**Effective remedies - Childhood abuse pre- September 1964**

**Scottish Human Rights Commission**

**November 2017**

**Executive summary**

Progress for survivors of historic child abuse has been made in a number of areas, most recently with the entry into force of the Limitation (Childhood Abuse) (Scotland) Act 2017, which removes the 3 year limitation period for civil claims of childhood abuse. This Act does not alter the position for survivors who experienced abuse prior to 26 September 1964; these survivors are still unable to access the civil courts.

Access to the civil courts is one possible route by which victims of human rights violations may obtain compensation, which is a component of an effective remedy.

Older survivors who experienced abuse prior to September 1964 cannot however access this option.

* There are circumstances where the law limits access to a court, and lack of access to a civil court for pre-1964 survivors is not *in itself* necessarily a violation of the human right to a remedy.
* That said, for remedies for historic child abuse to be considered adequate, there must be an alternative for those who cannot access the civil court system. At present, the Commission does not believe this exists.
* An appropriate reparations package should be in place for all survivors before it can be said that their right to effective remedy has been fulfilled. The Commission believes that a national reparations programme, including a compensation mechanism, must be created and open to all survivors including those who suffered abuse prior to 1964.
* The Commission believes it is possible to create a compensation mechanism, which could prioritise pre-1964 survivors where appropriate to do so.
* The genuine participation of survivors in the design and oversight of the reparations programme is vital moving forward.

**Introduction and background**

1. Historic child abuse has been a longstanding human rights concern in Scotland and across the UK. In 2002 the European Court of Human Rights found that remedies in Scotland for historic child abuse were inadequate.[[1]](#footnote-1) In 2009, the Scottish Government provided funding to the Scottish Human Rights Commission to develop a human rights framework to secure remedies for historic child abuse in Scotland. Produced in 2010, the Human Rights Framework for Justice and Remedies for Historic Child Abuse (the “Framework”) drew on international human rights law as well as the views of survivors.
2. In 2011, Scottish Ministers agreed to implement the recommendations of the Framework. A key part of that was a survivor led InterAction process to recommend and coordinate steps to implement the recommendations in the Framework. In 2012, the Commission decided to undertake leading the InterAction process. The Commission contracted the Centre of Excellent for Looked After Children in Scotland (CELCIS), University of Strathclyde, to carry out core parts of the work.
3. The InterActions took place during 2013. Following the InterActions, an Action Plan on Justice for Victims of Historic Child Abuse (the “Action Plan”) was produced. A diagram detailing the various commitments identified in the Action Plan is set out at Appendix 1. An InterAction Review Group (the “Review Group”) was established to oversee the process and in particular the implementation of the Action Plan. The Review Group is chaired by CELCIS and includes representatives of survivor groups, Scottish Government, care providers, support agencies, and the Commission.
4. Progress has been made in a number of areas, most recently the entry into force of the Limitation (Childhood Abuse) (Scotland) Act 2017 (the “Act”). The Act removes limitation periods for claims of childhood abuse, to allow cases that were previously time-barred to proceed in the Scottish civil courts. The Act does not, however, allow survivors who experienced abuse prior to 26 September 1964 to pursue their cases. This has created a situation whereby some survivors cannot access a key remedy avenue that is available to other survivors. This situation will be referred to as the ‘pre-1964 issue’ in this paper; this is for reasons of brevity and in no way means to trivialise the issue.

**Proposed process**

1. The pre-1964 issue has been a longstanding concern and has been raised by survivors and their representatives frequently over the years. The Review Group has decided to devote a full day’s meeting to the issue, to be held in January 2018. The purpose of the Review Group meeting is to facilitate an open, constructive dialogue between survivors, their representatives, the Commission and the Scottish Government in the hope of moving towards an outcome that is acceptable to all.
2. Key to the success of the original InterAction process was the genuine participation of survivors of historic abuse. It is therefore vital that the voices of pre-1964 survivors are heard and that their views are properly understood and form part of any decision making process. It is equally important that decisions arising from this pre-1964 discussion, and the reasoning that sits behind them, are transparent and communicated effectively and in an accessible way.
3. To ensure the genuine participation of pre-1964 survivors and to inform the later discussion, a smaller ‘focus group’ will be arranged prior to the Review Group meeting. It is hoped the focus group will meet in December 2017. The focus group will be informal and it is hoped it will give pre-1964 survivors the opportunity and space to share their views and perspectives on the issue. All meetings will be facilitated by CELCIS and appropriate support will be provided.
4. The purpose of this paper is to set the pre-1964 issue in context and to inform participants moving into the Review Group meeting to be held in January 2018. This paper will: explain the reasoning behind the pre-1964 issue; set out the human rights principles relevant to the issue, drawing on the Framework published in 2010 and the supporting Legal Paper[[2]](#footnote-2); and set out other Action Plan commitments that have been progressed that are open to pre-1964 survivors.

**Origin of the pre-1964 issue**

1. The difference between the concepts of *limitation* and *prescription* is key to understanding the issue. Although they are both often referred to as ‘time bar’, prescription and limitation are two different things. Limitation is a procedural rule that means a person cannot bring a civil action after a certain period of time. Prescription, on the other hand, entirely extinguishes the legal liability to pay damages after a claim has gone over the prescriptive period. It is as if the liability has disappeared. Once the prescriptive period passes, a claim is referred to as ‘prescribed’. The law recognises that there will be circumstances where it could be appropriate to allow cases subject to a limitation period to proceed, but generally the law does not provide any discretion in relation to prescribed claims. The logic behind prescription as a legal principle is to ensure legal certainty.
2. Before the introduction of the Prescription and Limitation (Scotland) Act 1984, the prescriptive period was 20 years for personal injury claims. Claims for historic child abuse fall into the personal injury category. The 1984 Act amended the law so that, in future, no prescriptive period would apply to personal injury claims – only a 3 year limitation period. However, the 1984 Act did not change the law for claims that had, by the date of introduction of the 1984 Act, already been extinguished though prescription. Moving back 20 years, this meant that claims that arose before 26 September 1964 had already prescribed and could not be re-opened.
3. The Limitation (Scotland) (Childhood Abuse) Act 2017 removed the 3 year limitation period for childhood abuse claims, but it did not open up claims that had prescribed. The Scottish Government, survivors, and the Commission agree that the law cannot now be changed to allow pre-1964 claims to proceed in the Scottish civil courts. That said, there is a now a situation whereby pre-1964 survivors are unable to access a key avenue that is open to other survivors. There is widespread feeling among the Review Group and the wider survivor community that more must be done to address this.

**Human Rights Framework**

1. This section draws out the human rights principles around effective remedy, drawing on the SHRC Framework published in 2010 and the supporting Legal Paper. This section does not replicate the content of the Framework and the Legal Paper, and both should still be referred to to gain a complete understanding of the human rights principles relevant to historic abuse.
2. Historic child abuse may amount to a violation by the state of international human rights including those set out in the European Convention on Human Rights (“ECHR”) and Human Rights Act. If so, the State has the duty to ensure effective remedies for violations of human rights.[[3]](#footnote-3) This duty extends to historic human rights abuses which have not been remedied. The right to an effective remedy includes:

* Access to relevant information concerning violations and reparation mechanisms.
* Equal and effective access to justice
* Adequate, effective and prompt reparation for harm suffered

***Access to relevant information concerning violations and reparation mechanisms***

1. This element of the right to an effective remedy requires informing the general public and, in particular, survivors of their rights and the remedies available to them. It includes information on “*all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes* [of the abuse of their human rights, both the immediate causes as well as the systematic causes] *and to learn the truth in regard to these violations.”*[[4]](#footnote-4)

***Equal and effective access to justice***

1. Article 13 of the ECHR protects the right to an effective remedy.[[5]](#footnote-5) Judicial and other remedies must be effective and equally accessible in practice not only in law.[[6]](#footnote-6) This requires that they ‘*should be appropriately adapted so as to take account of the special vulnerability of certain categories of person*’.[[7]](#footnote-7)
2. It is important to note that statutes of prescription and limitation on civil liability are not automatically contrary to the ECHR. The right to access courts can be limited (restricted) where that limitation is provided for by law, pursues a legitimate aim and is a proportionate means of achieving that aim. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian law (the “*Van Boven* principles”) make clear that limitation periods in relation to civil claims should not be ‘unduly restrictive’.[[8]](#footnote-8)
3. In a 1996 case, the European Court of Human Rights considered the issue of access to a court (protected by Article 6(1) of the ECHR). In stressing that the right of access to a court is not absolute and can be subject to reasonable limitations, the Court noted that limitation periods in personal injury cases are a common feature of European legal systems. The Court went on to say that time-bar serves “*several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time”.*[[9]](#footnote-9)
4. Having regard to the case law surrounding statutes of limitation and access to the civil courts, the Commission believes it is unlikely that the lack of access to civil courts in Scotland for pre-1964 survivors would itself be regarded as disproportionate.
5. However, for remedies for historic child abuse to be considered adequate, it is the Commission’s view that there must be a suitable alternative in place. The Commission believes an appropriate and comprehensive reparations programme would have to be in place for all survivors before an effective remedy could be said to have been provided for everyone.[[10]](#footnote-10)

***Adequate, effective and prompt reparation***

1. The aim of reparation in international law is, to the extent possible, to redress all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[[11]](#footnote-11) Reparations packages should include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[[12]](#footnote-12) Mechanisms must be found to ensure victims of pre 1964 conduct are entitled to such reparations.
2. It is important to note that institutions responsible for conduct (including private entities) should contribute to reparations packages to the extent to which they are accountable.[[13]](#footnote-13) Reparations should be adequate, effective and prompt.[[14]](#footnote-14)

*Restitution of rights*

1. This means restoring the victim to their original situation where possible, for example through their enjoyment of human rights. It may be possible, for example, for some of the rights violations associated with abuse, like the right to education and the highest attainable standard of physical and mental health to be addressed. It is acknowledged that there will be circumstances where it is not possible to restore the victim to their original situation.

*Adequate compensation*

1. Compensation is economically assessable damage. It should be available for any human rights violations, not only those which involve criminal conduct, and is particularly important where restitution is not possible. The amount of adequate compensation should be determined on a case by case basis according to the gravity of abuse and all relevant circumstances. Compensation should ideally cover any economically assessable damage, for example for physical or mental harm, lost opportunities including employment, education and social benefits, material damages and loss of earnings including earning potential, moral damage and any costs for legal or expert assistance and medical, psychological and social services.[[15]](#footnote-15)
2. Compensation does not have to be linked to prosecution or legal procedures, so separate mechanisms can be created to receive, adjudicate and respond to claims for compensation. Reparations packages for historic child abuse in other countries including Canada and Ireland have included compensation mechanisms. The creation of a publicly funded compensation scheme as part of the overall reparations package was also recommended by the Northern Irish Historical Institutional Abuse Inquiry.[[16]](#footnote-16)
3. CELCIS are running a Scottish Government sponsored consultation on various options for a potential financial compensation/redress scheme for people who experienced any form of abuse in care in Scotland.[[17]](#footnote-17) The consultation is clear that a compensation scheme would be equally open to pre-1964 survivors. The Commission’s view is that without a compensation scheme, survivors of pre-1964 abuse are not being afforded their right to an effective remedy.[[18]](#footnote-18) The Commission believes it is possible establish a suitable mechanism in Scotland that means pre-1964 survivors’ rights are realised.
4. The Commission is aware that a number of pre-1964 survivors are older and/or are in ill-health. It is therefore particularly important that these survivors are able to access prompt reparations. The UN Human Rights Committee is clear that ‘*remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person*…’.[[19]](#footnote-19) The importance of prompt remedies, particularly for older survivors, was something that was highlighted throughout the research paper that informed the development of the Framework.[[20]](#footnote-20)
5. In Ireland, the Residential Injuries Redress Board determines compensation for widely defined instances of abuse, including physical, emotional, and sexual abuse as well as neglect. Section 10 of the Residential Institutions Redress Act 2002 allows the Board to make interim awards where the Board believes that, having regard to the ‘age or infirmity’ of an applicant, the making of an interim award is appropriate.[[21]](#footnote-21)

*Rehabilitation*

1. Rehabilitation measures such as therapy, counselling, education and training should also be provided where appropriate. Other forms of rehabilitation such as parenting skills may also be appropriate.

*Satisfaction*

1. Satisfaction can include a wide range of measures such as full and public disclosure of the truth or a public historical record, public apology, sanctions for those responsible, and victim commemorations.[[22]](#footnote-22) The Apologies (Scotland) Act 2016 is discussed below.

*Guarantees of non-repetition*

1. The right to guarantees of non-repetition is not only in relation to the violation against the individual, but of that type of violation, including through changes in law and practice.[[23]](#footnote-23) Such steps may include the identification of necessary changes to law and policy, and increases in appropriate education.

**Areas of progress**

1. A number of actions under the various Action Plan headings have been progressed. With the exception of the Limitation (Childhood Abuse) (Scotland) Act 2017, all of the areas detailed below are open to pre-1964 survivors. This section is not intended to analyse the action taken, nor should it be regarded as a comprehensive ‘stock take’ of action taken under the Action Plan; that is something for the Review Group to consider. This section is purely intended to be a factual summary of developments.
2. Given the right to an effective remedy encompasses a number of different areas, the actions described below are relevant when considering whether the right to an effective remedy has been provided for everyone, and in identifying gaps.

***Scottish Child Abuse Inquiry***

1. The Scottish Child Abuse Inquiry (the “Inquiry”) is chaired by Lady Smith, who is supported by a secretariat, a legal team and Counsel to the Inquiry. The Inquiry’s Terms of Reference set out its remit; however, in summary the Inquiry is looking at the abuse of children in care in Scotland. The Inquiry is looking at what happened, why and where abuse took place, the effects of abuse on children and their families and whether the organisations responsible for children in care failed in their duties.

***National confidential forum***

1. The National Confidential Forum (the “Forum”) was set up as part of the Victims and Witnesses (Scotland) Act 2014. The purpose is to listen to and collect the experiences of adults who were in institutional care as children. The Forum operates independently from government. Testimony forms a record about the experiences of children in care in Scotland in the past. Each year the Head of the Forum produces a report based on the testimony collected. The Forum is there to learn from the experiences and make recommendations aimed at ensuring care experiences for children in the future is as positive as possible.

***Apologies (Scotland) Act 2016***

1. The Apologies (Scotland) Act 2016 came into force in December 2016. The aim of the legislation is to make it easier for a person or organisation accused of wrong to issue a meaningful acknowledgement and apology, without the risk that it could be used in civil proceedings against them as an admission of liability. The hope is that this will inspire a cultural shift towards apologising in Scotland.

***Future Pathways – Scotland’s In Care Survivor Support Fund***

1. Future Pathways was launched in September 2016, offering support to people who were abused or neglected as children while they were living in care in Scotland. It is supported by Scottish Government funding and is managed by a group of organisations that make up the Future Pathways Alliance.[[24]](#footnote-24)
2. The purpose of the fund is to provide individual support to survivors, depending on their needs. The types of support include, but are not limited to: activities within the local community; counselling; psychological trauma support; arranging housing and benefit advice; access to records; work and education.

***Consultation on financial redress for survivors of historical child abuse in care***

1. CELCIS are running a Scottish Government sponsored consultation on various options for a potential financial compensation/redress scheme for people who experienced any form abuse in care in Scotland.[[25]](#footnote-25) The input of survivors was essential to the design and finalisation of the consultation. The consultation closes on 17 November 2017, after which an options paper will be produced for the Scottish Government to consider. It should be noted that the Scottish Government has not committed to establishing a financial compensation/redress scheme, but will consider the results of the consultation.

***Public Records (Scotland) Act 2011***

1. The Public Records (Scotland) Act 2011 places a legal requirement on public authorities in Scotland to have an adequate records management system in place. All named public authorities must prepare and implement a Records Management Plan (RMP). An RMP must show what policies are in place for the appropriate storage, retention, disposal, archiving and security of records.[[26]](#footnote-26) It is hoped that public records of enduring value will be safeguarded and the long-term retention of the personal records of vulnerable people will be supported. Any record must of course comply with Data Protection legislation.

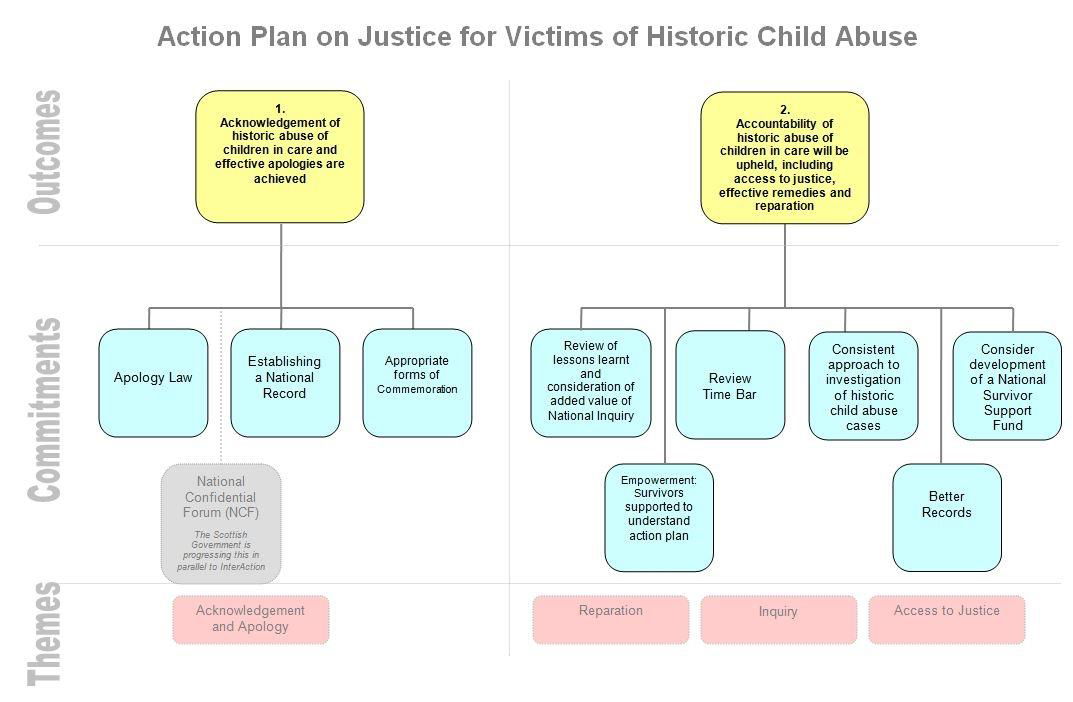
***Limitation (Childhood Abuse) (Scotland) Act***

1. The aim and effect of the Limitation (Childhood Abuse) (Scotland) Act 2017 is discussed at length above. This is the only area of action progressed that does not apply to pre-1964 survivors.

**Conclusion**

1. This paper has attempted to draw out the human rights principles on effective remedy that are most relevant to the pre-1964 issue. There has been progress in a number of areas, and the vast majority of avenues are open to all survivors, including pre-1964 survivors. However, the coming into force of the Limitation (Childhood Abuse) (Scotland) Act 2017 has created a situation whereby older survivors cannot access a key option that is now available to post-1964 survivors.
2. Without a comprehensive reparations mechanism, including an accessible compensation scheme, the right to effective remedy for pre-1964 survivors is not being provided. It is hoped that the Review Group meeting will make real progress in identifying a solution that is acceptable for everyone. The Commission believes that, with the genuine participation of survivors and their representatives, it is possible to establish a workable, fair process that is open to everyone and delivers the right to an effective remedy for pre-1964 survivors.

**Appendix 1: Diagram detailing commitments identified in Action Plan**



1. *E and others v UK* (2002) Application No. 33218/96. The European Court of Human Rights pointed out inadequacies in remedies available in Scotland, notably the limitation of the compensation mechanism to crimes committed after 1964 (thereby excluding older survivors), and how the law around limitation periods in relation to civil remedies was applied in practice. [↑](#footnote-ref-1)
2. A review of international human rights law relevant to the proposed acknowledgement and accountability forum for adult survivors of child abuse, Susan Kemp and the Scottish Human Rights Commission, February 2010. Available [here](http://www.scottishhumanrights.com/justice/historic-child-abuse/). [↑](#footnote-ref-2)
3. This is the case where the State itself has violated a person’s rights and also where the State has failed to protect an individual from acts or omissions of others which amount to human rights abuses. [↑](#footnote-ref-3)
4. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian law (“Van Boven Principles”) X, para. 24. Note that the Van Boven principles apply to ‘gross violations of International Human Rights Law and serious violations of International Humanitarian Law’. [↑](#footnote-ref-4)
5. Article 13 ECHR: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by person acting in an official capacity.” For a full discussion of the requirements of Article 13, see Legal Paper at pg. 60 – 61. [↑](#footnote-ref-5)
6. *E and others v UK* [↑](#footnote-ref-6)
7. UN HRC, General Comment no. 31, para. 15. [↑](#footnote-ref-7)
8. Van Boven Principle 7. [↑](#footnote-ref-8)
9. *Stubbings and others v UK*, 24 September 1996, paras 44 and 55-56. [↑](#footnote-ref-9)
10. It should also be noted that, in personal injury cases, Scottish courts award monetary damages and costs, not other forms of reparations such as support or services for survivors. Access to civil courts alone cannot satisfy all of the requirements of an effective remedy. [↑](#footnote-ref-10)
11. *Factory at Chorzow,* PCIJ (Permanent Court of International Justice), Ser A, No 17 (1928). [↑](#footnote-ref-11)
12. UN Special Rapporteur on the Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, *‘Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms’*, UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-fifth session, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993 at 56. [↑](#footnote-ref-12)
13. Van Boven Principles, IX, para 15. This has been the case in other contexts such as Ireland, where institutions such as churches have provided elements of reparation including compensation. [↑](#footnote-ref-13)
14. Legal paper pgs. 61 – 63. See also Van Boven Principles. [↑](#footnote-ref-14)
15. See Legal Paper, pgs. 86-87. [↑](#footnote-ref-15)
16. Historical Institutional Abuse Inquiry Report, paras. 23-29. On Northern Irish compensation proposals, see also ‘What Survivors Want: Part Two. A Compensation Framework for Historic Abuses in Residential Institutions’, K Mahoney & P Lundy, Commissioned by the Panel of Experts on Redress, May 2016. [↑](#footnote-ref-16)
17. Exploring options for a financial compensation/redress scheme for victims/survivors of abuse in care: A consultation for victims/survivors of abuse in care in Scotland. Available [here](https://www.celcis.org/our-work/key-areas/historical-abuse/consultation1/). [↑](#footnote-ref-17)
18. See *Z and others v UK; E and others v UK* (Legal paper pages 66-68). [↑](#footnote-ref-18)
19. General Comment No. 31, Human Rights Committee, 26 May 2014 at para. 15. [↑](#footnote-ref-19)
20. Available [here](http://www.scottishhumanrights.com/media/1282/justicehistoricabusepdfclasirccresearchreporttimeforjustice.pdf). [↑](#footnote-ref-20)
21. Other criteria are also attached. The Board may make an interim award where: it makes a preliminary decision that the applicant is entitled to an award; is satisfied that an end award equal or greater than the amount of the interim award will be made; and is of the opinion, having regard to the age or infirmity of an applicant, the making of an interim award is appropriate in the circumstances. [↑](#footnote-ref-21)
22. See Human Rights Framework for Justice and Remedies for Historic Child Abuse, pg. 40. [↑](#footnote-ref-22)
23. UN Human Rights Committee, General Comment no. 31, para. 17. [↑](#footnote-ref-23)
24. Healthcare Improvement Scotland; Penumbra; Mental Health Foundation; Health In Mind; Glasgow City Health and Social Care Partnership; Survivor representatives. [↑](#footnote-ref-24)
25. Exploring options for a financial compensation/redress scheme for victims/survivors of abuse in care: A consultation for victims/survivors of abuse in care in Scotland. Available [here](https://www.celcis.org/our-work/key-areas/historical-abuse/consultation1/). [↑](#footnote-ref-25)
26. See Information Leaflet on Public Records (Scotland) Act 2011 published by National Records of Scotland, available [here](https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwjyvsjj7LHXAhWDzqQKHfOvCg0QFggwMAI&url=https%3A%2F%2Fwww.nrscotland.gov.uk%2Ffiles%2F%2Frecord-keeping%2Fpublic-records-act%2Fprsa-information-leaflet.pdf&usg=AOvVaw1v_I2e5xwuwsIVIBmCubSa). [↑](#footnote-ref-26)