaw. The 'Shaw report' highlighted a number of issues which led to further action and changes, including:

- Concern about care records, recognising that these were more than documents and instead a vital link with individuals' identity and childhood. The National Public Records Review took place in 2009 and led to the Public Records (Scotland) Act 2011 setting out the arrangements for the management and retention of records.
- The need for support, and the establishment of In Care Survivors Service Scotland in 2008 as a support service for adults who suffered childhood abuse in care. This was replaced with a new person-centred, outcomes-based support service called Future Pathways in 2016.
- A pilot confidential forum 'to give survivors the chance to speak about their experiences and to help them come to terms with the past'.⁹ Following this, the Scottish Government established the National Confidential Forum in 2014.

33. There were two further significant developments in relation to the rights of survivors of historical child abuse in care, which were driven and informed by the Scottish Human Rights Commission:

- In 2010, commissioned by the Scottish Government, and drawing on human rights law and research, the Scottish Human Rights Commission published a human rights framework for ensuring effective access to justice, remedies and reparation for childhood abuse.
- An InterAction process (a facilitated negotiation within a human rights framework with key stakeholders) followed to develop an Action Plan on Justice for Victims of Historic Child Abuse.¹⁰

⁹ 2009 - The Scottish Government announced a pilot confidential forum (came to be known as The Time to be Heard Forum) to listen and validate survivors experiences, create a historical record, signpost to services available and test out a confidential committee model.

¹⁰ SHRC InterAction on Historic Abuse of Children in Care Action Plan on Justice for Victims of Historic Abuse of Children in Care

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Delivered in partnership between the SHRC and CELCIS, this process brought together survivors and other stakeholders for the first time. The Action Plan arguably provided the basis and structure for many of the current reparations already in place. The strategic steering group that had been established for the InterAction Process continued as the Review Group for the Action Plan.

34. The need for reflection on the past, a better understanding of abuse, and the opportunity to consider any necessary changes, contributed to the Scottish Government setting up the Scottish Child Abuse Inquiry.¹¹ This development sits alongside significant changes in legislation, policy and practice to respond to those who have suffered abuse in the past and increased protection for children now and in the future.

Policy Response – Caring for Children in Scotland

35. The time period relating to historical child abuse in care that the scheme will consider has seen transformative change in the understanding of children's rights, child development, the emotional and behavioural needs of children and how those needs can best be met.

36. In relation to children in care, the Children (Scotland) Act 1995 saw children's rights and participation integrated into legislation and outlined responsibilities to prepare and support children for leaving care. Regulations for a range of children's care settings quickly followed¹², and in 2002 national standards were introduced for children's care homes, foster care and family placement services, and school care accommodation services. Since 2001, a range of services, including residential and foster care, have to be registered and they are inspected

¹¹ Official Meeting of the Parliament Report, 28th May 2015, The Cabinet Secretary for Education and Lifelong Learning (Angela Constance)
<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=9973&i=91608&ScotParlORr=9973&mode=pdf>

¹² These regulations detailed a range of issues which care services need to address such as: the welfare of users, personal plans, the fitness of managers, employees and premises, the facilities, staffing, and complaints procedures.

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on a regular basis.¹³ The National Residential Child Care Initiative was set up in 2008 to undertake a strategic review of residential child care services in Scotland and has led to further improvements. In 2003, Scotland established a Commissioner for Children and Young People to champion children's rights.

37. In 2002, the Scottish Social Services Council (SSSC) was established to develop standards of conduct and codes of practice for social services workers and for social services employers. A register of social services workers was introduced in 2003. Guidance for staff recruitment was introduced and the Protection of Children (Scotland) Act 2003 established a list of individuals unsuitable to work with children, and a membership scheme for people undertaking regulated work with children or protected adults was created by the Protection of Vulnerable Groups (Scotland) Act 2007. Training and qualifications for residential staff developed significantly in 2000.¹⁴

38. Recent years have also seen significant shifts in our understanding and approach to relevant broader areas such as child protection, youth justice, and the importance of early intervention and joint working across services.

39. The Children and Young People (Scotland) Act 2014 introduced a number of developments, including placing corporate parenting duties on a range of publicly funded organisations intended to improve the outcomes for looked after children, accept responsibility for them and make their needs a priority. The 2014 Act also strengthened Scotland's approach and assistance for care leavers and ensured greater recognition of the role and need for assistance in relation to kinship care. Working for three years, the Independent Care Review recently

¹³ The Care Commission was established in as an independent regulator under the Regulation of Care (Scotland) Act 2001 Later replaced by the Care Inspectorate (2011)

¹⁴ Increased funding of Scottish Institute of Residential Child Care (SIRCC) was key in this area.

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published its findings and the Scottish Government has committed to implementing the Review's recommendations.¹⁵

Learning from Redress Schemes Elsewhere

40. The Bill is informed by the delivery of redress elsewhere. Redress schemes have been established in a number of other countries around Europe and the world, albeit with different contextual backdrops and eligibility criteria. Schemes have been established in Australia, Austria, Belgium, Canada, Germany, Iceland, Ireland, the Netherlands, New Zealand, Norway, Jersey, Sweden, Switzerland, and the United States.¹⁶ 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 in Northern Ireland, the Historical Institutional Abuse Redress Board was established to receive and process applications for compensation in relation to historical child abuse in residential institutions.

41. 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.¹⁷

42. In a separate investigation, IICSA recommended that child migrants should receive financial redress. In response, the UK Government set up a payment scheme in recognition of the fundamentally flawed nature of the historic child migration policy that

¹⁵ The Independent Care Review published seven reports on 5 February 2020: The Promise, a Pinky Promise for younger readers, The Plan, The Money, Follow the Money, The Rules and Thank you.

<https://www.carereview.scot/conclusions/independent-care-review-reports/>

¹⁶ 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

¹⁷ 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>

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saw children separated from their families and sent overseas as part of the UK Government's historical participation in child migration programmes. Payments are made to all eligible former British child migrants, regardless of whether they suffered abuse.

43. Examining the experience elsewhere highlights the range of unique contexts, origins, and processes to assess and deliver payments. Many redress schemes follow large scale investigations or inquiries and the eligibility criteria vary. For example, the National Redress Scheme in Australia is focused on sexual abuse whilst other schemes only include institutional residential settings rather than also including foster care. Learning from elsewhere will continue wherever possible, whilst acknowledging the limitations in being able to make direct comparisons between schemes.

A Financial Redress Scheme for Scotland

44. On 23 October 2018 in the Scottish Parliament, the Deputy First Minister of Scotland offered an unreserved apology on behalf of the Scottish Government to all those who were abused as children while in care, and committed to establish a financial redress scheme for survivors of abuse in care.¹⁸

45. Responding to recommendations from the Review Group, which were based on the results of the national survivor consultation in 2017 and other work¹⁹, the Deputy First Minister outlined the Scottish Government's ambition to deliver legislation establishing a statutory redress scheme for Scotland before the end of this parliamentary session. In recognition of the timescale and issues involved, and in anticipation of the statutory scheme, he outlined the intention to allow for

¹⁸ The Deputy First Minister of Scotland made a [statement to Parliament](http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11722&i=106114#ScotParlOR) on 23 October 2018 in which he committed to establish a financial redress scheme for survivors of abuse in care and offered an apology on behalf of the Scottish Government to all those who were abused as children while in care.

¹⁹ The survivor consultation referenced earlier at paragraph 25 took place alongside an engagement exercise to gather initial views from residential and foster care providers and other relevant professional groups, and a review of available information about financial redress schemes in other countries.

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advance payments to be made to elderly and terminally ill survivors of abuse.

46. The advance payment scheme opened on 25 April 2019 and is delivered by the Scottish Government. The discretionary scheme provides acknowledgement and recognition, by means of an *ex gratia* financial payment of £10,000 and a reiteration of the Deputy First Minister's apology, to those who suffered abuse in care in Scotland before 1 December 2004, and who either have a terminal illness or are aged 68 or over (previously the threshold was set at aged 70 or over).

47. The detail and delivery of the advance payment scheme, in particular the application process, was designed to be as sensitive and straightforward as possible, whilst ensuring robust procedures for the use of public funds. The scheme has increased understanding of issues that can arise for applicants during the redress process, as well as the many and varied sources of documentation potentially relevant to applications, in particular in relation to care settings. Learning from the advance payment scheme, including a formal review of the first five months of operation, has proved invaluable in developing the Bill. The advance payment scheme will continue to operate until the statutory scheme opens.

48. Following the commitment to develop a statutory scheme, the Scottish Government launched a pre-legislative consultation in September 2019 inviting views on specific proposals for the establishment of a financial redress scheme, building on the findings of the earlier survivor consultation. In total, 280 separate responses to the consultation were received. 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 abuse in care. Further details of the consultation responses to specific proposals are included in the relevant sections on key provisions of the Bill below.

Key Features of the Redress Scheme

49. Key aspects of the design and delivery of the financial redress scheme include:

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- Independent decision-making: a non-departmental public body, Redress Scotland, will be created to independently assess and make decisions on applications for redress.
- Administration and processing: A division of the Scottish Government will carry out the administration of the scheme, the processing of applications and the making of redress payments.
- Eligibility: the scheme is for survivors of historical child abuse in relevant care settings in Scotland. Historical in this context means abuse which took place before 1 December 2004.
- Time period: the scheme will be open to accept applications for five years, although the Scottish Ministers will have the power to extend that (subject to the Parliament's approval).
- Payment structure: the scheme will adopt a combination payment approach and offer survivors the choice to apply for a fixed rate redress payment or an individually assessed redress payment.
- Payment levels:
Fixed rate redress payment £10,000
Individually assessed redress payment levels
Level 1 £20,000
Level 2 £40,000
Level 3 £80,000
- Assessment: the level of each individually assessed redress payment will be determined following consideration of the nature, severity, frequency and duration of abuse along with all other relevant matters. An assessment framework will be published as guidance to provide transparency and consistency in decision-making.
- Evidence: the scheme will be robust and credible to ensure that survivors, providers and others can have confidence in its processes and outcomes. This will be achieved through the production of comprehensive guidance on evidentiary matters, transparency in the appointment process of decision-makers with suitable skills, knowledge and expertise, as well as the statutory safeguard of a reconsideration process to allow fraud to be dealt with.

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- Waiver: 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.
- Financial contributions: fair and meaningful financial contributions to the redress scheme will be sought from those 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.
- Legal costs: subject to appropriate limits, the legal costs for applicants will be funded as part of the redress scheme.
- Next-of-kin: a restricted category of next of kin of deceased survivors will be eligible to apply for the fixed rate redress payment where the survivor died on or after 17 November 2016, the date on which the Deputy First Minister of Scotland made a statement to the Parliament committing to consult on the provision of financial redress to survivors.
- Non-financial redress: the scheme established by the Bill will offer access to support in addition to redress payments. It will also sit alongside other measures in place to support survivors of historical child abuse including apology.

Independent Decision-Making

50. The Bill will establish Redress Scotland, a new non-departmental public body (NDPB) to make decisions on applications for redress in order to ensure that decision-making is independent of the Scottish Government.

51. In order to reflect the policy intention, the Bill provides that, in performing its functions, Redress Scotland is not subject to the direction or control of any member of the Scottish Government (section 6). In addition, to provide security of tenure, members will be appointed for a minimum of three years (and a maximum of five years), with the possibility of re-appointment.

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52. Redress Scotland will consist of a chair and at least five other members, all of whom are to be appointed by the Scottish Ministers. Members may only be appointed where they have skills, knowledge and expertise which the Scottish Ministers consider relevant to the carrying out of the body's functions. Following a public appointments process, it is intended to appoint persons with relevant expertise in the fields of emotional and psychological trauma, law, social work and health. In the case of Redress Scotland it has been decided that an unregulated appointments process would be more suitable (as opposed to the appointments process regulated under the Public Appointments and Public Bodies etc. (Scotland) Act 2003), given the specialist nature of the appointments and taking into account the expected duration of the financial redress scheme. A small secretariat will be required to support the members and the body has the power to appoint these staff. The Scottish Ministers have the power to dissolve the body once its work is complete.

53. Decisions in respect of fixed rate payments will be made by panels of at least two members. Decisions in respect of individually assessed payments will be made by panels of at least three members. This will involve assessing the eligibility of applicants, as well as determining the relevant payment level for an eligible claim for an individually assessed payment. It is intended that at least one legally qualified member will sit on each panel.

54. The body will also have functions in relation to the review of decisions. A review may be requested in respect of a determination that a person is not eligible for a redress payment, in respect of the amount which a person is to be offered by way of an individually assessed payment, or in respect of the amount to be deducted by way of a previous payment. Such a review will be carried out by a panel of at least three members, all of whom were not members of the original panel that made the decision under review.

55. Reviews may also be requested in respect of a number of other matters, including a determination under section 23 that permission to apply for a next of kin payment due to exceptional circumstances is not being granted; a determination under section 58 that a person is precluded from being offered a redress payment due to previous convictions; a determination under section 64 that an application is not

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going to continue after the applicant's death; a determination under section 72 (reconsideration where possible material error); a notice compelling the giving of evidence (section 76); and a fee payment request under section 88 (duty on the Scottish Ministers to pay certain legal fees in connection with applications).

Administrative Support

56. In order to make the most efficient use of resources, all other aspects of the application process apart from decision-making will be carried out in-house by the Scottish Government. To reflect this arrangement, the Bill creates a statutory duty on the Scottish Ministers to provide administrative support to Redress Scotland (section 9). This will include providing information and guidance to potential applicants, arranging any required support to make an application, receiving applications, transmitting applications to Redress Scotland for decision, liaising with applicants to request further information as the decision-making panel requires, exercising the power to obtain information from care providers and others to support a survivor's application, and ultimately making payments as advised by Redress Scotland.

57. The Survivor Forum is not provided for within the Bill (in order to maximise flexibility and allow it to be responsive to the views and needs of survivors) but will be established by the Scottish Ministers to provide a mechanism for survivor views and feedback on the delivery of the redress scheme. The Survivor Forum will contribute to the continuous improvement of the delivery of the redress scheme and aim to ensure the scheme does all it can to make the process as straightforward as possible to applicants and that they are well supported. Further consideration is being given as to how the Forum will communicate with the scheme administration. As noted elsewhere, the Survivor Forum will have no sight of or involvement in individual applications to the scheme.

Consultation

58. The consultation asked whether the decision-making panel should consist of three members, whether respondents agreed that the key skills and knowledge for panel members should be an understanding of human rights, legal knowledge, and knowledge of complex trauma and its impact, and whether there were other specific professional backgrounds or skills they thought were essential.

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59. In total 83% of respondents supported a panel of three members on the grounds that this would facilitate consensus or majority decisions to be reached, and would ensure a spread of knowledge, skills and backgrounds. Individuals who disagreed generally favoured a panel of more than three members. There was general agreement (97% overall) that understanding of human rights, legal knowledge, and knowledge of complex trauma and its impact were key for panel members, with respondents often emphasising the need for specialist knowledge and experience relevant to the issue of in care abuse. Knowledge and understanding of the care system and the broad issue of historical abuse, as well as financial matters, were also identified as relevant. Personal qualities such as empathy, compassion, common sense, and commitment to fairness and justice were also mentioned.

60. The consultation also proposed that the Survivor Forum be established to advise and inform the redress scheme administration. Respondents noted that the experience of survivors would be 'invaluable' and that, on principle, survivor involvement was important, noting also suggestions for how survivors might be recruited and that membership should be diverse and representative of the full range of survivor experiences and perspectives.

61. As regards the public body itself, it was proposed that the financial redress scheme would be administered and governed by a new public body which, although accountable to Scottish Ministers, would be operationally independent of them in particular as regards the decision-making panel and process.

62. A total of 83% of respondents agreed with the proposal that a new public body should be created to administer the redress scheme. Some thought this would help to ensure independence, but for others their support for this proposal was conditional on the new body demonstrably being so. Other respondents questioned the need for a new public body, either on grounds of cost or because it was felt that existing organisations could offer an appropriate base for the scheme.

63. It was also proposed that the chair and chief executive of the public body would be appointed through the public appointments process. The Scottish Ministers asked how survivors could be involved in the recruitment process for these posts, and how they should be

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selected to take part in this process. There was widespread support for the involvement of survivors in the appointment of the chair and chief executive of the new public body. Most commonly, respondents indicated that survivors should be represented on the interview panel, but some argued for an involvement throughout the recruitment process. These matters will be given consideration in the implementation phase.

64. Respondents' suggestions regarding the desired skills and personal qualities of panel members, and the process for recruiting them, will be taken forward in due course with assistance from the Public Appointments Team within the Scottish Government. However, the Bill ensures that only those with relevant skills, knowledge and expertise may be appointed.

65. Departing from the model suggested in the consultation paper, administration of redress applications will not be conducted by a new public body but will instead be carried out in-house by the Scottish Government, building on the experience of the advance payment scheme and to make best use of resources. As above, decisions on redress applications will be taken by a new public body named 'Redress Scotland'. This dual model should address respondents' views both that decision-making should be demonstrably independent and that the costs of administering the scheme should not be unduly high.

66. Given that Redress Scotland will be a small organisation, with responsibility only for decision-making – not for processing applications or making payments – it is unlikely to need a chief executive as well as a chair. Recruiting a chair only would further reduce costs. Preliminary discussions have been undertaken regarding sourcing a central belt location for Redress Scotland and the in-house redress administration (although a decision on whether or not the two should be co-located has not been made). Guidance will be published setting out the functions of each body and the detail of how they will operate together.

Alternative Approaches

67. Given the particular purpose and nature of the redress scheme, the time limited nature of its operation and the essential need to provide trauma-informed and independent decision-making, it is considered that the most appropriate approach is to establish a new NDPD.

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68. A range of delivery models for the statutory redress scheme were explored in addition to the chosen option, a small NDPB responsible for making decisions on redress applications and a Scottish Government division to administer the application process. These alternative options included housing both the decision-making and administration functions within one large NDPB; and creating one or more statutory office-holders to oversee a non-ministerial department handling both decision-making and administration.

69. In assessing the desirability of the various models, the criteria taken into account were cost-effectiveness, complexity to implement, risk of delay to the opening of the scheme, effective governance, centrality of the survivor voice, and ease of communicating benefits to survivors and the public. Of all the options, the 'small NDPB and Scottish Government Division' model clearly offered the best value for money and the lowest risk of delay to the scheme opening due to the ability to rely heavily on existing Scottish Government corporate resources. It also allowed for effective governance, with a suitable degree of independence from the Government for those making decisions on redress applications, and a strong survivor voice. The model is more straightforward than some of the other options, with a clear and easily-communicated division of responsibility between the two organisations.

Eligibility

70. The redress scheme is for survivors of historical child abuse in care, where that abuse occurred before 1 December 2004 to a person then aged under 18 years who was, at the time of the abuse, resident in a relevant care setting in Scotland. This overall approach to the scheme is considered in detail below.

Cut-off date for having been in care

71. The purpose of the scheme is to acknowledge and provide tangible recognition of harm as a result of historical child abuse in various care settings in Scotland. The Bill provides that, for an application to be made, abuse must have occurred before 1 December 2004 (section 16(2)). This was the date of the then First Minister Jack McConnell's

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public apology in the Parliament, when Scotland began to face up to the harm done to children in care in the past.²⁰

72. Rapid and substantial change in relation to the monitoring and regulation of the care system in Scotland took place in the period immediately following the creation of the Scottish Parliament. This included the passing of the Regulation of Care (Scotland) Act 2001, with the key aim of improving standards of care services, leading to the establishment of the Scottish Commission for the Regulation of Care (known as “the Care Commission”) and the Scottish Social Services Council. The Scottish Social Services Council was established in 2001 for the mandatory registration and regulation of care services and social workers. In 2002, the Care Commission was established, with responsibility for the inspection of adult and children services, as was Disclosure Scotland, to provide criminal records disclosure services for employers and voluntary sector organisations. As a result the regulation, inspection and child protection guidance and standards now in place are radically different to those of the past.

Consultation

73. A majority of both individual (63%) and organisational (54%) respondents to the consultation agreed with this proposal. However, around one in five of all those responding (22%) were unsure about it, and 17% of respondents actively disagreed with it. Those who disagreed or were unsure were mainly concerned about the implications for those who had suffered abuse since 2004.

Alternative Approaches

74. Consideration was given to 17 December 2014 as an alternative, to reflect the Scottish Child Abuse Inquiry’s terms of reference. However, in the Scottish Government’s view, given the changes and improvements made since 1 December 2004, the 2004 date represents a more appropriate cut-off point in the context of this redress scheme and keeps the focus of the scheme on abuse which should be considered “historical”.

²⁰ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=4546&mode=pdf>

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75. Whilst consideration has been given to the Inquiry's terms of reference in framing eligibility criteria for the scheme, redress has a different context and purpose, and requires eligibility criteria which take account of that.

Meaning Of "Abuse"

76. Section 17(1) provides that, in relation to references to a person having been abused, "abuse" means sexual, physical and emotional abuse, or abuse which takes the form of neglect. The Bill also expressly provides that "physical abuse" does not include corporal punishment to the extent that it was lawful at the time it was administered. The intention is that the guidance to be issued by the Scottish Ministers under section 97 (to which Redress Scotland must have regard) will provide interpretative guidance in relation to the meaning of "abuse".

Consultation

77. The consultation stated that the Scottish Government intended to base the definition of "abuse" on that as set out in the Limitation (Childhood Abuse) (Scotland) Act 2017 ("the 2017 Act"), which includes "sexual, physical and emotional abuse and abuse that takes the form of neglect". There was a very high level of agreement with this proposal among both individual and organisational respondents (94% and 91%, respectively). The recognition that abuse takes a variety of forms, and that all have damaging, long-term impacts and should be treated equally, was welcomed. Some other respondents thought however that alignment with the way in which "abuse" was defined in the Inquiry's terms of reference (see below) would be preferable. However, in the interests of certainty, in this context the Bill provides an exhaustive rather than an inclusive definition of "abuse".

Alternative Approaches

78. Consideration was also given to using the same definition as in the Inquiry's terms of reference, which defines abuse as "primarily physical abuse and sexual abuse, with associated psychological and emotional abuse". Its terms of reference go on to state that:

"The Inquiry will be entitled to consider other forms of abuse at its discretion, including medical experimentation, spiritual abuse, unacceptable practices (such as deprivation of contact with siblings) and

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neglect, but these matters do not require to be examined individually or in isolation”.

79. The proposed definition in the Bill is broad as it specifically includes abuse which takes the form of neglect and includes emotional abuse whether or not physical or sexual abuse also occurred. The use of this broad definition provides a flexible and a proportionate approach, focussing on the particular experience of the survivor, rather than making a judgement that any particular form of abuse is, in and of itself, more severe than another.

Meaning Of “Relevant Care Setting”

80. The ways in which children found themselves in care in the past were many and varied, for example because of the death or serious illness of one or both parents, or as a result of a court order or other legal process. The eligibility criteria for the scheme need to encompass a very wide variety of care settings, reflecting the fundamental principles of the scheme as well as taking account of the changing landscape of care over the time period in question.

81. In broad terms, the scheme aims to cover two categories of care setting in Scotland. The first category concerns children who were “in care” because their families (including extended families) were unable to look after them on a day to day basis and, in consequence, the children required to be placed in an institutional care setting (for example, residence in a children’s home provided by a public authority or voluntary organisation) or other public care setting (for example, residence with foster carers). The second category concerns children who were subject to some form of intervention by a body exercising public functions (for example, where a court order placed a child in an approved school, or arrangements were made by a local or education authority in relation to the boarding of children in schools not managed by that authority and the authority met the costs of that).

82. Consistent with that aim, the scheme is not therefore intended to cover arrangements where a child resided with their family or extended family (such as, for example, kinship care arrangements), nor private arrangements by which a child came to reside somewhere other than with a family or extended family member and which were not instigated primarily as a result of arrangements made in exercise of public

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functions (such as, for example, private fostering or private healthcare arrangements). In this context, “public functions” should be understood as including functions exercised by both public authorities and voluntary organisations exercising functions in relation to the safeguarding or promotion of the welfare of the child or the protection or furthering of the child’s interests. The inclusion of such voluntary organisations reflects the evolution of “the state” over the period in question.

83. For the purpose of the scheme, as set out in section 18 of the Bill, “relevant care setting” means, firstly, 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, and secondly a place, other than a residential institution, in which a child resided while being boarded-out or fostered. This does not include situations where the child was boarded-out or fostered with a relative or guardian or under arrangements made with a person other than a public authority or a voluntary organisation exercising functions in relation to the safeguarding or promotion of the welfare of the child, or the protection or furthering of the child’s interests.

84. “Residential institution” is in turn defined to mean a children’s home, a penal institution, a residential care facility, school-related accommodation, and secure accommodation. Each of these individual categories is then defined in broad terms in section 19, where appropriate, taking account of situations not intended to fall within the scheme. So, the definition of “school” for example (in the context of “school-related accommodation”) includes a school other than a public school only where the child’s attendance at the school was arranged and paid for by or on behalf of a local or education authority, or a voluntary organisation exercising functions in relation to the safeguarding or promotion of the welfare of the child or the protection or furthering of the child’s interests. Likewise, the definition of “residential care facility” means an establishment, including a hospital, which provided long-term residential accommodation for children for the purpose of meeting needs arising from a mental or physical condition, in which the child resided under arrangements made by or on behalf of a public authority or a voluntary organisation exercising functions in relation to the safeguarding or promotion of the welfare of the child or the protection or furthering of the child’s interests. Establishments which did not provide such long-term residential care for children are therefore not included.

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85. The Scottish Ministers will have the power by way of regulations (subject to the Scottish Parliament's approval by affirmative procedure) to adjust the definition of "relevant care setting" by adding to or varying the descriptions of types of residential institution listed in section 18(3), or by modifying the detailed descriptions of each type of residential institution provided for in section 19. Experience gained through the advance payment scheme has shown that additional types of care setting may come to light once the scheme is operational, and that it is possible that adjustments may be required in the future. The Scottish Ministers also have a power at section 21 to adjust the eligibility requirements of the scheme where that is necessary and consistent with the underlying purpose of the scheme. This could, for example, be in relation to certain types of abuse (such as certain types of peer abuse e.g. a one-off fight between peers which was not known about by the residential institution) or in relation to the circumstances in which a person abused came to be resident in a relevant care setting (such as short-term private respite care in a children's home).

86. Section 20 provides that a reference to a person being "resident" in a relevant care setting includes a reference to being absent from that setting if they remained under the care of the person who provided the residential accommodation or someone authorised by that person. This ensures that children who were resident in a relevant care setting but who were abused outwith that setting (for example on a day excursion) would be eligible to apply to the redress scheme in respect of that abuse.

Consultation

87. The consultation paper explained that it was intended to base the definition of "in care" on two criteria: that abuse should have occurred within an eligible residential setting (those settings covered by the Inquiry), and (additionally) that the institution or body in question must have had "long-term responsibility for the applicant in place of the parent".

88. The consultation paper explained this meant that not everyone covered by the terms of reference of the Inquiry would be eligible for the redress scheme. It cited two examples where institutions would not have had "long term responsibility in place of the parent", namely where children attended fee-paying boarding schools and were sent there by

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their parents for the primary purpose of education, and where children were in hospital care primarily for the purposes of medical or surgical treatment. In total 79% of respondents (85% of individuals, 46% of organisational respondents) agreed with the proposal to define “in care” in this way, those disagreeing typically commenting that key elements of the proposal (such as “long term responsibility”) required additional clarification or definition, or simply that eligibility should not be dependent on the length of time spent in care. There was less support for the specific proposals in relation to fee-paying boarding schools (44% in favour of the proposals compared to 39% opposed to them and 18% unsure) and hospitals (40% in favour of the proposals compared to 39% opposed to them and 21% unsure).

Alternative Approaches

89. Consideration was given to mirroring the definition of “Children in Care” in the Terms of Reference of the Inquiry, but it was felt that including arrangements which were purely private and involved no exercise of public functions (such as private fee-paying pupils at independent boarding schools) was not in keeping with the overall purposes of the scheme. The overall purposes of the scheme are broadly to cover children who were “in care” because their families were unable to look after them on a day to day basis and, in consequence, the children were required to be placed in an institutional care setting, and to cover children who were subject to some form of intervention by a body exercising public functions.

Period for the Scheme to be Open for Applications

90. The Bill, at section 29, provides that the scheme will be open to applications for a period of five years. In order to retain some flexibility, the Scottish Ministers will have a regulation-making power (which will be subject to the Scottish Parliament’s approval by affirmative procedure) to extend the five year period.

Consultation

91. A total of 79% of respondents to the pre-legislative consultation agreed that the redress scheme should be open for five years. Most often, respondents said that this time period was sufficient to allow individuals to learn about the scheme and submit a claim (with the caveat that the scheme was adequately promoted). Some also said that five years would be helpful to survivors in bringing ‘closure’ within a

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reasonable time period, and to care providers and other relevant bodies in giving ‘certainty’ with regard to potential future liabilities. Those who disagreed thought the five-year period risked excluding eligible people and said that a longer (or open-ended) scheme would better meet the needs of survivors.

Alternative Approaches

92. A shorter time period for the scheme to be open for applications was considered, but rejected as providing insufficient time for survivors to fully consider applying for redress through the scheme. Five years was considered an appropriate length of time for the scheme to be open, particularly given the safeguard of the regulation-making power to extend the duration of the scheme, where necessary and approved by the Parliament.

Payment Structure, Levels and Assessment

93. The Bill provides for a combination payment approach. Survivors will be able to choose at the point of application whether to apply for a fixed rate payment or an individually assessed payment. This is in line with the findings of the national survivor consultation in 2017 carried out by CELCIS²¹, which were set out clearly in the pre-legislative consultation.

94. Both the fixed rate and the individually assessed redress payments have the same purpose: to acknowledge and provide tangible recognition of the harm suffered as a result of historical child abuse whilst in a relevant care setting in Scotland.

95. The fixed rate redress payment will be available to survivors who meet the eligibility requirements of the scheme (i.e. those who have been assessed as having been subject to “abuse” while a “child” and while resident in “a relevant care setting” within the meaning of the scheme). It is designed to provide choice for those who seek financial redress without having to provide a detailed account of their abuse which, for some, would be an arduous and distressing process. As will be set out in guidance, it will involve different evidential requirements

²¹ See paragraph 25 above.

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than the individually assessed payment and will provide recognition without the need for detailed recounting of the abuse suffered.

96. However, it is important to some survivors to give a full account of what happened to them. The individually assessed redress payment provides the choice for survivors, who meet the eligibility requirements of the scheme, to recount their own personal experience of abuse. This enables the decision-making panel of Redress Scotland to carry out an individual assessment to consider whether a further sum is appropriate, over and above the fixed rate payment. The assessment will involve a more detailed examination of the facts and circumstances of the survivor's experience, taking into account the severity, frequency, nature and duration of the abuse and all other relevant matters. As will be set out in guidance, it will require more by way of supporting information from the applicant than the fixed rate redress payment.

97. The individually assessed redress payment is made up of three levels beyond the fixed rate payment. Each level consists of a set payment (rather than a payment within a range).

98. Those who apply for and receive a fixed rate redress payment will, for the duration of the scheme, be able to subsequently apply for an individually assessed redress payment (from which the fixed rate redress payment will be deducted). See paragraph 136 below for general information on the number of applications permitted under the scheme.

Payment Levels

99. The Bill at sections 37 and 38 provides for the following payment levels set out below.

Fixed rate redress payment		£10,000
Individually assessed redress payment levels	Level 1	£20,000
	Level 2	£40,000
	Level 3	£80,000

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100. The payment levels proposed reflect that the purpose of redress is to provide acknowledgment and recognition of the harm as a result of historical child abuse in various care settings in Scotland.

101. The financial redress is not designed to compensate for any specific losses suffered. As such, redress payments are not intended to be compensatory in the same way as an award of damages made by a civil court and will not be assessed on the lifelong impact of abuse or any potential loss of opportunity that arose. Moreover, the scheme is not about establishing legal liability for the consequences of the abuse as a court would. Redress Scotland will not make a determination on any issue of fault or negligence arising from any matter to which an application for a payment under the scheme relates. Instead, redress offers a process which is more accessible, swifter, non-adversarial and based on different evidentiary requirements. The redress scheme will also offer the opportunity for some existing elements of non-financial redress, such as apology. Survivors will also have access to support through the redress scheme.

102. Payment levels have been informed by those available through other redress schemes for historical child abuse in care, although it is difficult to draw direct comparisons given no two schemes are identical in historical context, scope or design.

103. Section 40 provides that the Scottish Ministers may increase the redress payment levels to account for inflation but is not more prescriptive in requiring them to do so. This recognises that inflation may not be a significant issue over a short period of time and seeks to avoid unnecessary complexity whilst allowing the flexibility for adjustment should it become appropriate.

Assessment

Assessment of Fixed Rate Redress Payment

104. Applications will be assessed by a panel of at least two members of Redress Scotland. The fixed rate payment will be offered where the decision-making panel is satisfied under section 35 that the applicant has established that they meet all of the eligibility criteria of the scheme and that the applicant is not precluded from being offered a redress payment in light of section 58 of the Bill. Any payment offered will be

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subject to the provisions on the deduction of previous payments (see paragraph 186 below), and provisions in respect of waiver (see paragraph 200 below).

Assessment of Individually Assessed Redress Payment

105. Applications will be assessed by a panel of at least three members of Redress Scotland.

106. An individually assessed payment will be offered where the decision-making panel is satisfied that such a payment is appropriate following assessment of the particular facts and circumstances of a survivor's experience, as evidenced within their application and supporting documentation; any further information provided in response to a request by the panel and any other information which the panel considers relevant.

107. The individually assessed redress payment will be assessed in two stages. The first stage, the initial determination, will follow the same process as the fixed rate redress payment and will involve an assessment of general eligibility for the scheme. If an applicant is determined to be eligible, they will be offered the choice to receive a fixed rate redress payment pending the outcome of the full individual assessment or to await that outcome. If an applicant is not eligible, their application will not proceed to the second stage of assessment.

108. The second stage involves a determination of the appropriate payment level following consideration of a number of factors set out in the Bill: the nature, severity, frequency, and duration of abuse together with all other relevant facts and circumstances.

109. It is likely that not every applicant who applies for an individually assessed redress payment will meet the required threshold. Where applications do not satisfy the panel that the threshold for a Level 1-3 payment has been met, applicants will, provided they meet the general eligibility criteria of the scheme, be entitled to a fixed rate redress payment. If no fixed rate redress payment has previously been made (e.g. following the initial determination), this will be offered at the conclusion of that assessment.

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110. Any payment will be subject to the provisions on the deduction of relevant payments and provisions in respect of waiver.

Development of the Assessment Framework for Individually Assessed Redress Payments

111. It is necessary to develop a fair and transparent mechanism by which survivors' experiences can be assessed according to a consideration of these factors. Guidance on the assessment framework will be produced and published by the Scottish Ministers acting under section 97.

112. In consultation with clinical psychologists and other relevant experts, the Scottish Government is developing an assessment framework to be used operationally by decision-making panels of Redress Scotland in the assessment of applications for individually assessed redress payments.

113. The framework will assist decision-makers to make appropriate, consistent decisions. It will also assist survivors to form a view of where their experience could potentially sit within the relevant payment levels (subject to the assessment of that by Redress Scotland).

114. The framework will not seek to be rigidly prescriptive. Every application will require a holistic assessment of the facts and circumstances of the survivor's experience. The framework will not adopt a points-based approach as some other schemes have done, but instead will provide descriptions and examples of abuse that would generally be expected to fall within each payment level. The framework will not create a hierarchy of type of abuse and will be inclusive in the consideration of all types of abuse: physical, sexual, emotional and abuse which takes the form of neglect.

115. The framework will also recognise that consideration of all relevant facts and circumstances will be required in order to determine which of the payment levels appropriately reflects the survivor's experience. These will form part of the development of the framework, in consultation with experts working in this field.

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116. There are a number of matters that may be considered relevant in an individual application including: the age of the applicant at the time of the abuse, relationship to the perpetrator, number of perpetrators, number of eligible care settings in which the applicant was abused, experience of multiple types of abuse, the personal circumstances of the applicant (for example, disability), the length of time spent in care settings while being abused, and the extent to which allegations of abuse made by the applicant, at the time or subsequently, were not given proper consideration (and other aspects of institutional betrayal). It will also be important for decision-makers to consider the combination of abusive behaviour that some children were subjected to. The ways in which impact may be taken into consideration are set out further in paragraphs 133 and 134.

Consultation

117. Payment levels and the payment structure were not included in the pre-legislative consultation, as the combination payment approach had previously been supported by the majority of respondents to the 2017 CELCIS consultation.

118. References were made throughout the pre-legislative consultation to Stage One and Stage Two payments. During the subsequent design of the payment structure these payments were renamed to fixed rate redress payments and individually assessed redress payments.

119. In terms of assessment, the overwhelming majority of respondents favoured treating all types of abuse equally, rather than creating a hierarchy whereby certain types of abuse are considered worthy of higher payment than others.

120. The consultation asked questions around the impact of abuse and how that should be taken into account in the assessment of individually assessed redress payments. A recurring view within consultation responses was that the impact of the abuse should be key in determining payments.

121. Respondents were also asked whether the length of time in care should be factored into individual assessment. Most respondents agreed that it should. The most common view was that there is likely to be a link between the length of time spent in care and the extent of abuse

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suffered. Similarly, respondents thought that the longer the time spent in care, the greater the likely impact, both in the immediate and in the longer-term. These views both assume that abuse happened throughout the time a child was in care, whereas it is known that the extent of abuse could be entirely different depending on the establishment, or the nature or quality of the senior management or staff involved. As above, whilst length of time in care does not explicitly feature within the list of considerations within section 38 of the Bill (with the focus instead being on the duration of the abuse), where relevant to an individual, the length of time they were in abusive establishments can be considered as part of the overall facts and circumstances of the application.

122. Other factors put forward for consideration included: suffering from multiple types of abuse, acknowledgment of abuse by the institution, the failure of the institution to act when it knew about the abuse at the time, the age at which the abuse began, the number of care placements a child was in, the relationship between the abused and the abuser, grooming, violence and intimidation and the level of trauma experienced before going into care.²²

Alternative Approaches

Payment Structure

123. An alternative approach would have been to offer only a fixed rate, standard payment to all eligible applicants. Although this would have provided a degree of equality among survivors and avoided difficulties in measuring or assessing abuse, fundamentally, in doing so it would not have recognised the differences in their experiences and the abuse they suffered. It would have denied survivors the choice to have their individual experience considered.

124. Alternatively, another approach would have been to offer only an individually assessed redress payment. This would have recognised the unique experience of all survivors but would require an assessment process which would have been more onerous on all survivors as it would have looked in detail at individual circumstances. Such an exercise could be very distressing for some survivors who also may find

²² Analysis of the responses to the pre-legislative public consultation on financial redress for historical child abuse in care is available at <https://www.gov.scot/publications/financial-redress-historical-child-abuse-care-analysis-consultation-responses/>

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it difficult to collect evidence to support their account. It was not considered appropriate to limit access to financial redress only to those willing and able to engage in such a process. Survivor choice was a key consideration.

125. The scheme could also have provided for payments to be made within ranges of lower and upper limits in each level, as opposed to a fixed payment for each level. Such an approach would further individualise payments and distinguish the experiences of survivors within the relevant payment levels. However would potentially be to the detriment of transparency of decision-making. It would introduce an excessive amount of discretion for decision-makers and associated uncertainty for survivors.

Payment Levels

126. It would have been possible to align payment levels with sums awarded to survivors by civil courts following personal injury actions.

127. However, as noted above, the scheme is not intended to replicate either the process or payment available through the civil courts and will not attempt to establish legal liability for the consequences of the abuse, nor determine any issue of fault or negligence arising from any matter to which an application for a payment under the scheme relates. It follows from this that the purpose of redress is not to provide compensation akin to an award of damages which would seek to calculate loss insofar as possible to put the survivor back in the position they would have been in had they not been abused. Redress serves a different purpose which will be reflected not necessarily in comparable awards but in a more accessible application and determination process with access to non-financial redress, such as support.

Assessment

128. Alternative approaches taken by other schemes were considered when deciding how best to calculate individually assessed payments. However points-based systems, rigid systems of fixed tariffs, and an approach which has over-reliance on discretion were all rejected. The approach outlined above is preferred for its simplicity and transparency. It has also been designed to ease the burden on applicants as much as possible.

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129. The approach adopted is intended to provide a trauma-informed system which is sensitive to survivors in a way that is often challenging to achieve with the use of points or tariffs. It also avoids creating an assessment system in which the decisions are purely based on discretion. For the purposes of creating a simple, transparent assessment process, drawing on research and following engagement with relevant professionals, an assessment framework will be published based on general examples and descriptions of abuse.

130. In terms of factors to be taken account of in assessment of the individually assessed payments, an alternative approach would have been to include impact of abuse as a factor to be assessed in every application. However, engagement with professionals working in the field of emotional and psychological trauma highlighted the drawbacks of such an approach.

131. To focus on the impact of abuse, as a factor in its own right, has the potential to penalise a survivor, or at least treat them differently, if they are not able to demonstrate a psychological impact in the way that others can. Redress is not about assessing an individual's resilience to what happened and how well they appear to have got on with their life notwithstanding the abuse. The professional view so far has therefore been that the level of the redress payment should focus on the abuse, not how the survivor has coped with it, and that is the approach taken in the Bill.

132. An individual assessment of the impact of abuse is in any event complex; not only in distinguishing different impacts for the purpose of representing them on a scale, but also in attributing psychological impact to abuse in care without examining the circumstances that led to someone going into care, or what happened to them after leaving care. Both these factors will have had a psychological impact and it is extremely difficult to assess what is attributable to the abuse and what is not.

133. The redress scheme recognises that all abuse has a lasting impact; sometimes physical, sometimes psychological, sometimes both. Survivors will not be required to establish or evidence the extent to which their lives have been affected by the abuse they suffered as children, although some survivors will want to describe this and they will

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not be discouraged from doing so. As well as allowing them to give their full account, so they feel heard, this will also provide the decision-making panel with information they can consider in determining the severity of the abuse, and the totality of the experience.

134. Furthermore, evidence of impact may provide evidence of the act of abuse itself. This is similar to the approach in criminal law whereby an injury can provide corroborative evidence that an assault occurred, even though there may be other ways in which the injury was caused. In some applications, the evidence of impact will fall to be considered as a source of evidence, but it will not be required in every case and it will not be measured or assessed as a factor in its own right.

Applications for Redress

135. As noted above, applications for redress payments will be assessed and determined by Redress Scotland, an independent public body established by the Bill. Administrative support will be provided by a division of the Scottish Government. The staff of the division will work with applicants to ensure that applications are as complete as the applicant believes they can be, and accompanied by the required supporting information, before passing the applications to Redress Scotland for assessment and decision.

136. Section 27 provides that as a general rule, only one application may be made by or in respect of the person who was abused and to whom the application relates. Provision is made to allow applications to be paused without the need to re-apply to the scheme and trigger this rule. This allows those applicants who need to take a step back during the process to do so without jeopardising their ability to conclude their application at a later date before the scheme ends.

137. However, there are circumstances where more than one application is permitted:

- Those who apply for a fixed rate redress payment, and have been determined to be eligible for such a payment, will retain the right to subsequently apply for an individually assessed redress payment (from which the fixed rate redress payment previously paid will be deducted). Applicants who apply for an individually assessed redress payment will not subsequently be

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permitted to apply for a fixed rate redress payment because the value of the fixed rate payment is incorporated into the individually assessed redress payment levels.

- Those who have previously applied for a redress payment but have withdrawn that application before it was determined, may, in certain circumstances, submit a further application. However, for example, an applicant who applies for a fixed rate payment successfully and then applies for and withdraws an application for an individually assessed payment would not be able to apply for a fixed rate payment again.
- In certain circumstances, next of kin applications are permitted in respect of a survivor of abuse who has previously applied for (but not received) a redress payment.
- Children of a deceased survivor of abuse who apply for a next of kin payment do not need to apply jointly and separate next of kin applications are permitted, although this will not increase the share of the next of kin payment they receive (see paragraph 268 below).
- Applicants who have been precluded from being offered a redress payment because of the operation of section 58 may submit a further application where the result of an appeal against conviction or sentence means that section 58 will no longer be engaged by their application.
- Where Redress Scotland make a determination that special circumstances exist, a further application is permitted where a previous application resulted in no payment being made (either the applicant was found to be ineligible or did not accept the payment). Special circumstances would include, but not be limited to, the applicant's personal circumstances, or new evidence which the applicant had a reasonable excuse for not presenting in the original application.

138. Applications may relate to multiple residential settings. A separate application for each setting is not expected or permitted under the scheme.

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Prioritisation of Applications

139. The Bill provides that, in taking decisions on the prioritisation of applications, the chair of Redress Scotland must have regard to the age and health of applicants.

Evidential Requirements

140. The Bill is not prescriptive in the types of evidence that Redress Scotland will be able to consider. Under the power conferred on the Scottish Ministers at section 97, guidance will be produced and published which decision-making panels must have regard to when making their determinations which, under section 34 must be based on:

- The information provided in or with the application;
- Any further information provided in response to a request by the panel; and
- Any other information which the panel considers relevant.

Evidence of Eligibility – Relevant Care Setting

141. Under section 27 of the Bill, an application must contain or be accompanied by such information or evidence as the Scottish Ministers require. Guidance under section 97 may also make provision about the sources and types of information or evidence that an application may or must contain or be accompanied by. For both a fixed rate redress payment and an individually assessed redress payment, it is anticipated that, in all but exceptional cases, applicants will be asked to provide documentary evidence or other supplementary information to satisfy the Panel that they lived in a relevant care setting prior to their 18th birthday. In the overwhelming majority of cases, this aspect of the eligibility criteria will not be established on the survivor's account within the application form alone. As currently occurs within the advance payment scheme, this information will be robustly verified in every case.

142. A great deal of flexibility is required as to what might constitute satisfactory documentary evidence or supplementary information, given the varying nature of the care settings that are relevant under the scheme and the arrangements by which children were placed in them. Knowledge of evidential sources is improving all the time, experience from the advance payment scheme demonstrates that record keeping was inconsistent and often inadequate and there are a number of

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relevant institutions which no longer exist. A pragmatic and creative approach has to be taken to identifying potential sources of information. Examples of evidence that has been submitted in support of applications to the advance payment scheme includes extracts from school registers which list the address of the applicant as an eligible setting and documents from the courts which show that an applicant was remanded to a relevant setting. Nevertheless, in recognition of the well documented and significant challenges that some survivors face in obtaining historical care records, it is anticipated that the guidance will provide that in exceptional circumstances, Redress Scotland should use its discretion as to whether it is satisfied of this aspect of eligibility without the production of documentary evidence. However, in order to ensure that all of the factors set out above can be taken into account and to avoid rules being drawn in a way that may prove to be too narrow, this will be addressed using the guidance power under section 97 of the Bill.

Evidence of Eligibility - Abuse

Fixed Rate Redress Payment

143. The intention is that the power to specify what information the application form must contain will be used to require applicants to provide a statement about the abuse they suffered. This is required so that the decision-maker can make a determination that the experience described falls under the definition of abuse used by the scheme. Applicants will not be required to provide any further evidence about the abuse or its impact on them.

144. The panel may, however, take into account any supporting information available to it.

Individually Assessed Redress Payment

145. Guidance will set out that applicants will be required to provide detailed information about the abuse they suffered and will be required to provide supplementary information in support of this aspect of their application. The guidance will also provide that the panel should not consider itself satisfied that the applicant's individual circumstances meet the threshold for a Level 1 – 3 payment on the basis of the survivor's account within the application form alone.

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146. There are many types of information that would potentially be considered in support of an individually assessed payment in addition to the survivor's account within the application form. This might include:

Information relating to the applicant:

- Previous statements or evidence given in other proceedings;
- Medical and social care records of the applicant;
- Evidence of physical injury or psychological or psychiatric harm;
- Previous reports or disclosures to the police or to others;
- Statements from third parties (witnesses to the abuse, or to disclosure of abuse by the applicant or potentially other survivors from the same care setting);
- Criminal convictions of perpetrators.

Information relating to the care setting:

- Criminal convictions relating to abuse occurring within the care setting;
- Findings of liability within previous civil cases relating to abuse occurring within the care setting;
- Relevant findings published by the Scottish Child Abuse Inquiry in relation to the care setting;
- Relevant inspection reports or other records noting concerns regarding the care setting.

147. Where a survivor has been unable to obtain any evidence to support their account, the staff of the Scottish Government division carrying out the administrative and processing functions of the redress scheme will work with them to assist, where possible, in obtaining evidence. This may, in appropriate circumstances and with the consent of the applicant, include commissioning and paying for medical or psychological expert reports.

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Giving Information in Person

148. It is anticipated that Redress Scotland will consider and assess applications for redress payments largely on the basis of documents provided to it. Measures will be put in place to ensure accessibility of the scheme (e.g. to allow those with literacy difficulties or other vulnerabilities to access appropriate support to complete their application).

149. As knowledge of records and different sources of documentary evidence continues to improve, it is important to ensure that all possible avenues of supporting evidence can be considered by the panel. This may include hearing from the applicant in person and there may be appropriate circumstances in which the decision-making panel may ask an applicant to provide further information in person, in support of their application.

150. The circumstances where this may be appropriate will be set out in guidance and are likely to include:

- where the supplementary documentary or other evidence found (despite exhaustive searches) has not provided a sufficient basis on which the panel is satisfied they can make a determination of the redress application; or
- where the panel consider it would be necessary, in all the circumstances, to request personal attendance of the applicant to properly consider their application for redress or a review of a decision made by Redress Scotland in relation to their application for redress.

151. Redress Scotland will not have the power to compel the applicant to attend and the choice will remain with the applicant as to whether or not to do so (albeit refusal to attend may mean that the panel will not be satisfied to a sufficient degree to determine the redress application in the applicant's favour). The applicant will not be placed on oath. The purpose of the personal attendance of the applicant is not interrogation or testing of the credibility and reliability of the survivor's account.

152. Applicants will not be able to request to meet the decision-making panel; this will only be at the panel's discretion.

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Safeguards Against Fraud

153. 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. The approach to evidence set out above provides an important safeguard against fraud.

154. A balance needs to be struck between 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. This is 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.

155. The format of the application, which will be set out by the Scottish Ministers, will also include a declaration as to the truth of the contents of the statement and as to the applicant's belief of the authenticity of any supporting documents. As noted above, it is intended that, 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 application form will 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 is suspected.

156. The Bill provides 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, where this had a material effect on the determination. 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

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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.

Consultation

157. In terms of the evidence that should be required for the fixed rate redress payment, respondents generally supported the use of (i) a signed declaration by the applicant that they had suffered abuse, (ii) a short written description of the abuse and its impact, and (iii) any existing written statement from another source which provides details of the abuse. However, there was no clear consensus about which of these three forms of evidence should be preferred.

158. In relation to individually assessed redress payments, responses from organisations were somewhat more likely to prioritise the use of third-party documentary evidence while responses from individuals were more likely to favour oral or written evidence provided directly by the applicant. There was also a mix of views on whether different types of evidence should be required or allowed, or used in combination for corroborative purposes, and where the balance should be struck between sufficiency of evidence and the need to ensure that the scheme was survivor-centred, flexible and empowering.

159. A large majority of both organisations (95%) and individuals (88%) agreed that individuals should be able to give oral testimony in support of their application (but should not be required to do so).

Alternative Approaches

160. An alternative approach would have been to require oral testimony in every case or to allow applicants to request the opportunity to give oral testimony. Undoubtedly, the provision of oral evidence holds a different meaning for different survivors and different groups. For some, it is an accessibility issue and applicants may be daunted by the prospect of providing written information on sensitive matters. However, support to make an application will be provided for those who need assistance (see paragraph 306 below). For others it is about acknowledgment and being heard, but that function will be provided not as part of the assessment process, but as part of wider reparations.

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161. Discussions around oral evidence have also arisen from concerns over potential difficulties in obtaining evidence. The Bill therefore provides that Redress Scotland may determine the procedure when dealing with applications, which would allow for the applicant to be able, at the request of the panel, to give information in person to ensure that the scheme is as flexible as possible and the panel can consider the widest possible sources of potential evidence in support of survivors' applications for redress.

162. Crucially, however, oral evidence will not be required in every case and where information is given in person, the purpose is not to provide an opportunity for the credibility and reliability of a survivor's account to be tested. Additional information and evidence submitted in support of their application will generally be sufficient to establish whether a redress payment is appropriate, without the need for oral testimony.

163. Nor will the giving of oral evidence be an opportunity for survivors to choose to present their case in what they, or their legal representatives, consider to be a more persuasive and compelling manner. Giving information in person is not seen as a more meaningful form of evidence than any other and will be requested only where the panel think it necessary.

164. A further alternative approach to ensure the robustness of the scheme would have been to create a statutory offence of making a fraudulent application under the scheme. The value of creating a bespoke offence lies in its function as a deterrent. However, it is considered that the common law offence of fraud ought to adequately cover relevant circumstances. Police and prosecutors are skilled at dealing with such cases and would be able to apply general principles and evidential requirements to ensure robust investigation and consideration of cases. It is also considered that the inclusion of a bespoke offence would send the wrong message to survivors and others, setting the wrong expectations of the scheme.

Power to Compel Information

165. The Bill, at section 76, creates a power for the Scottish Ministers, in their capacity as administrators of the scheme, to compel any individual or body (other than the applicant) to provide them with specified information or other evidence for the purposes of the

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determination of an application for a redress payment, including any review of it. The Bill also provides that Redress Scotland may direct the Scottish Ministers to exercise these powers.

166. 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 co-operation of those bodies who hold relevant information and section 84 does ensure that the Scottish Ministers when administering the scheme have sufficient powers to be able to verify information from third parties in relation to redress applications. The exercise of these powers will vary depending on the applicant's wishes; some may wish a great deal of assistance in obtaining evidence whilst others will obtain all necessary information themselves. In addition, these powers to authenticate information would only be used to facilitate the necessary verification of records provided by the survivor.

167. However, having a robust and adequate framework to facilitate the provision of records, where co-operation is not forthcoming, is essential to support survivors to apply for redress payments and to facilitate the assessment of applications.

168. The power is broad to ensure that it can be used to obtain relevant information or records from a wide range of sources. It would not be exercised in a manner that would go against the survivor's wishes and interests. Where survivors do not want records to be obtained on their behalf but do want to submit those records with their application, they would be able to obtain the documents themselves using existing means such as subject access requests.

169. The Bill sets out the processes which require to be followed including the process for those issued with a formal request for information to challenge and seek a review of that request. Such reviews would be carried out by Redress Scotland to ensure independent oversight where the Scottish Ministers choose to issue a notice under section 76 of the Bill.

170. The Bill also provides 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.

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New Criminal Offence of Failing to Comply with Request or Evidence Tampering

171. In line with other redress schemes and the powers of statutory inquiries such as the Scottish Child Abuse Inquiry, failure to comply with a request for information will, in certain circumstances, constitute a criminal offence capable of prosecution at summary level. The advantages of criminalisation are both substantive, giving a powerful sanction for non-compliance, and symbolic, to underline the importance of redress and that those who do not help to facilitate it will be held accountable. Provision is also made in connection with acts to conceal, destroy or alter evidence required by a notice served in exercise of the powers to compel evidence.

172. The Bill provides for punishment upon conviction of imprisonment to a term not exceeding six months or a fine not exceeding level three on the standard scale, or both. The inclusion of offences of this nature is in keeping with the Inquiries Act 2005 and the penalties are modelled on that Act.

Consultation

173. The difficulties facing applicants in documenting their in-care experience were widely noted and there was almost universal support (98%) for the proposal for the redress scheme to have the power to require bodies or organisations to release relevant documentation.

Applicants Etc. With Convictions for Serious Offences

174. Survivors of abuse, or next of kin applicants, with criminal convictions are not excluded from applying for financial redress. However, the Scottish Government considers that it is legitimate in the public interest to be able to restrict the use of public funding in relation to the making of redress payments under the scheme to or in respect of those who have been convicted of serious criminal offences, particularly involving serious levels of abusive conduct. This is consistent with the overall aim of the redress scheme which is redressing the harms of the past. It is considered that the provisions are a proportionate means of pursuing the legitimate aim of using most of the redress money towards blameless individuals so that the financial element of the redress scheme is potentially restricted for those with such types of serious criminal convictions. This consideration would also apply before making

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a payment to any beneficiary an applicant has nominated to receive their payment should they die before the application is complete.

175. It is, however, important to underline that there is no automatic exclusion or presumption against the payment of redress where the recipient of the payment or the person to whom the application relates has a previous conviction for serious criminal conduct. Accordingly, on a case by case basis, Redress Scotland will require to consider as an initial stage of the application process, whether, having regard to a range of factors, the making of a redress payment to applicants in such cases would be contrary to the public interest.

176. These provisions apply only in respect of unspent convictions for any of the following categories of offence whether committed in Scotland or elsewhere:

- murder,
- rape,
- a sexual offence other than rape which has resulted in a sentence of imprisonment for a term of five years or more, or
- a violent offence other than murder, rape or another sexual offence which has resulted in a sentence of imprisonment for a term of five years or more.

177. In relation to the above, the list of offences and the reference to a threshold of five years of imprisonment, other than offences of murder or rape, reflect the sentencing powers of the High Court of Justiciary.²³ The offence of murder is of course subject to an automatic sentence of life imprisonment. Additionally, in respect of convictions for rape, it is considered appropriate that those should always be taken into account by Redress Scotland regardless of the length of sentence.

178. In making a determination as to whether or not in light of the relevant conviction a person should be precluded from being offered a redress payment under the scheme, the panel must have regard to any

²³ Section 3(3) of the Criminal Procedure (Scotland) Act 1995 which limits the sentencing powers of the Sheriff Court

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guidance issued under section 97 and is required to take into account a broad range of factors including:

- the nature of the offence,
- the length of any sentence of imprisonment,
- the length of time since the offence was committed,
- any rehabilitation activity undertaken by the person who committed the offence, and
- any other matter that the panel considers to be relevant.

179. Where the determination is that, in all the circumstances, the previous conviction does not preclude a redress payment from being offered, the applicant would be informed and thereafter their application would be treated in the usual way.

180. Where the determination is that the previous conviction does preclude the applicant from being offered a redress payment, the applicant may still be entitled to request access to non-financial redress which will be offered by the scheme such as apology or support. However, this would be subject to the usual assessment on the basis of the application and any supporting information as to whether the applicant would satisfy the eligibility criteria for the scheme. Nominated beneficiaries and next of kin would, however, not be eligible to apply for non-financial redress which is intended only for survivors of abuse.

181. Applicants have the right to seek a review of the decision made to preclude them from being offered a redress payment.

Consultation

182. Within the pre-legislative consultation, there was widespread support for the proposals to allow those with criminal convictions to apply, although some respondents argued that eligibility (or the level of payment) should take account of the nature of any conviction.

Alternative Approaches

183. An alternative approach would have been to automatically exclude all those survivors, next of kin or nominated beneficiaries with a relevant conviction, as defined in the Bill, from receiving a redress payment. However, the policy intention is not to automatically preclude access to

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redress payments for those who have previously committed criminal offences, no matter how serious those offences were. Indeed, given the inclusion of borstals and other penal institutions within the scope of the scheme, it is recognised that in some circumstances it was in committing offences that some children became vulnerable and at risk of abuse. It is also recognised that the consequences of the abuse suffered are wide ranging and in some cases may have contributed to, or manifested in, subsequent criminal conduct by survivors. Instead, it is appropriate for Redress Scotland to consider, in the public interest, each case on its own merits before reaching a decision on entitlement to any redress payment.

184. The Bill could have defined relevant convictions more widely to capture less serious offending. This option was not pursued because it is intended that the potential determination that an individual with previous convictions should be precluded from being offered a redress payment should only relate to those with convictions relating to serious offences of the types set out in the Bill. The threshold is set deliberately high to ensure that a proportionate approach is taken and that applications are not routinely subjected to this further assessment.

185. A final alternative approach considered was to make no separate provision for applicants whose applications are affected by a relevant conviction, and for their applications to be considered without any examination of previous criminal conduct no matter how serious. This option was carefully considered but rejected on the grounds that, despite the sensitivity and complexity involved in carrying out such an assessment, it is considered that there is a legitimate public interest justification in being able to consider restricting the use of public funding in relation to the making of redress payments under the scheme to or in respect of those who have been convicted of serious criminal offences.

Deduction of Previous Payments

186. Survivors who have received a payment, or a number of payments, from another source in respect of the abuse that is eligible for redress (or where it has been agreed that they will receive such a payment) will remain eligible for the statutory scheme. However, the corresponding amount will be deducted from any redress payment offered (whether that is the fixed rate redress payment, an individually assessed redress payment or a next of kin redress payment). Payments to be deducted

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include: court awarded damages, settlements of claims (often referred to as out of court settlements), payments from the Criminal Injuries Compensation Authority (CICA)²⁴, payments from the advance payment scheme, and other ex-gratia payments. However, any element of a payment which was reimbursement of legal fees or other costs incurred in relation to the process under which the payment was obtained will not be deducted. A previous redress payment is also not deducted here, because this is addressed by avoiding a double payment in the second redress payment under section 38(3) of the Bill instead (i.e. where someone has previously applied for and received a fixed rate payment and then later applies for an individually assessed payment).

187. Only payments made in terms of abuse eligible for redress under the scheme will be deducted from the redress payment. Payments made in respect of other matters will not be taken into account – e.g. payments made under the UK Government’s scheme for former British child migrants; or, depending on the facts and circumstances, payments made in relation to specific incidents of negligence which resulted in injury to the survivor where this could not reasonably be held to have been an episode of abuse. These will have to be considered on a case by case basis.

188. To ensure that the value of such payments are appropriately recognised, payments made before the commencement of section 41, which at this stage is anticipated to be when the scheme opens for applications, will be adjusted to account for inflation from the date of award to the date of commencement. However, the value of advance payments will not be adjusted in this manner and will, for the purpose of deduction, hold a value of £10,000 throughout the period of the redress scheme as this payment is effectively the equivalent of an early fixed rate payment. Payments made after the commencement of this section will not be adjusted to account for inflation so that the amount offered is not affected by the order in which applications are processed.

189. It is considered that this approach to payments for the same abuse fairly and effectively respects the principle that a person should not be

²⁴ For completeness, the Bill also includes payments made by the Northern Irish Criminal Injuries Scheme because there may be the possibility that an applicant was abused whilst on holiday in Northern Ireland albeit normally residing in a relevant care setting as defined in the Bill.

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compensated twice for the same matter. However, crucially, it does not deny any survivor the right to apply for an enhancement on that payment, where it is less than that offered by the redress scheme, and it also allows applicants to apply to the scheme for access to non-financial redress which will be offered including apology and support.

190. Applicants have the right to seek a review of the decision made in respect of the deduction of such payments.

Identification of Relevant Payments

191. Provisions are included within the Bill to require applicants to declare relevant payments. In addition, under section 77, the Scottish Ministers will also have a power to request information about relevant payments from the organisation(s) concerned. This would require sharing such information as the Scottish Ministers consider reasonably necessary for the purpose, as the organisation will need to know the details of the person in order to identify the payment in its records. This would include allowing the name and date of birth of the applicant – or, in the case of a next of kin payment, the recipient of the payment – to be shared with named organisations (and possibly some additional details about the places where the person was looked after as a child). The purpose of the exercise is solely to provide for organisations to share information to prevent double payment.

192. In order to facilitate information-sharing by applicants, the Bill includes a provision to address pre-existing non-disclosure clauses which might otherwise prevent disclosure of information about such payments. The Bill makes it clear that the provision of information by applicants regarding previous settlements will not give rise to a claim for breach of contract.

193. In relation to payments from CICA, an agreement will be sought with CICA to allow previous compensation payments to be identified or confirmed. CICA has a reciprocal interest in terms of identifying applicants for compensation who have already received a redress payment. The agreement will also ensure that a process is agreed which prevents double deduction i.e. where the redress body reduces a redress payment because of a previous CICA payment which CICA itself then also seeks to recover from the subsequent redress payment.

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194. It will be important to ensure that any guidance produced and published is clear to ensure that applicants are aware of the effect of a redress payment on their eligibility to claim from CICA and vice versa.

Consultation

195. Three-quarters of all respondents (75%) thought that anyone who has received a payment from another source (such as a civil court case) should still be eligible to apply to the redress scheme. Respondents commonly said the scheme should be open to all, and that this was the fairest or best approach. Just over half of all respondents thought that redress payments should take account of any payments received from other sources.

Alternative Approaches

196. An alternative approach would be to exclude all those who have received a relevant previous payment from the statutory scheme. However, this would deny survivors who otherwise meet the eligibility requirements access to redress based solely on their previous efforts at having their abuse recognised or compensated. Survivors who have received payments lower than those offered by the scheme would not have access to the scheme to enhance their previous settlement and would not be on an equal footing with other survivors.

197. Another alternative approach would be to consider previous payments as entirely separate and irrelevant to redress and to not deduct an equivalent amount from the redress payment. However, this may result in double payment for the same injury which treats survivors unequally and may jeopardise financial contributions to the redress scheme from third parties, who would potentially be paying twice for the same matter.

Acceptance of Offers

198. Offers of redress payments will be open for acceptance by applicants for a period of 12 weeks from the date of receipt of the offer. This period may be extended in special circumstances. In exceptional cases, this may be done retrospectively: for example, where an applicant became unwell and was unable to contact Redress Scotland to extend the acceptance period until after it had expired. Where an offer has not been accepted within this period and no extension to the period has been granted, or review of the offer requested, the offer will be

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deemed to have been rejected. Acceptance of an offer is signified by the signing of the waiver (see paragraph 200 below) unless there is already an existing waiver in place from a redress payment the applicant has already received and there is no need for it to be updated.

199. The Bill provides that redress payments may be paid as a lump sum amount or in instalments where this is at the request, or with the consent of, the applicant. The Bill also provides for payments to those under the age of 16 years, adults with incapacity or other vulnerable people, to be capable of being made subject to additional directions.

Waiver

200. The redress scheme is designed to be an alternative to civil litigation. Redress payments are therefore conditional upon the applicant agreeing not to raise or continue any legal action in respect of abuse that is eligible under the redress scheme against the Scottish Government and those who have made fair and meaningful financial contributions to the scheme.

201. The redress scheme offers survivors a choice to participate in a national collective endeavour which, in exchange for relinquishing their right to pursue a remedy through the civil courts, will provide a package of financial redress alongside access to non-financial reparations including apology and support.

202. Redress payments may be lower for some survivors under the scheme than would have been awarded by the courts. For others, the opposite may be true. However, the redress scheme is an alternative remedy for survivors and is not designed to achieve the same outcomes as a court process. The scheme is designed to reduce or eliminate the risks and barriers to access sometimes associated with civil litigation. The scheme will be more accessible, swifter, non-adversarial, and have different evidential requirements. It is transparent in the payment levels offered and payments are not dependent on a defender having assets or an insurer being identified. Redress payments are not contingent upon an ability to pay; once eligibility for a redress payment has been established, the payment is guaranteed to be made in accordance with the terms of the Bill.

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203. There are valid reasons why a survivor may choose not to relinquish their right to continue or pursue a legal action including: the potential value or complexity of their action; the accountability and acknowledgement associated with a formal adjudication and finding liability proclaimed; or the stage of the process that they have reached in an ongoing legal action. The creation of the redress scheme does not prejudice the ability of survivors to choose that path. The scheme gives survivors more, not less, choice as to how to pursue financial reparation. Redress does not replace existing avenues of financial reparation.

204. There are a number of reasons for the redress scheme being designed as an alternative to court rather than as an additional remedy that can be pursued in conjunction with litigation.

205. A key reason is to encourage financial contributions from those who were responsible for the care of children where and when the abuse occurred, which is understood to be important to survivors and consistent with adopting a human rights based approach to redress.²⁵ The waiver supports third parties to proactively, publicly, and as part of a national response, face up to the profound injustices of the past by crystallising their potential exposure to civil litigation for historical abuse (at least insofar as those who accept redress payments are concerned) and, in return for that, avoid the financial and reputational risks of costly, lengthy and adversarial litigation.

206. The redress scheme is designed to combine fair processes and fair outcomes to meet the needs of survivors, financial contributors and the Scottish Government, where the shared goal is to achieve a swifter, non-adversarial, more trauma-informed process in response to historical child abuse. To do this there needs to be a degree of closure in respect of financial reparations.

207. Without waiver, potential contributors would need to consider their exposure to litigation across individual cases and how this would impact them if they were to meet that cost in addition to their contribution to the redress scheme. Such consideration is complex and requires an

²⁵ The 2017 survivor consultation found that 94% of respondents were of the view that care providers ought to contribute to a financial redress scheme.
https://www.celcis.org/files/6615/3622/6805/Report_1_Executive_Summary_06.09.18.pdf

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examination of actual and potential liability in respect of an unknown number of future claims. The clarity offered by the waiver allows the consideration to move away from an assessment of exposure on an individual basis and instead encourages commitments to be made to a unified, inclusive response to address systemic failure.

208. The purpose of the waiver is not to allow parties to reduce or escape liability but is concerned with offering a degree of certainty over costs, which can be redirected to the redress payments themselves. To allow survivors to pursue both redress and litigation diminishes the scheme's capacity to provide an adequate national response which seeks to face up to the injustices of the past in order to support survivors and others to move forward.

Operation of Waiver

209. The Bill provides that redress payments made under the scheme (fixed rate, individually assessed and next of kin) will be conditional upon the applicant signing a waiver. Nominated beneficiaries will also be asked to sign a waiver before any redress payments are made to them.

210. If an applicant (who has not already applied for a fixed rate payment) applies for an individually assessed payment, that person will, if they meet the core eligibility criteria for the scheme, be offered the opportunity to accept an initial payment before the full individually assessed application is determined. Acceptance of such a payment would be conditional upon signing a waiver at that point. Those applicants will be signing a waiver without knowing the final amount of the payment they will be offered under the scheme, or whether they want to accept that or reject it and potentially pursue a civil action. As such, the applicant can either choose to sign a waiver and accept the initial payment or not sign a waiver and await the full outcome before receiving any payment.

211. The Bill places a duty on Scottish Ministers to maintain a public list, known as the "contributor list", of all those who have been assessed to have made fair and meaningful financial contribution to the scheme.

212. All waivers granted would extend to the Scottish Ministers and each of those bodies on the contributor list. This prevents survivors from having to individually identify any and all third parties against whom they

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might have a claim and guards against omissions or errors that might be made.

213. The date that Redress Scotland makes a determination on eligibility for a redress payment is the date that crystallises which bodies are covered by a person's waiver. A body will only have rights waived against it where it was included in the list by the date Redress Scotland determined an individual was eligible for a redress payment. The applicant for redress will be given information about which organisations are on the list when they are being sent their offer. The waiver will only become binding when the individual accepting the payment has signed it.

214. Applicants will be given the opportunity to obtain funded independent legal advice before accepting a redress payment under the scheme and signing a waiver. This will be strongly encouraged to ensure that they are fully aware of the effect of the waiver.

Alternative Approaches

215. It would be possible to develop a redress scheme without provision for waiver whilst also preventing double payment for the same matter. The Bill could have provided that any payments made under the scheme are offset, or deducted, from any future award of damages by a court (in respect of successful actions arising from the same abuse).

216. However, offset is not an incentive to third parties to financially contribute to the scheme as they may still face the financial and reputational risk of legal action (albeit the amount they have originally paid would be deducted). There would be little incentive to commit to incurring the cost of a financial contribution now, in the absence of any claim. Instead they could choose to wait until a court action was raised before making any settlement. It may be that no one raises any action at all, and, if anyone does, the organisation could seek to settle it at that time and would be in no worse position than if it had put money into a redress scheme.

217. It is also unclear how offset would work in the case of there being multiple bodies 'responsible' for abuse who have each contributed to the scheme. This would be complex to administer.

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218. Offset would also not deliver the closure sought by the creation of the scheme. Litigation as a process can be lengthy and traumatic for survivors. It presents administrative, financial and reputational risks to those who have to resource and fund defences. Waiver aims to prevent subsequent litigation and the risks and costs associated with that in a way that offset does not.

Financial Contributions to The Scheme

219. The Scottish context for redress is that of a diverse care landscape which evolved over time, where religious organisations, charities and local authorities (among others) were providers of care, and with various arms of the state, nationally and locally, involved in consideration of safety, security and quality of care provided. These different types of provision varied in prominence over the period covered by the scheme, with religious and charitable bodies providing much of the care in the earlier decades of the last century and local authorities having an increasingly substantial role in more recent decades. This profile is reflected in the split of advance payments being made across different types of provision and has been considered carefully in relation to the nature of contributions being sought.

220. It is not intended that the redress scheme, or the contributions sought to support it, are founded on the basis of apportioning liability for particular instances of abuse. The scheme is not about establishing legal liability for the consequences of the abuse and Redress Scotland will not make a determination on any issue of fault or negligence arising from any matter for which an application for a payment is made under the scheme. The role of Redress Scotland is not that of an investigative body (unlike the Scottish Child Abuse Inquiry) or a court.

221. Financial contributions to the redress scheme will be sought from those organisations which exercise or have exercised functions in relation to the safeguarding or promotion of the welfare of children or the protection or furthering of their interests. This would include, for example, an organisation which owned, managed or was otherwise connected to relevant care settings or organisations which placed children they were responsible for in relevant care settings. A broad range of organisations are therefore potential contributors to the scheme.

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222. Participation in the scheme by the making of contributions offers an opportunity to play a meaningful role in Scotland's national endeavour to face up to the harms of the past. Through the extension and operation of the waiver, contributing organisations also have an opportunity to crystallise potential risks they would otherwise face through complex and costly litigation on the part of survivors, at least to the extent that those survivors accept redress payments. The Scottish Ministers will determine if an organisation is offering a fair and meaningful financial contribution, in which case a waiver will be extended to that organisation (subject to when the organisation is entered onto the contributor list and the waivers which therefore apply to it) in return for a legal requirement to meet its agreed commitment.

223. Given the very large number of organisations which will potentially be part of this engagement process as the scheme progresses, the initial focus to seek participation has been on those organisations which have been selected for investigation by the independent Scottish Child Abuse Inquiry so far and which were responsible for relevant care settings in the context of the redress scheme.

224. Although the Scottish context is unique, the experiences of the provision of redress elsewhere has informed the approach to contributions.

Assessment of Fair and Meaningful Financial Contributions

225. To ensure that contributions are fairly determined, a number of assessments will be made, including consideration of publicly available information in respect of historical abuse. 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 and the potential redress payments which may follow. Given the uncertainty surrounding potential applications, a review mechanism will be proposed as part of the agreement to contribute in order to reflect 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

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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.

226. The Bill requires that principles are published setting out how a fair and meaningful contribution will be assessed. These principles will set out in detail the methods used to determine contribution amounts and the process followed by the Scottish Ministers to assess if a contribution is fair and meaningful and therefore that a waiver should be extended to the organisation. The publication of these principles before the launch of the scheme and the communication of the contribution amounts will play a critical role in providing the transparency necessary for survivors to make an informed choice with regard to the signing of a waiver.

227. For an organisation to be included in the list of scheme contributors subject to the waiver, the Scottish Ministers will consider the proposed contribution and the evidence from which it was drawn and must determine whether it meets the principles for a fair and meaningful contribution. For an organisation to be removed from the contributor list, it is anticipated that the Scottish Ministers will either have decided on the basis of a change of circumstances that it is no longer appropriate for the organisation to remain on the list or the organisation will have defaulted (in unjustified circumstances) from the agreement to pay a fair and meaningful contribution.

228. The contributions sought will be fair because they will be assessed against the available evidence and the actual number of applications settled where the organisations are named. The contributions will be meaningful because they will represent a tangible acknowledgement of the harms of the past and by agreeing to participate in the scheme, contributing organisations will thereby be taken to have accepted the determination of applications by Redress Scotland. This is also meaningful because by participating in the scheme an organisation supports a survivor's access to a trauma-informed and non-adversarial source of redress.

229. Organisations included in the list are required to pay the fair and meaningful contribution which they have agreed to; otherwise this can be pursued as a debt owed to the Scottish Ministers.

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Local Government

230. A collective contribution will be sought through the Convention of Scottish Local Authorities (COSLA) to reflect the legacy of local government responsibility for abuse in care. This contribution will reflect firstly the exposure of local authorities for abuse carried out in care settings under their control or in foster care, but also the broader responsibility of local authorities for the placing of children in care, the oversight and scrutiny of care in their areas and the historical failure to respond appropriately to allegations of abuse.

Insurance

231. The position of insurance companies is a significant factor for many potential contributors, including some who may otherwise struggle to make the fair and meaningful contributions required to justify the extension of the waiver to them.

232. It is not appropriate for the Scottish Government to interfere in contractual relationships between insurers and those insured. However, the Scottish Government is aware that insurance companies have been asked to assist organisations facing a call for contribution. Given the potential exposure to litigation and costs faced by organisations who do not secure the waiver, the approach to contributions aims to encourage insurers to support contributions to the scheme.

Consultation and Alternative Approaches

233. In the earlier CELCIS consultation (2017) and the pre-legislative consultation for the Bill, the view from respondents who identified as survivors supported the position that such contributions should be sought in order to acknowledge and provide tangible recognition of the harm suffered as a result of historical child abuse whilst residing in an eligible care setting in Scotland.

234. In terms of how to secure contributions, consultation respondents agreed that there should be consequences for non-payment (97% overall; 99% for individuals and 84% for organisations). The most common views among individuals were that contributions should be required by law, and non-payment should result in legal action, financial or other sanctions (e.g. withdrawal of public funding, revoking of charitable status, or closure), or 'naming and shaming'. Among organisations, there were mixed views about whether persuasion and

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discussion, or a more formal (potentially legislative) approach should be used to secure financial contributions. Although some organisations agreed that legal action was an option, this group often also raised caveats or concerns about this, with some arguing that non-payment should be dealt with on a case-by-case basis.

235. A wide range of options that could act as leverage to secure participation in the redress scheme was explored, including measures to compel contributions, and the potential legal considerations which may arise in relation to those options. However, the redress scheme does not establish legal liability, and it is not intended to work as a civil court would. Redress Scotland will not make determinations about fault or negligence arising from historical child abuse. Obligations to require financial contributions cannot appropriately be imposed in a way consistent with the model of the redress scheme proposed. If survivors wish to pursue whatever legal remedies may be open to them through the civil courts, and do not wish to waive any rights of action against those organisations they consider to be responsible for their abuse, they have that choice by not obtaining a payment under the scheme. Likewise, organisations will have a choice whether to make a fair and meaningful financial contribution to the scheme. If they decide not to do so, and therefore do not participate in the scheme, they face the potentially significant financial consequences from not being able to benefit from any waiver granted by survivors who have chosen to participate in the scheme.

236. Options that were considered in this context included provisions in the Bill to compel contributions, stripping non-contributing organisations of their charitable status, removing government grants and compulsory acquisition of assets. In addition to these options, a levy on the insurance industry was considered but, given the nature of this redress scheme, it would not be appropriate to do so and could significantly delay the redress scheme. Consideration was also given as to whether raising an action for personal injury could be made easier for survivors (for example by dis-applying the means-testing and clawback aspects of civil legal aid, or by introducing the concept of “punitive damages” into Scots law for actions of this type). However, it was concluded that it would be difficult to justify why changes like these should be made only in relation to this category of personal injury claim.

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237. Areas that have been progressed are in relation to the amendment of charity law to facilitate contributions, and a duty to report redress activity to incorporate the importance of acknowledging the harms of the past in regular reporting activity. This is set out below.

Payment of Legal Fees and Reimbursement of Other Costs

238. 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. Nominated beneficiaries will also be eligible to have legal fees reasonably incurred paid.

239. 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.

240. It is recognised that legal fees could be reasonably incurred in relation to applications that are ultimately unsuccessful or withdrawn.

241. 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.

242. 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).

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243. In exceptional circumstances, Redress Scotland may determine that, despite an application not being submitted, legal fees reasonably incurred by a person who sought advice on eligibility, but did not ultimately submit an application for a redress payment, must be paid by the Scottish Ministers. This provision is intended to recognise that some cases of eligibility may be borderline or the evidence required to establish it may not be located or the potential applicant may have died before the application could be submitted. The provisions recognise the work carried out by the solicitor and in doing so also seek to ensure that for solicitors, taking on potential applicants with complex cases is not seen as a financial risk.

Reimbursement of Other Costs Incurred in Making an Application

244. Section 87 makes provision for regulations to be made in respect of the reimbursement of other costs and expenses reasonably incurred in the making of an application.

245. Applications for reimbursement of costs and expenses will be assessed by the Scottish Ministers and may be subject to review by Redress Scotland.

Legal Fee Payment Levels

246. Learning lessons from other redress schemes in which legal costs have escalated and been subject to criticism, appropriate maxima will be placed on the legal fees to be paid by the Scottish Ministers under the scheme. Maximum levels and other matters related to fee requests will be set out in regulations provided for in sections 88 and 89. Different maximum levels may be set for applications for fixed rate payments, individually assessed payments, next of kin payments and reviews.

247. The Bill provides for a mechanism to allow legal representatives to seek permission from Redress Scotland to incur legal fees in excess of the relevant maximum.

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248. The legal representative has a right of review of decisions by Redress Scotland in relation to:

- the amount of legal fees to be paid, where it is lower than requested,
- a determination that a fee request was without merit,
- a determination that special circumstances did not exist in relation to fees incurred where no application for redress was submitted,
- a refusal to grant permission to incur fees in excess of the maximum permitted in regulations.

Consultation

249. In terms of the need for independent legal advice, nine-tenths of respondents (90%) thought this might be required at the point of accepting a redress payment and signing a waiver, while around a third thought that it might be required in making the decision to apply to the scheme (36%) and during the application process (32%).

250. There was a general endorsement of the need to manage legal costs. There was support for both set fees and capped fees and a range of other mechanisms was also suggested, such as: establishing a list of approved or registered lawyers working for agreed fees; setting clear parameters for the work that would be funded at particular points in the process; obtaining agreement between the Scottish Government and the Law Society or relevant law firms of an appropriate fee system; and having fees calculated as a percentage of the final redress payment given.

Alternative Approaches

251. An alternative approach would have been to avoid placing maximum limits on the legal fees payable under the scheme. In Ireland, redress scheme legal advice was not required by applicants but reasonable legal costs were covered by the scheme with no cap on the amount paid. There has been criticism of the amount paid in legal fees in this scheme:

“By 31 December 2015, the Redress Board had approved legal cost payments of €192.9 million to 991 legal firms in respect of 15,345

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applications. 17 legal firms were paid between €1 million and €5 million each and seven firms were paid amounts between €5 million and €19 million each.”²⁶

252. Similarly, in the Historic Abuse Redress Scheme Jersey, applicants had the option of using legal representation and reasonable legal fees were covered by the scheme. However, it too has received criticism for the large sums paid out in legal costs with figures confirming that £2 million has been paid to applicants through the Historic Abuse Redress Scheme while lawyers have received a total of £3.2 million.²⁷

253. Evidence from other schemes about escalating costs highlighted the need to introduce safeguards and to place a ceiling on the amount that will be paid in legal fees under the Bill.

254. Another approach considered was to set legal fees payable as a percentage of the redress payment. However, this was rejected because it was considered fair to link the payment of fees with work carried out by the legal representative and not the ultimate redress payment obtained. There was also a concern that such an approach may inadvertently make solicitors less likely to take on complex, but perhaps not high value, applications.

255. Further, provision could have been made to allow funding for legal advice to have been provided through the existing legal aid system. However, it would not have been appropriate for applicants for redress to be subject to means-testing to access legal advice or for redress payments to be subject to the clawback mechanisms in place, for example, under legal aid rules.

Next of Kin Payments

256. The Bill makes provision to allow a restricted category of next of kin of deceased survivors to be eligible to apply for financial redress.

²⁶ see McCarthy, S (2016) Comptroller and Auditor General Special Report: Cost of Child Abuse Inquiry and Redress, Report No. 96

²⁷ <https://jerseyeveningpost.com/news/2015/11/05/more-paid-in-legal-fees-than-to-abuse-victims/>

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257. The purpose of the next of kin payment is tied to the underlying entitlement of the survivor of abuse and is to acknowledge the fact that the survivor died before having had the opportunity to apply for or receive a redress payment for which they would have been eligible under the redress scheme. It is not intended as a payment in respect of any harm caused to the next of kin as a consequence of their spouse, civil partner, cohabitant or parent having been abused in care.

Eligibility

258. Eligibility for a next of kin payment arises when a number of criteria are met. The survivor of abuse must have died on or after 17 November 2016, the date on which the Deputy First Minister made a statement to the Parliament committing to consult on the provision of financial redress to survivors of historical child abuse in care. From this date, the Scottish Government considers that survivors and their families may have formed reasonable expectations that a financial redress scheme would be established by the Scottish Government for such abuse survivors.

259. Eligibility also relies on the deceased survivor having met the eligibility criteria of the scheme, meaning that they were abused as a child in a relevant care setting before 1 December 2004.

260. In addition, the deceased survivor must either have not applied for a redress payment in respect of their abuse, or if they applied, they died whilst their application was ongoing and no payment was made. That means that the deceased survivor must not have received a fixed rate payment and no redress payment is subsequently paid to their estate or nominated beneficiary (see paragraph 277 below).

261. The Bill defines what an ongoing application is. For the avoidance of doubt, a next of kin would not be entitled to apply where the deceased survivor had previously rejected a redress payment. The Bill does however, in exceptional circumstances, allow next of kin to seek permission from Redress Scotland to apply where the deceased survivor was offered a redress payment but did not accept it during the period it was valid and as such the offer 'timed out' (which would normally be treated as a rejection of the offer). Such exceptional circumstances might include where the survivor was unwell or incapacitated and unable to accept the offer or extend the validity period. Next of kin have a right of review against decisions of Redress Scotland not to grant permission.

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262. Next of kin is confined to the following two categories of immediate family (in order of preference):

- A spouse, civil partner or cohabitant of the person who was the survivor of historical child abuse in care; or
- Any surviving children of that person (which includes any child or stepchild of the deceased or a person who was accepted as a child of the deceased's family).

263. Where both a cohabitant and a spouse or civil partner exist, the Bill provides that, if the cohabitant can demonstrate that they lived with the deceased for a period of six months immediately before death, the cohabitant will be the party eligible to apply for the next of kin payment and not the spouse or civil partner.

264. Surviving children will only be eligible to apply as next of kin where there is no surviving spouse, civil partner or as the case may be cohabitant.

265. The rules around the consideration of serious criminal convictions would also apply to convictions of next of kin applicants.

Payment Amount

266. The total available next of kin payment is the fixed rate redress payment (£10,000) and is subject to the general provisions on deduction of previous payments and waiver.

267. Where the next of kin applicant is a spouse, civil partner or, as the case may, cohabitant, they will receive the whole amount of the fixed rate redress payment.

268. Where the next of kin applicant is a surviving child, the fixed rate payment will be divided equally among all surviving children at the date of the first child's application.

269. Where there are multiple surviving children, joint applications will allow the share of the next of kin payment due to each child to be paid at the same time. However, it is recognised that complex family dynamics exist and it may not always be possible or desirable for joint applications to be submitted, so separate applications will be permitted.

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270. It is intended that the application form will require all surviving children applying for redress to confirm to the best of their knowledge whether there is a surviving spouse, civil partner or cohabitant of the deceased and if there are any other surviving children of the deceased. Redress Scotland will rely upon these declarations having been made in good faith to allow applications to be processed and the share of the fixed rate payment payable to each surviving child to be calculated. Where there has been an error or a false declaration in respect of the number of surviving children which is only discovered when a subsequent application is received from another child of the deceased, that later applicant will not be prejudiced by the earlier error in payment. Provided they can satisfy the evidential requirements, they will remain entitled to a share of the next of kin redress payment. Depending on the circumstances, the powers to recover payments made as a result of error or false information may be used to recover the previous overpayment made to the sibling applying earlier.

271. There may be cases in which some but not all of the surviving children apply to the redress scheme. In those circumstances, the share of those who opt not to apply will not be redistributed to those that did apply and nor will the Scottish Ministers or Redress Scotland proactively contact them to advise them of their eligibility for a next of kin redress payment. To do so would disclose to them sensitive information about their deceased parent and the abuse they suffered which they may not have known and their parent may not have wanted them to know.

Consultation

272. There was widespread support for next of kin payments. There was no clear consensus on a cut-off date for next of kin applications. However, 17 December 2014 was the option that attracted most support (42%), with respondents noting that this date was aligned with the announcement of the Scottish Child Abuse Inquiry. However, some thought there should be no cut-off date, or favoured an earlier cut-off date, with 1 December 2004 (when the then First Minister issued an apology on behalf of the Scottish Government) commonly suggested.

Alternative Approaches

273. An alternative approach would have been to choose a different cut-off date after which survivors must have died before their next of kin are eligible under the redress scheme. An earlier date would increase the

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numbers of potential next of kin applicants. However, the purpose of the payment is to acknowledge the survivors who may have formed a view that a redress scheme to which they were eligible was to be created, but who passed away in the time that it has taken to explore and develop the scheme. The announcement on 17 November 2016 to consult on the provision of financial redress to survivors best reflects the date on which survivors may reasonably have formed that view.

274. Another alternative would have been not to restrict the payment to next of kin but to have aligned the payment to the principal beneficiary under the survivor's will or rules of intestacy. This option was explored. However, there is potentially a great deal of complexity in identifying principal beneficiaries under both testate and intestate estates. This is compounded when considering the likelihood of overseas applicants. Such an approach would not have created a mechanism to facilitate next of kin payments which could be operated in a fair and consistent manner and which did not place an excessive administrative burden on either the redress body or the next of kin applicant.

275. Given the challenges noted above on the identification of the number of surviving children of a deceased, and therefore the calculation of the share of the payment to be paid to each child applying, another approach considered was to give each surviving child a fixed amount regardless of how many siblings they have. However, such an approach does not reflect the purpose of the next of kin payment which is recognition of the abuse suffered by the deceased, not recognition of the experience of the next of kin. The next of kin payment therefore requires to be shared among eligible applicants in that category.

276. A further approach considered was for the next of kin payment to be shared among only those surviving children who applied to the scheme recognising that, otherwise, if all surviving children did not make a joint application, the full value of the next of kin payment may not be paid in every case (e.g. if one or more surviving children chose not to apply). However, this would allow a surviving child to improve their claim by applying separately and concealing their knowledge of the scheme or the evidence required to apply to the scheme from their siblings. Instead, the approach adopted allocates a share to all surviving children declared in the application regardless of whether they apply. One way to prevent this uncertainty might have been to allow only one application per

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category of next of kin applying, e.g. requiring a joint application by all surviving children in every case and not permitting subsequent applications by siblings not included within the application. However, this may be problematic depending on family history and dynamics and would in effect allow children to improve their claim by being the only applicant.

Death of Applicant; Nomination of Beneficiary

277. When a survivor of historical child abuse submits an application for financial redress, they will be given the opportunity to nominate a beneficiary, if they so wish, who, subject to satisfactory assessment of the applicant's eligibility, should receive any payment in the event that the applicant dies before a redress payment under the scheme is made. However, this will depend upon how far the application has been progressed at the time of the applicant's death. The rules around the consideration of serious criminal convictions would also apply to convictions of the nominated beneficiary.

278. A nominated beneficiary could be anyone of the applicant's choosing and would not be restricted to next of kin. It would be made clear to the survivor within the application form that, in the event of their death, the nominated beneficiary would receive information about their application including the determination of the panel and the reasons behind that, which would be likely to disclose to the nominated beneficiary personal and sensitive details about the survivor and the abuse they suffered.

279. Where a nominated beneficiary is invited to take over an application, they are provided with a period of four weeks to accept the invitation and, if necessary, provide any outstanding information required from them.

280. Where an applicant dies after making an application for redress but before accepting an offer of a redress payment and there was a nomination in force, the nominated beneficiary would be invited to take over the application in the following circumstances:

- Where the survivor died after being offered but before accepting the redress payment;

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- Where the redress panel had not yet made a determination but had received or obtained all necessary information in support of the application required for it to be able to make a determination; or
- Where the redress panel has not yet received or obtained all necessary information in support of the application that it requires in order to make a determination, but the panel considers there are exceptional circumstances to allow the nominated beneficiary an opportunity to ‘take over’ the application and submit the outstanding information to allow the panel to make a determination. Guidance on what constitutes ‘exceptional circumstances’ will be produced under section 97 of the Bill and may include where there was an administrative matter still to be attended to or some other identifiable piece of information that the nominated beneficiary would be capable of providing. It would not extend to any outstanding requests for further information that went to the core of the survivor’s eligibility. A nominated beneficiary would have the right to review a decision that there were no exceptional circumstances which would allow them to ‘take over’ the application.

281. These provisions do not apply in relation to applications for next of kin payments. Where a next of kin dies during the application process, they will not have the option to nominate a beneficiary and the application will simply be treated as terminated and no payment will be made. But in the case of a next of kin application by a spouse, civil partner or cohabitant, it would be open to the children of the original survivor of the abuse to apply for a next of kin payment.

282. Payment of any sum will be subject to the deduction of relevant payments and conditional upon the nominated beneficiary signing a waiver to discharge any claims the nominated beneficiary may have against the Scottish Ministers and other designated bodies in respect of the abuse suffered by the now deceased survivor.

283. Where an applicant dies after accepting, but before receiving, the redress payment, payment would fall to be treated as already forming part of the deceased’s estate to be disbursed in accordance with the general law of succession, rather than having to be redirected to the nominated beneficiary. The provisions around nominated beneficiaries

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only apply where the survivor dies before accepting a redress payment, to allow the nominated beneficiary to take over the application in the restricted circumstances outlined above.

Alternative Approaches

284. An alternative approach would have been not to include nominated beneficiaries as part of the application process. However, it is fair and appropriate to ensure that a payment could be made where an applicant was determined as eligible and the application was near completion prior to the survivor's death. The approach taken allows for survivors to choose who the payment will go to in these circumstances, which further acknowledges the importance of choice for survivors.

Amendments to Charity Law

285. The Scottish Government will seek financial contributions from those organisations which were connected to the care of children at the time of abuse, whether providing care directly or otherwise involved in the decision-making processes and arrangements by which the child came to be in care. Many of these organisations are charitable organisations.

286. There are a number of potential legal barriers to charities being able to contribute, if they choose to do so. For example, there may not be specific powers in the charity's constitution which permit a contribution to the redress fund.

287. There are also potential barriers within the Charities and Trustee Investment (Scotland) Act 2005 ("the 2005 Act"), for example, the list of charitable purposes (which does not include a contribution to the redress scheme) and the charity test (see section 7 of the 2005 Act).

288. Section 14 of the Bill provides that making a financial contribution to the redress scheme will be treated as being in furtherance of the charity's charitable purpose and consistent with the charity's constitution and that making such a contribution is to be treated as providing public benefit. In addition, the making of financial contributions to the redress scheme will be treated for all purposes as not being contrary to the interests of the charity, and as being within the powers exercisable by the charity trustees. The trustees' duties to act in the interests of the

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charity will still apply. No changes are made to the current list of charitable purposes or the charity test.

289. The Bill also provides, at section 15, that regulations may be made in relation to the use by charities of restricted funds for the making of financial contributions to the redress scheme. Such regulations may, if made, provide a mechanism whereby charity trustees would have the power to use the funds of the charity to make a contribution to the statutory redress scheme, whether or not it would otherwise be within the powers of the charity trustees to do so.

290. While it may be considered innovative to allow trustees to use charitable funds for this purpose without seeking any prior authority, the redress scheme is a one-off, exceptional, time-limited scheme which is designed to provide some measure of financial redress for the historic wrong of child abuse, and for which many survivors consider that some charities bear a large measure of responsibility. Therefore, it is considered that there are sufficient policy justifications for this legislative change.

291. Some charities have a very high proportion of their funds tied up in what are referred to in their accounts as “restricted funds”. Restricted funds are funds that can only be used for the particular purposes specified by the donor. Income from assets held in a restricted fund (for example, interest) will be subject to the same restriction as the original fund unless the terms of the original restriction say otherwise. However, if restricted funds were totally excluded from being able to be used to contribute to the redress scheme, this might mean that certain large charities would be unable to adequately contribute to the scheme.

292. Addressing this issue is complex and sensitive. On the one hand, if charities are allowed to use funds which were specifically donated for a certain purpose in order to contribute to the redress scheme, this could undermine confidence in charitable giving. On the other hand, many charities face the possibility of having significant damages claims awarded against them in the civil courts to the extent that this may impact on the charity’s ability to provide ongoing services and perhaps even challenge the charity’s continued existence. Many survivors of historical abuse also consider charities to be under a moral obligation to contribute to the redress scheme. Therefore, potentially enabling

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charities to utilise restricted funds, where the charity concerned considers that to be appropriate, to allow the charity to make a fair and meaningful contribution to the redress scheme, with the subsequent benefit of the waiver being extended to that charity, would appear to be a proportionate intervention.

293. In relation to the potential use of restricted funds through the regulation-making power, the Scottish Ministers intend to work closely with the Office of the Scottish Charity Regulator (OSCR) to develop a proportionate mechanism to use restricted funds where the charity considers that to be appropriate. There is a requirement that the development of the regulations must include consultation with OSCR.

Consultation and Alternative Approaches

294. The pre-legislative consultation asked respondents if they thought there were any barriers to making contributions to the redress scheme, and, if so, how might these be overcome. Among those responding as individuals, the most common response was that there were – or should be – ‘no barriers’ to institutions making financial contributions to the redress scheme. Responses from organisations – but not individuals – frequently identified barriers relating to charity law. Those who raised this point did not believe charitable organisations would lawfully be able to use funds to make payments to a redress scheme for historical cases of abuse. In total 94% of respondents to the consultation agreed with the Scottish Government position that those organisations which may have been responsible for or involved in the care of children at the time they were abused should be expected to contribute to the financial redress scheme. Failing to adequately address the barriers in charity law could result in a redress scheme that did not reflect the needs of survivors or the positive actions of organisations actively seeking to participate. The alternative approach of making no reference to these barriers within the legislation was therefore not considered viable.

Reporting on Redress Activity

295. 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

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opportunity for organisations to demonstrate all that they have done to acknowledge and address their role in the context of historical child abuse – on the basis that redress involves taking a range of actions to meaningfully respond to the harms of the past, not just making financial payments to survivors.

296. The organisations subject to the reporting duty will be all those which have agreed to contribute financially to the redress scheme in a fair and meaningful way. The 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.

297. 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 the Scottish Ministers following the end of each financial year.²⁸ The Scottish Ministers will collate the information from the redress reports sent to them and publish a combined report for the year. The Bill also enables the Scottish Ministers to make regulations requiring organisations to include a statement on wider redress activities in their annual reports or an equivalent document.

298. Where an organisation required to report has not carried out any wider redress activity, it 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.

299. In addition to situations in which an organisation has been named in a redress application which results in an offer of payment, the Scottish Ministers may also direct an organisation to report where they consider that an organisation with a duty to do so has not fulfilled its obligations

²⁸ 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 which case, the intention is that a direction would not be given in relation to that 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.

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by the relevant deadline. If the Scottish Ministers consider that the organisation has failed to comply with a reporting direction, they may publish the fact that the organisation has failed to do so. The Scottish Ministers may revise or revoke a reporting direction.

Dissolution of National Confidential Forum

300. 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. These are discussed in more detail in the section below. This section focusses on the specific provisions relating to the repeal of the sections of the Victims and Witness (Scotland) Act 2014 which establish the National Confidential Forum (NCF).

301. The NCF was established to listen to and collect the experiences of adults who were in institutional care as children. The NCF offers an opportunity, a 'hearing', for survivors to share their account in a safe and supportive environment. The testimony of survivors is recorded anonymously and confidentially. These accounts will form an important record about the experiences of children in care in Scotland in the past and aim to provide recommendations about improvements for the future.

302. The number of survivors attending the NCF has declined since other initiatives providing acknowledgement have been put in place, including the Scottish Child Abuse Inquiry. In 2018 – 2019, only 25 survivors gave testimony. The Bill therefore provides for the dissolution of the NCF. The current intention is that the NCF will cease operation at the end of March 2021 after six years of hearings. Discussions are continuing with the Mental Welfare Commission and the NCF as to their records management plans. It is vitally important to establish how published reports based on anonymised testimony and operational reports relevant to broader learning will be stored and, where possible, accessed in the future.

303. To ensure confidentiality is maintained following the closure of the NCF, the Bill creates new ongoing obligations on those who have had or will continue to have access to NCF information. These ongoing obligations will ensure that the testimonies given will continue to be treated confidentially despite the repealing of the NCF legislation.

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Consultation

304. Respondents praised the work of the NCF and emphasised the importance of continuing to have this type of confidential service. However, some (mainly organisations) also thought it was appropriate to build on the achievements of the NCF and repeal the sections of the 2014 Act which established the NCF.

Alternative Approach

305. An alternative approach would have been to keep the NCF in place alongside the redress scheme. However, the provision of acknowledgment and support for survivors of historical child abuse in care has developed significantly since the NCF was launched – for example, with the establishment of the SCAI – and survivors are simply no longer using the NCF to any great extent. The provisions in the legislation are too restrictive to allow the NCF to develop and adapt to the changed needs of survivors and the redress scheme itself will provide an element of acknowledgment to survivors.

Accessibility and Support to Apply for Redress

306. It is anticipated that many applicants will require support to apply to the scheme, over and above legal advice. This is recognised in section 85 of the Bill, which enables the Scottish Ministers to make arrangements for the provision of emotional, psychological and practical support to those considering or having made an application for redress. The Survivor Forum will provide valuable views and advice on what levels and types of support would be most beneficial for the scheme. The nature and level of support required will vary and the scheme will need to be responsive and flexible in its response to those needs. This could include literacy and practical support, counselling or emotional support, help to find records or evidence to support an individual's application and financial advice about their payment.

307. Some applicants will require support to secure the necessary documentation that they were in care. Through the advance payment scheme, considerable skill and knowledge has been developed, networks have been built and key contacts in organisations who can provide records and supporting documentation have been engaged with. This will help applicants to the statutory scheme where they wish this type of assistance.

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308. The scheme will employ case workers (based in-house in the Scottish Government) to assist applicants and other options are being considered to complement this. Whilst some applicants may have minimal records, others may receive large volumes of, for example, social work records. This is more than an administrative task; information may be highly redacted and contain emotive or confusing information. For example, it might be information that the applicant is hearing for the first time, or contain inaccuracies and gaps. It is recognised that for many survivors of abuse in care, accessing records is an important link to their identity, childhood and past. Suitable provision for support in these cases will be made.

309. Significant efforts are required to ensure equality of access and to minimise barriers to applying. Relationships are being built with partners to ensure the process is as accessible as possible. For example, consultation has taken place with Deaf Scotland and People First Scotland, and learning from redress schemes in other countries has been taken into consideration.

310. Some individuals may be identified as vulnerable to risk on receipt of payment; either through potential harm to themselves or being at risk of financial or other kinds of exploitation. This is a challenging area and consideration will need to be given to what basis that judgement has been, or should be, made and by whom. This raises important dilemmas and tensions regarding risk, self-determination and individual rights. A power has been included in the Bill to allow applicants to be paid in a variety of ways, for example by instalments where the applicant consents.

311. Applicants for next of kin payments may also need support to apply and this will need to be considered in relation to the additional issues these families face. There may be limited circumstances where a child under the age of 18 years applies for a payment. The processes for application and how a payment is delivered will need to be considered in order to recognise their stage of development, circumstances and any potential risk of receiving a payment. Further consideration is being given to trust fund arrangements, how this could work and when this would apply, and the Bill provides that the decision-making panel should have broad and flexible powers to issue appropriate directions in relation to how payments should be made in particular circumstances.

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312. The Adults With Incapacity (Scotland) Act 2000 provides a framework for safeguarding the welfare and managing the finances of adults (people aged 16 or over) who lack capacity in relation to a particular matter due to mental illness, learning disability, dementia or a related condition, or an inability to communicate. For individuals that meet these criteria, welfare guardianship, financial guardianship and power of attorney can be in place. Engagement will continue with the Mental Welfare Commission, the Office of the Public Guardian and other groups to consider what this means for applicants, particularly ensuring their rights and understanding through the process.

Non-Financial Redress; Acknowledgement, Apology and Support

313. Redress schemes in other countries typically also offer non-financial elements, such as access to therapeutic support and counselling, personal and public acknowledgement, and apology. Commemoration and memorial are often also features of a package of remedies and facing up to the failings of the past.²⁹ Whilst not every survivor will want or need all of these elements, it is important that choice and access to a broad range of remedies is provided. Survivors in Scotland have highlighted in a number of previous consultations that financial redress on its own will not fully meet survivor needs.³⁰

314. The Scottish Government also proposes to include access to these elements of non-financial redress in its scheme. It is an area in which the Scottish Government and care providers can work together to demonstrate meaningful recognition of the harm done in the past and deliver effective remedies.

²⁹ CELCIS (2018) *Report 3: International perspectives – a descriptive summary Consultation and engagement on a potential financial compensation/redress scheme for victims/survivors of abuse in care*

³⁰ Kendrick, A and Shaw J (2015) (2015) *Consultation on the Public Inquiry into Historical Child Abuse in Scotland and other Scottish Government Commitments to Survivors of Historical Child Abuse* CELCIS / School of Social Work and Social Policy University of Strathclyde; and (2018) *CELCIS Report 2: Analysis and Findings of the Consultation with Victims/Survivors : Consultation and Engagement on a Potential Financial Compensation/Redress Scheme for Victims/Survivors of Abuse in Care*

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315. The Bill gives the Scottish Ministers a general power to fund emotional support and counselling as part of non-financial redress but is not prescriptive as to how this will be exercised or what will be provided (section 86). Access to apology and acknowledgment will be facilitated through the Scottish Ministers. The Bill provides that, in addition to those receiving a redress payment under the scheme, non-financial redress will also be available to: survivors who have previously received an advance payment; and survivors who have been determined by Redress Scotland as meeting the eligibility criteria but, because of the deduction of previous payments or a determination in relation to their previous criminal conduct, to whom no redress payment has been made.

Counselling and Therapeutic Support

316. Since 2016, survivors of abuse in care have been able to access a range of support commissioned through Future Pathways - the Scottish Government funded national support service for survivors of abuse in care. Using a personal outcomes approach, services are commissioned according to identified individual needs, including counselling and therapeutic support, help to access education and work, access to records and to community activities. Future Pathways currently commissions and coordinates support for around 1400 survivors, the majority of whom are likely to be eligible for redress. The current funding agreement runs until March 2023.

317. Taking into consideration survivor views³¹, the experience of Future Pathways and other support organisations and that of redress schemes elsewhere, it is considered the priority area of need and demand alongside the financial redress scheme will be for therapeutic support and counselling.

³¹ In addition to the pre-legislative consultation of 2019, survivors in Scotland provided views on supports in (2018) CELCIS *Report 2: Analysis and Findings of the Consultation with Victims/Survivors : Consultation and Engagement on a Potential Financial Compensation/Redress Scheme for Victims/Survivors of Abuse in Care* and Kendrick, A and Shaw J (2015) (2015) *Consultation on the Public Inquiry into Historical Child Abuse in Scotland and other Scottish Government Commitments to Survivors of Historical Child Abuse* CELCIS / School of Social Work and Social Policy University of Strathclyde

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318. Redress schemes in other countries which include therapeutic support deliver it in different ways. Some schemes cap this at a certain financial amount or number of sessions. In Ireland, a specific service was set up offering a range of counselling type provision and this was funded by care providers.

319. The Scottish Government will give detailed consideration to the learning, experience and models of provision available from these other countries, from Future Pathways and other support organisations. Specifically in relation to therapeutic services, opportunities to build and enhance current provision will be examined, identifying where gaps exist and where training specific to abuse in care might enhance the availability of appropriate support nationally. Additional and alternative models of delivery such as online or phone counselling will also be investigated to offer choice to survivors. Careful consideration is needed in relation to current survivor support provision and expertise to deliver an approach that is efficient, effective, avoids duplication and is accessible for survivors.

Consultation

320. In general, respondents affirmed the importance of available support, that this should be based on individual need in terms of nature and duration and the impact of applying for redress potentially increasing need.

321. There was general consensus (96%) among respondents supporting a dedicated support service. Respondents noted that the service should be individualised and trauma-informed in its nature. In addition to providing access to therapeutic supports, responses mentioned financial advice, advocacy, and education and training support.

Acknowledgement and Apology

322. Survivors have stated that being heard, being believed and having their abuse acknowledged is an important step in accessing justice and, for many, a vital part of healing. For some it is important that this acknowledgement is on an individual basis while for others it is about public acknowledgement and for some it is both.

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323. Financial redress is in itself a form of acknowledgement, providing both individual and public recognition from the Scottish Government and those contributing to a scheme of the harm done to those children in care. The establishment of the independent Scottish Child Abuse Inquiry and Future Pathways are public acknowledgments by the Scottish Government that abuse took place, that the abuse was wrong and that the country should recognise that and do what it can to address the wrongs of the past.

324. As noted earlier, how and where records will be stored from the NCF, the Scottish Child Abuse Inquiry and the redress scheme is also an important aspect of public acknowledgement. These findings and reports, and information gathered through these initiatives, will contribute to the public record of how the Government and others responded to this period in Scotland's history. The Scottish Government will continue to consider public acknowledgement and commemoration.

325. Survivors in Scotland have already shared views in previous years about what they would like to see by way of commemoration, memorial and public acknowledgement.³² They have expressed a wide range of ideas to recognise this time in Scotland's history and to ensure it is not forgotten, highlighting the importance of reconciliation and ensuring lessons are learned for the future. Commemoration is the only outstanding commitment from the Action Plan on Justice for Victims of Historical Abuse of Children in Care that is still to be implemented by the Scottish Government. The Review Group considers the key opportunity for it to be taken forward is after the redress scheme has been established. Whilst at this point the focus is rightly on redress, sight will not be lost of this important area of work. As redress becomes established, close working will continue with survivors to consider how to take forward this vital and sensitive commitment.

326. Similarly in relation to apology, both public and personal apologies are important. Apology, like other forms of acknowledgement, needs to be meaningful at an individual level for survivors. Close working will continue with survivors to develop good practice guidance on the principles and provision of apology. The redress scheme will be able to

³² CELCIS (2015) Consultation on the Public Inquiry into Historical Abuse in Scotland and other Scottish Government commitments; and National Confidential Forum (2017) Summary report; engagement events following what has been learned so far

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build on the experience of the advance payment scheme where applicants have, in large numbers, commented on how much it has meant to them to receive a letter from a senior Scottish Government official reiterating the apology delivered by the Deputy First Minister in the Parliament in October 2018³³. Consideration will continue to be given as to how other redress schemes deal with the issue of apology. For example, the Australian National Redress Scheme offers a 'direct personal response' and sets out guiding principles regarding the facilitation of written apologies, how these can be obtained, the roles of those involved and how the apology should be delivered. Provision for apology has not been included in the Bill despite its importance as a key element of redress. This is in recognition of the fact that the terms of the Apologies (Scotland) Act 2016 mean that legislation is not required, and, more importantly, that a forced apology is not a meaningful apology. Instead, it is intended to build on the good practice adopted in the advance payment scheme and to develop the delivery of this element of non-financial redress as part of the broader scheme.

Consultation

327. Respondents stressed the importance of both a personal acknowledgement (and apology), and a public acknowledgement of the wrongs and harms done in institutions where abuse took place. The importance of this area being informed by survivors' views was highlighted. The views expressed about the meaning of an apology and the relationship between that and a payment were varied. For some the apology was highlighted as more important than a payment or without an apology the payment could be viewed as 'hush money'; for others the payment on its own was acknowledgement enough.

328. There was general consensus (87%) among respondents that a personal apology should be given to survivors of in-care abuse alongside a redress payment. It was noted that a personal apology could be meaningful, demonstrated acceptance of responsibility for abuse and affirmed that the victims were not to blame. Respondents also provided views on who should provide the apology with the most common response from both individual and organisational respondents being a

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<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11722&i=106114#ScotParlOR>

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senior representative of the organisations where the abuse took place – if those organisations still existed.

Alternative Approaches

329. An alternative approach would be for financial redress to be provided as a standalone offer to survivors in the absence of any wider reparations package. This would not reflect the intended purpose of the redress scheme, the needs of survivors, known good practice or schemes elsewhere that recognise the range of needs and interests beyond receipt of a payment.

330. For some survivors, the process of applying to the redress scheme may have been retriggering and had a significant impact on their wellbeing. Therefore, access to professional therapeutic support is essential.

331. Whilst survivors and organisations could make their own arrangements independently for acknowledgement and apology, there is potential for barriers, gaps and inconsistencies to emerge. The redress scheme administration can offer guidance to organisations on how to structure an apology so that it is delivered in a way that has the best chance of a meaningful outcome for survivors.

Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development Etc.

Equal Opportunities

332. An Equality Impact Assessment (EQIA) has been carried out and will be published on the Scottish Government website following the Bill's introduction.

333. The Scottish Government believes that the Bill does not discriminate on the basis of maternity and pregnancy, marriage and civil partnership, gender reassignment, race, disability, religion and belief, sex or sexual orientation.

334. As regards age, the redress scheme does differentiate between those abused as children before 1 December 2004 and those abused after that date. For the reasons set out within this Policy Memorandum

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and within the EQIA, differential treatment is appropriate and proportionate and reflects that the purpose of the redress scheme is to account for historical abuse. That is not to suggest that children were not abused after 1 December 2004, but the Scottish Government considers that regulatory changes and improvements made since that date, including in relation to the areas of safeguarding, regulation, and record keeping, mean that the context of that abuse, and the remedies available to survivors, are in themselves different.

335. The redress scheme seeks to provide a route to financial redress for survivors of historical child abuse in relevant care settings including where the abuse took place before 26 September 1964. This is significant in terms of equality of opportunity given that the operation of the law of prescription means that those survivors are unable to raise a civil action to pursue damages in respect of that abuse. For those survivors, the redress scheme is demonstrably more inclusive than existing remedies.

336. There will be some survivors across all groups of protected characteristics who will be excluded from applying for a redress payment because the abuse occurred whilst resident in a setting outwith the scope of the redress scheme, e.g. a private boarding school, where the fees were not paid by an education authority or care provider. Arrangements which were purely private and involved no exercise of public functions (such as private fee-paying pupils at private boarding schools) do not fit with the intended purpose of the redress scheme.

Human Rights

337. A Human Rights Impact Assessment (HRIA) has been carried out and will be published on the Scottish Government website following the Bill's introduction.

338. There are a number of areas covered by the Bill that potentially engage rights under the European Convention on Human Rights (ECHR) including Article 6 (the right to a fair trial), Article 8 (the protection of private life), and Article 14 (the prohibition of discrimination) and Article 1 of Protocol 1 or A1P1 (the right to property). However, the Scottish Government considers that the provisions of the Bill are ECHR compliant.

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Eligibility Criteria

339. ECHR obligations, so far as engaged, require that eligibility must link rationally to the overall purpose of the scheme and that decisions to exclude any particular group must be proportionate. Full consideration has been given as to all relevant eligibility criteria including the cut-off date and the definition of ‘relevant care setting’ in the redress scheme, and it is considered that any decisions made on the eligibility criteria of the scheme sufficiently respect relevant ECHR obligations so far as engaged, in particular Article 6, A1P1 and Article 14.

Treatment of Applicants with Serious Criminal Convictions

340. In relation to applicants whose applications are affected by certain serious criminal convictions, the policy intention is not, as a blanket rule, to exclude those with serious criminal convictions from being able to apply for a payment under the scheme. However, it is considered that there may be some circumstances in which it may be contrary to the public interest for applicants to benefit from public funding by means of a redress payment where they, or the person in respect of whom the payment is sought, have a serious, unspent criminal conviction. This will, nevertheless, be subject to a consideration of all relevant facts and circumstances. In the event that Redress Scotland considers that a prospective applicant should be precluded from receiving a redress payment, that person would still be able to apply for other forms of redress support – for example, counselling. Applicants who are precluded from receiving a redress payment by the panel will also be able to request a review of the decision. Again, the Scottish Government considers this sufficiently and proportionately respects relevant ECHR obligations so far as engaged – in particular Article 6, A1P1 and Article 14.

Process for Determining Applications Under the Scheme and Independence of the Decision-Maker

341. It is considered that entitlements to redress payments will fall to be determined as involving civil rights as long as appropriate entitlement conditions are met. The functions for determining applications under the scheme and their review will be conferred on Redress Scotland, an NDPB. The operational independence of Redress Scotland is set out in the Bill and provisions as regards appointment of its members, including the duration of their appointment, are considered to be sufficient to ensure that Redress Scotland is independent and impartial for the

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purposes of Article 6(1) ECHR. It is also considered that the process overall for determining applications and their review (which could also include recourse to judicial review) is Article 6(1) compliant.

Waiver

342. By providing an effective opportunity for applicants to obtain independent legal advice (funding will be provided for this and applicants will be strongly advised to seek legal advice), it is considered that the waiver will be fair and ECHR rights will be respected (in particular Article 6(1) ECHR).

Obtaining Fair and Meaningful Contributions to the Funding of the Scheme

343. The Bill makes provision for fair and meaningful contributions to the funding of the scheme from organisations which may have been responsible for or involved in the care of children at the time they were abused, on the basis of an agreement with the Scottish Ministers. A list of contributing organisations will be published. Any organisation which makes such a contribution will be able to benefit from any waiver granted by an abuse survivor in return for a payment under the scheme (subject to when the organisation is entered onto the contributor list and the waivers which therefore apply to it). It is not considered that the provisions on fair and meaningful contributions engage rights under A1P1 ECHR. The possibility of gaining the benefit of a waiver in respect of successful applications under the redress scheme in return for a fair and meaningful contribution does not amount to a “possession” within the meaning of A1P1.

Provision of Information and Evidence in Support of Applications

344. The Bill requires the provision of information and evidence in support of applications. Moreover, in their capacity as administrators of the redress scheme, the Scottish Ministers will have the power to compel any individual or body to provide them with specified information or other evidence for the purposes of determinations of redress applications by Redress Scotland and a failure to comply with such request may constitute an offence. The Bill also provides for information-sharing between Redress Scotland and the Scottish Ministers but only in so far as necessary to enable performance of functions conferred under or by virtue of the Bill, or otherwise necessary for or in connection with the operation of the redress scheme. In addition, under the Bill, the

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Scottish Ministers or Redress Scotland will be able to share information with third parties but only for limited purposes. Article 8 ECHR is potentially engaged in respect of information-sharing. However sufficient safeguards have been built into the Bill provisions to ensure that any interference with the right to privacy is proportionate, that these provisions are ECHR compliant, and that the applicant's right to confidentiality is protected. Moreover, any information-sharing must be compliant with other relevant rules of law such as data protection legislation and the law of confidentiality.

Island Communities

345. The Bill has no differential impact on island communities. The provisions will apply equally to all parts of Scotland.

Local Government

346. The Bill will have a direct impact on local authorities. The financial impact on the business of local authorities has been captured in the Financial Memorandum and is the subject of ongoing engagement with COSLA. The making of financial contributions through COSLA by local authorities would have financial consequences for local authorities but, through the extension of the waiver, may reduce future costs which would otherwise arise through litigation.

Sustainable Development

347. The Scottish Government carried out a Fairer Scotland Duty Assessment.

348. Due to the sensitive nature of the subject, there is a degree of uncertainty around the number of eligible applicants to the scheme and their socio-economic circumstances. However, according to the Care Review Report (2019)³⁴, care experienced adults are over one and a half times more likely to experience severe multiple disadvantage and, on average, earn three quarters of the salary of their peers. Future Pathways, Scotland's national support service for survivors of abuse in care, analysed the postcodes provided by 1,214 people registered in Scotland to identify their SIMD (Scottish Index of Multiple Deprivations)

³⁴ <https://www.carereview.scot/wp-content/uploads/2020/02/Follow-the-money.pdf>

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ranking and found that those registered were more likely to live in areas of deprivation.³⁵

349. In recognising and responding to the historical wrong of abuse covered by the scheme, and in particular by providing financial redress to eligible applicants abused prior to 26 September 1964 who have no recourse to personal injury actions in the civil courts, the redress scheme is anticipated to have a positive social impact. It will contribute to a number of National Outcomes, including that in Scotland people: grow up loved, safe and respected so that they realise their full potential; respect, protect and fulfil human rights and live free from discrimination; and live in communities that are inclusive, empowered, resilient and safe.

350. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is therefore exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

³⁵ Future Pathways Quarterly Report: Q3 19/20 October – December 2019

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Policy Memorandum

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