

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

Evidence to the Education and Skills Committee of the Scottish Parliament

1 October 2020

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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Introduction and background

1. The Scottish Human Rights Commission (“Commission”) welcomes the opportunity to submit written evidence to the Education and Skills Committee on the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill (the “Bill”). The Commission strongly supports the establishment of a redress scheme.
2. The Commission has been working since our inception in 2008 to promote effective access to justice and remedies for survivors of historical child abuse. Ensuring the full and effective participation of survivors in decisions around how best to realise their rights has been central to the Commission’s work in this area. Survivors have advocated for the establishment of a redress scheme for a number of years.
3. In 2010, the Commission developed and published a “Framework on Justice and Remedies for Historic Abuse of Children in Care”, grounded in international human rights law. Following this, the Commission and other key stakeholders developed an Interaction model to facilitate dialogue between survivors, the Scottish Government, social care organisations and institutions and others. The result of the Interaction process was Action Plan on Justice for Victims of Historic Abuse of Children in Care (the “Action Plan”), which sets out two outcomes:
 - The acknowledgement of historic abuse of children in care and effective apologies are achieved; and
 - The accountability of historic abuse of children in care will be upheld, including access to justice, effective remedies and reparation.¹
4. An Interaction Review Group (the “Review Group”) was established to oversee the implementation of the Action Plan. The Review Group includes representatives of survivors groups, CELCIS,² Scottish Government, care providers, support

agencies, and the Commission. The current proposal should be set within the wider context of the Action Plan and all of the requisite elements and commitments to the strengthening and implementation of acknowledgement and accountability it outlines.³

5. In January 2017, CELCIS were commissioned by the Scottish Government to work in partnership with the Review Group to take forward a consultation and engagement process on the matter of financial redress for people who experienced abuse in care in Scotland. Survivors provided a great deal of insight and reflection in their engagement with the consultation, with 99% of participants of the view that the Scottish Government should introduce a redress scheme.⁴ The Chair of the Commission has been the Chair of the Review group since Prof Andrew Kendrick of CELCIS retired in 2019.

Human rights framework

6. Child abuse, which includes sexual abuse and serious physical or emotional abuse or neglect, are breaches of the human right to be free from torture or other cruel, inhuman or degrading treatment.⁵ Anyone who has been subjected to such abuse has a right to access justice and to an effective remedy.⁶ In 2010, the Commission developed and published a “Framework on Justice and Remedies for Historic Abuse of Children in Care”, grounded in international human rights law.⁷ A copy of the Framework is provided with this submission. We do not intend to replicate the content of the Framework, rather we draw out the key overarching human rights principles relevant to the Committee’s scrutiny of the Bill in this section.
7. 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.
8. The aim of reparation in international law is, to the extent possible, to redress all the consequences of a violation and re-establish the situation which would, in all probability, have existed if that act had not been committed.⁸ Reparations packages should include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁹ 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.¹⁰

Restitution of rights

9. This means restoring the victim to their original situation where possible. 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

10. 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 costs for legal or expert assistance and medical, psychological and social services. Compensation does not have to be linked to prosecution or legal procedures, so separate

mechanisms can and should be created to receive, adjudicate and respond to claims for compensation.

Rehabilitation

11. Rehabilitation measures such as therapy, counselling, education and training should be provided where appropriate.

Satisfaction

12. 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.¹¹

Guarantees of non-repetition

13. 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. Such steps may include the identification of necessary changes to law and policy, and increases in appropriate education.

Rights of people abused prior to 26 September 1964 (Pre-64 survivors)

14. A number of actions under the Action Plan have been progressed, most recently with the entry into force of the Limitation (Childhood Abuse) (Scotland) Act 2017. The Limitation Act removes the 3 year limitation period for childhood abuse claims, to allow cases that were previously time-barred to proceed in the Scottish civil courts. The legislation therefore removed a very significant barrier for many survivors in accessing justice.
15. Due to the operation of prescription, the Limitation Act does not 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 that is available to

other survivors. In 2017, the Commission published a paper expressing our view that an appropriate reparations package would have to be in place for all survivors before it could be said that their right to effective remedy had been fulfilled. The Commission made clear our belief that there must be another remedy available for those who cannot access the civil court system. The Commission believes that a financial redress scheme of the type proposed in the Bill is necessary before it can be said that an effective remedy is in place for all survivors.¹²

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16. The remainder of the Commission's evidence is structured around the particular areas of interest highlighted by the Committee in its call for views. The Commission also highlights particular areas of concern, or areas we believe are missing from the Bill as currently drafted.

Definition of "abuse"

17. Section 17 of the Bill defines "abuse" as including sexual abuse, physical abuse, emotional abuse, and abuse which takes the form of neglect. The Commission supports the definition of abuse as set out in the Bill. It is well established that all of the forms of abuse covered by the definition in the Bill can represent violations of the rights to physical, psychological and mental integrity, both under Articles 3 and 8 of the ECHR.¹³ In particular, the Commission supports the inclusion of neglect as a form of abuse as this accords with international human rights law standards and definitions.¹⁴

Dates used to define "historical abuse"

18. Section 16(2) of the Bill provides that a person may apply for a redress payment if a person, or in the case of an application for a next of kin payment, the person in respect of whom the application is made was abused while a child and a resident in a

relevant care setting in Scotland. The abuse must have occurred before 1 December 2004.

19. The Commission acknowledges that the policy and legislative context with respect to the monitoring and regulation of care changed substantially after 1998 and that the First Minister's apology in 2004 was a significant part of the package of reparations for survivors. However, it should be noted that this apology was only the first step among a number of wider measures of reparation and there is a significant time period of more than 12 years between the apology and the implementation of the Limitation Act, which provided new opportunities for redress through the civil courts, where previously people's claims were subject to time bar.
20. To set the date at 1 December 2004 would mean that almost a generation of children in care would have no right to claim financial redress for historical abuse, despite the potential for serious breaches of their rights to physical and mental integrity within this period, the improvements to regulation notwithstanding.
21. The Commission believes a more reasonable cut-off date would be 3 years before Royal Assent was given to the Limitation (Childhood Abuse) (Scotland) Act 2017, given that someone bringing a civil case within this timeframe would not have been outwith the limitation period in the 1972 act and their claim could therefore not reasonably be claimed to be historical.

Definition of "in care"

22. Sections 18-20 of the Bill define the meaning of "relevant care setting". The Commission agrees that the approach taken may be appropriate for the majority of survivors, where there were clear processes through which legal responsibility for parenting transferred from biological or legal parents to public authorities or relevant voluntary organisations exercising public functions. In particular, the Commission supports the explicit inclusion of

children who were “boarded out” by state authorities within the definition of “relevant care setting” in section 18. This reflects boarding out as a widespread, but distinct, practice that forms part of our national history.

23. The Commission believes an assessment of whether this definition has the effect of ruling out specific groups of survivors is required. There were situations where there was no clear process of transferring legal responsibility for parenting, nevertheless the institution effectively had complete control over the liberty, and the moral, physical, social and spiritual well-being of a child. This may be particularly relevant for disabled people, including people with learning disabilities, institutionalised as children where parents were often advised that an institutional setting would be the most appropriate place for the care and support of the child, but where parents may not have formally ceded parental rights to the institution. It should be recognised that while ostensibly this institutionalisation was for medical or surgical treatment, it was in fact a national policy frequently justified with reference to regressive attitudes towards disabled people, with a consequence that many disabled people including people with learning disabilities, experienced all the types of abuse relevant to the redress scheme. In a similar vein, people with mental health issues often lived in these types of institutions on a long term basis.
24. The Convention on the Rights of Persons with Disabilities (“CRPD”) has since set out a number of important counterpoints to the historical policy of institutionalisation and includes a specific right to effective access to justice among others.¹⁵ Both international and domestic human rights law prohibit discrimination in the realisation of rights, including in access to effective remedy.
25. The Commission notes that section 18(4) of the Bill gives Ministers the power to modify the meaning of the term “residential institution”, and believes the definition should be kept under review to avoid the type of unintended consequence that is

outlined above. Including an obligation to review the definitions at regular intervals should be considered.

Boarding schools and other settings

26. The Commission notes that there are survivors who were in the care of the state who were sent to private boarding schools in order to fulfil the state's obligation to provide an education to the child, and therefore these individuals would be considered to have been in a "relevant care setting" for the purposes of the Bill. The Commission recognises that children who were sent to a fee paying boarding school by their parents cannot be considered to have been in the care of the state. That said, under human rights law, the state still has obligations to ensure the physical and mental integrity and broader well-being of children in the care of a boarding school or other setting.
27. The obligation under Article 1 of the ECHR to secure Convention rights to everyone, taken in conjunction with Article 3 ECHR, requires states to take measures designed to ensure that individuals within their jurisdiction – in any setting – are not subjected to treatment contrary to Article 3; this includes ill-treatment by private individuals.¹⁶ Where state responsibility is engaged, the right to an effective remedy arises. It is therefore not clear to the Commission that these survivors should be excluded from a redress scheme which seeks to acknowledge and respond to harm. It may be that separate schemes are appropriate to recognise particular contexts and the views of different survivors; however, the Commission stresses that redress for groups of survivors not eligible under the current Bill should be actively considered and progressed.

Waiver

28. Sections 45 and 46 of the Bill deal with waiver. Applicants who wish to accept a redress offer must first sign a waiver whereby they agree either to discontinue current civil proceedings in respect of historical abuse or give up their right to pursue such

civil claims in future against the Scottish Government or any organisations included on the list of scheme contributors under section 12 of the Bill. Under section 12, to be included on the list of scheme contributors, an organisation must have agreed to make what is deemed as a “fair and meaningful” financial contribution towards the funding of redress payments.

Consideration of alternative approach

29. The effect of the waiver is to require survivors to choose a particular avenue of remedy, or in other words to give up a legal right in order to receive a redress payment through the scheme. The right to remedy encompasses a number of different components, including compensation, restitution of rights, disclosure of the truth in a public forum and guarantees of non-recurrence. More than one avenue is often required to achieve all of the different aspects of the right to an effective remedy. Importantly, international standards do not preclude the exhaustion of more than one avenue to obtain fair compensation.
30. The pursuit of a civil action is important for a variety of reasons unrelated to compensation, including for the opportunity to air matters in a public forum and for a finding of liability by a court. It appears disproportionate to the Commission to exclude recipients of financial redress through the scheme from pursuing civil justice altogether. The Commission notes that the policy memorandum accompanying the Bill recognises a possible alternative approach whereby if a survivor received a scheme redress payment and then chose to pursue civil proceedings, any amount awarded by a court could be off-set against the amount previously received.¹⁷ A form of off-setting is already provided for in the Bill under s.41(2) where a previous payment made to a survivor in respect of abuse they suffered, for example as a result of a civil action or an out of court settlement, will be taken into account when determining the amount they receive through the redress scheme.
31. Another key consideration is that the human rights framework is clear that institutions responsible for conduct (including private

entities) should contribute to reparations packages to the extent to which they are accountable.¹⁸ Importantly, the results of the consultation undertaken by CELCIS on behalf of the Scottish Government in 2018 are clear that the vast majority of survivors who responded felt that those bodies who were responsible for abuse, whether they be care providers, local authorities or religious bodies, should contribute to any redress scheme.

32. The policy memorandum explains that the Scottish Government position is that the alternative off-setting model would be more complex to administer due to different bodies being responsible for abuse who have contributed to the scheme. Further, the Scottish Government believes that off-setting would not be an incentive to providers to financially contribute to the scheme as they may still face the prospect of legal action and would choose to wait until a court action was raised and settle claims individually rather than contributing to a national scheme.
33. The Commission is hopeful that a solution could be found which allows providers to meaningfully contribute to the redress scheme and at the same time preserves the legal rights of survivors to pursue the different avenues of remedy available to them. The Commission believes a transparent conversation is needed with providers on workable solutions which would allow them to make meaningful contributions, particularly focusing on how the off-set model could work in practice. Financial considerations are, of course, important to organisations; however, the Commission stresses that at the heart of this process should be recognition that survivors are legally entitled to access a range of effective remedies for the human rights violations they have suffered and that there are also moral imperatives on potential contributors to engage in the efforts to create a national scheme which is attempting to address the wrongs of the past.

Strengthening of existing provisions

34. Notwithstanding the Commission's view that an alternative off-setting model should be explored, the Commission believes there

are ways in which the waiver model could be strengthened should it remain.

35. Section 12(7) provides that removal of a scheme contributor from the contributor list does not affect a waiver signed in respect of that contributor. A practical consequence of this provision could be that if a survivor signs a waiver in the belief that the organisation responsible for their abuse will make a fair and meaningful contribution to the redress and that organisation does not make that contribution and is subsequently removed from the contributor list, the waiver will still apply. The Commission strongly believes that there should be a mechanism in place whereby organisations who do not make agreed upon contributions cannot benefit from a waiver.
36. Section 36 (4)(b) allows for the fixed rate payment (£10,000) to be paid prior to the application being fully determined. In order to receive the payment before the application is determined, the applicant must sign and return a waiver. The Commission understands that ensuring applicants receive payments in the shortest possible time is desirable; however, we question whether it is appropriate to allow applicants to sign waivers before they are aware of what level of individually assessed payment they will be offered. It would also be difficult for a solicitor to advise an applicant on whether they should sign a waiver and accept a redress payment without knowledge of the full offer being proposed under the scheme.
37. The waiver applies to scheme contributors and the Scottish Ministers. Taking into account the reasons given by the Scottish Government in support of including a waiver in the scheme, for example the need to incentivise providers to contribute to a national scheme, the Commission questions why a waiver should also apply to the Scottish Ministers. The Commission believes provisions allowing the Scottish Ministers to benefit from a waiver should be removed from the Bill.

Payment levels and assessments

38. Sections 37 and 38 detail that the scheme will allow for payment of a fixed rate redress payment of £10,000 and also individually assessed payments at level 1 (£20,000), level 2 (£40,000) and level 3 (£80,000). In considering what, if any, individually assessed payment level is appropriate a panel must have regard to the nature, severity, frequency and duration of the abuse experienced and any other matter it considers relevant.
39. The Commission reiterates the position under human rights law. 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 costs for legal or expert assistance and medical, psychological and social services.
40. The Commission is aware that survivors have questioned whether a higher amount should be payable in the most serious cases of abuse. The Commission believes the possibility of raising the highest payment level under the redress scheme should be fully explored with survivors. The policy memorandum does not detail how the payment levels have been arrived at, and the Commission believes there should be transparency around this decision making given the levels are being set in primary legislation.
41. The Commission is of the view that provisions around payment levels and the supporting guidance on assessment of applications and information and evidence required (provided for under section 97) should strike an appropriate balance between

assuring survivors and the general public that the process is robust but at the same time is not creating a system which has the potential to retraumatise and distress survivors.

Transparency around decision-making will be of paramount importance in any approach to assessments and the Commission understands that detailed guidance will be published in due course. It is difficult to form a view on the payment levels set out in the Bill prior to publication of guidance on assessment and evidence. The Commission questions whether it is appropriate to set payment levels in primary legislation before arrangements for assessment of evidence have been scrutinised.

42. The Commission notes that a number of alternative options for payment approaches have been identified in the policy memorandum. Human rights law does not dictate which approach should be taken; different options may fit better within a particular national context. The Commission restates that any approach should be informed by and based on the views and experiences of survivors.
43. It is vital that redress payments do not impact a person's social security entitlement. Redress payments are an essential part of effective reparations for human rights abuses and should not be regarded as additional income. The Commission welcomes that the Scottish Government is committed to securing a permanent disregard for all redress payments and is in discussions with the relevant UK Governments departments to achieve this.¹⁹

Advice and support required

44. Sections 85 and 86 allow Scottish Ministers to make arrangements for the provision of emotional, psychological and practical support to people considering or proceeding with an application for redress. Support will also be available to those who have completed their application, or people who received a payment under the advance payment scheme. A key aspect of taking a human rights based approach is ensuring meaningful participation of rights holders in decisions that affect them. The

policy memorandum states that the Survivor Forum, which will be established on a non-statutory basis to advise and inform the redress scheme administration, will provide views and advice on what levels and types of support would be most beneficial for the scheme. In addition to the Survivor Forum, the views of the individual applicant are of paramount importance and a degree of flexibility should be built into the process to allow survivors to shape their own application process and access the support most suitable and helpful to them. The Commission recommends that consideration should be given as to whether Scottish Ministers should be obliged to consult with particular groups or individuals in determining the support that should be made available.

45. Sections 88-90 deal with the payment of reasonably incurred legal fees incurred during the application process. This includes fees incurred in seeking legal advice on eligibility where a person does not go on to make an application. Accessing independent and free legal advice is essential in allowing survivors to make informed choices. The importance of access to such legal advice is heightened due to the operation of waiver within the redress scheme, as survivors may give up rights to pursue civil actions against their abusers when they accept a redress payment. Survivors must be in the position to make informed decisions about whether this is in their best interests.
46. Section 89(3) excludes payment of 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. The Commission questions how this provision will operate in practice given a solicitor would be required to fully assess prospects of success and likely damages awards in any litigation in order to advise a person on whether to accept a redress payment at a particular level and sign a waiver. This work is very similar, if not the same, as the legal work required in advising whether to pursue litigation.
47. The Commission notes that the Financial Memorandum accompanying the Bill sets out anticipated ceilings on payable

legal fees at £1,000 + VAT for individually assessed payments.²⁰ The Commission does not believe this ceiling is appropriate given the likely amount of legal work required in providing advice as to whether to accept a redress payment and sign a waiver. The Commission acknowledges that the ceilings set out in the Financial Memorandum are indicative and will be subject to discussion and consultation with relevant bodies. This should include discussion with survivors themselves.

Next of kin payments

48. Sections 22-26 of the Bill deal with eligibility to apply for next of kin payments. Section 39 provides that next of kin payments will be for the fixed rate amount of £10,000, or a portion of that amount depending on whether more than one child is applying. It is not clear to the Commission why next of kin applications should receive a smaller payment if they could provide evidence required to receive an individually assessed payment.
49. Section 22 provides that a survivor must have died on or after 17 November 2016 for their surviving spouse, partner or child to be eligible to apply for a next of kin payment. The Commission is concerned that the cut-off date of November 2016 provides an extremely limited and restrictive window of eligibility for next of kin payments. The rationale for enabling next of kin payments is that the family of the deceased person should receive some acknowledgement and remedy on behalf of the person who experienced the abuse. By setting the cut-off date as late as is proposed, opportunities for redress for the families of survivors are much more limited.

Scheme contributors

50. As set out above, the human rights framework is clear that institutions responsible for conduct (including private entities) should contribute to reparations packages to the extent to which they are accountable.²¹ Importantly, the results of the consultation undertaken by CELCIS on behalf of the Scottish

Government are also clear that the vast majority of survivors who responded felt that those bodies who were responsible for abuse, whether they be care providers, local authorities or religious bodies, should contribute to any redress scheme.

51. In relation to contributions from organisations responsible for abuse, the Commission urges maximum transparency. In particular, this should include the amount an organisation has agreed to contribute in addition to the information set out at section 12(4).
52. Section 13 provides that the Scottish Ministers must prepare and publish a statement of the principles applicable in determining whether an organisation should be included or removed from the scheme contributor list. Again, the Commission urges that there should be transparency around how an assessment of whether a contribution is “fair and meaningful” is made and any statement of principles should be the product of meaningful consultation with survivors should they wish to be involved in that process. The Commission has made a number of other comments in relation to waiver, which are set out above. Given the close link between scheme contributions and waiver, the Commission believes the need for maximum transparency in this area is all the more important.

Applicants with serious convictions

53. Section 58 allows for the decision-making panel to determine that a person convicted of murder, rape or another relevant offence (defined in section 59) is precluded from being offered a redress payment on the grounds that it would be contrary to the public interest to make a redress payment to that person. Section 58(6) details the factors that should be taken into account by the panel when coming to their decision, including the nature of the offence, the sentence imposed, the length of time since the offence was committed and any rehabilitation activity undertaken. People with convictions are not excluded from making an application to the

scheme and are also eligible to receive non-financial redress under the Bill.

54. The Commission has considered whether the proposed treatment of applicants with serious convictions could be discriminatory under Article 14 of the ECHR when read in conjunction with Article 1 of Protocol 1 of ECHR (“A1P1”), which protects the right to peaceful enjoyment of possessions.
55. Article 14 provides that the rights protected in the ECHR shall be secured without discrimination on any grounds.²² The right not to be discriminated against does not exist independently under Article 14; it must be connected to the fulfilment of another Convention right. This does not mean that there must be a violation of another Convention right before Article 14 applies, simply that the right must be engaged.²³
56. The Commission considers a redress scheme payment would be likely to fall within the ambit of Article 1 of Protocol 1 of the ECHR (“A1P1”).²⁴ The list of grounds contained in Article 14 is not exhaustive, and the term “other status” has been interpreted broadly.²⁵ The question is whether the difference in treatment of those convicted of a serious offence as opposed to those not having been convicted of such an offence is based on an objective and reasonable justification. This will require assessment of whether the measure is in pursuit of a legitimate aim and whether the difference in treatment strikes a fair balance between the protection of the interests of the community and respect for the rights and freedoms of the individual. In other words, is the measure proportionate to the legitimate aim pursued?²⁶ In the Commission’s assessment, particularly taking into account the stated aim and the fact that the Bill does not take a blanket approach to such cases, it is likely that the provisions would be considered proportionate.

Payments to vulnerable persons

57. Section 49 provides powers to Redress Scotland decision making panels to give directions around the payment and management of the redress payment “for the benefit of the applicant as it considers appropriate”. These powers exist where the applicant is under the age of 16 years, is an adult with incapacity or is “a person whose ability to manage the redress payment is otherwise impaired due to mental or physical illness, disability, age or any other reason”.²⁷
58. The human rights impact assessment accompanying the Bill²⁸ explains that the Scottish Government has identified that some applicants may be vulnerable to risk on receipt of payment, either posing harm to themselves or at the risk of financial or other types of exploitation from others. While the Commission understands the policy intention, we are concerned that the Bill as currently drafted places too much discretion with Redress Scotland in assessing the capabilities of a person to manage a redress payment. In particular, references to illness and disability are very concerning. There is a formal legal safeguarding framework in place through the Adults With Incapacity (Scotland) Act 2000 and any restrictions or directions on payments should be made in accordance with a recognised legal procedure, such as through powers of attorney or financial guardianship.
59. Linked to the provisions on support and advice, survivors should be supported throughout their application process and may wish to accept help with managing any payments received. Survivors should identify the most appropriate support for them and any payment management plan should be arrived at in full agreement with the survivor.

Provision of information

60. The Bill creates a power for the Scottish Ministers to compel any individual or body (other than the applicant) to provide them with specified information or other evidence for the purposes of the

determination of an application for a redress payment. The Commission supports the inclusion of this power.

61. The initial InterAction work made clear that access to records was one of the key asks of survivors, whether to facilitate personal understanding of the past or to support civil claims. If organisations are able to provide survivors with records which can support their claim, then this represents an important part of the reparation process. The Commission expects that most organisations would co-operate with survivors who are seeking to obtain information about their past; however, where this co-operation is not forthcoming and where the survivor supports the action, an explicit power to compel provision of information is welcome.
62. Case law of the European Court of Human Rights also indicates that the state must support individuals' access to information under their right to respect for private and family life protected by Article 8 ECHR.²⁹ The Van Boven principles also indicate that victims are entitled to "seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations."

Reviews of Redress Scotland decisions

63. The Bill makes provision throughout for review of decisions made by Redress Scotland. In particular, reviews can be requested of decisions that the applicant is not eligible for payment; that the applicant is to be offered a particular level of payment; or that a particular amount be deducted.³⁰ Reviews can also be sought of various other decisions, for example decisions around eligibility to apply for a next of kin payment,³¹ determinations relating to payments to vulnerable persons,³² decisions relating to applicants with convictions for serious offences,³³ decisions relating to nominated beneficiaries,³⁴ and determinations where there has been a possible material error.³⁵

64. Reviews of decisions listed above must be sought within 4 weeks, although there is provision to allow for reviews to proceed where they have not been requested within the time limit. The Commission believes this time limit, particularly in relation to decisions around eligibility and payment amounts, should be extended; 4 weeks is a short period of time, particularly when an individual may want to consult legal representatives or other advisors before requesting a review.
65. The Bill stipulates that review panels must not include any member of Redress Scotland who was involved in the original decision, and the independence of Redress Scotland is established under section 6 of the Bill.³⁶ The Bill does not provide for a further right of appeal once Redress Scotland has reviewed a decision. The right to a fair hearing in the determination of one's civil rights and obligations before an independent and impartial tribunal established by law is protected by Article 6(1) of the ECHR. An assessment under Article 6 requires consideration of whether, as a whole, the process is fair. As such, there is no one prescriptive review and appeals procedure and a number of different processes have been held to be Article 6 compliant when assessed in the whole. Article 6(1) does not guarantee a right of appeal where the decision regarding an individual's civil rights and obligations is made by an Article 6 compliant tribunal;³⁷ however, the Commission believes that consideration should still be given to establishing a further right of appeal outwith Redress Scotland. Although this may not be strictly required by Article 6, it would strengthen confidence in the process and would allow Redress Scotland to learn from and address any errors in decision making.

Redress Scotland – membership and scrutiny

66. Schedule 1 of the Bill provides that the Scottish Ministers must appoint members of Redress Scotland “only having such skills, knowledge and expertise as the Scottish Ministers consider relevant to the carrying out of the functions of Redress Scotland”. The Commission recommends that consideration should be given

to setting out any specific professional background or skills that Redress Scotland members should have in primary legislation. The Commission believes that an understanding of human rights, legal knowledge and knowledge of complex trauma are all important attributes that should be represented in the membership of Redress Scotland. All Redress Scotland staff should receive appropriate training to ensure that the organisation engages with survivors in a way that minimises the risk of re-traumatisation and ensures survivors' needs are understood and respected.

67. Monitoring and ongoing evaluation of the scheme's operation is of vital importance to ensuring the scheme retains the confidence of survivors and the wider public. Crucially, outside scrutiny will help to ensure that the scheme delivers on its purpose of acknowledging and providing tangible recognition of harm as a result of historical child abuse in various care settings in Scotland. Schedule 1 of the Bill includes the requirement on Redress Scotland to prepare an annual report to include a description of its main activities and an assessment of the achievement of its objectives that year. The report must be published and laid before the Scottish Parliament. The Commission believes an independent review mechanism should be created in addition to existing reporting requirements. It is critical that the redress scheme uses a variety of methods to ensure it continues to improve and discharge its functions effectively.
68. While independent scrutiny bodies can take different shapes, the Commission recommends any scrutiny body should comply with the below principles. The following list is not exhaustive:
- Independence – external oversight which secures and maintains survivor and wider public trust in the scheme.
 - Statutory creation – the body should function on the basis of statute and report to Parliament directly.

- Broad mandate – the body should be provided with sufficient and effective powers to enable it to carry out its mandate.
- Public accountability – this includes publishing its finding in annual and other thematic reports as well as collecting, disaggregating and widely publishing data.

69. Survivor participation in the design and operation of any scrutiny body will be vital. Survivor participation is discussed below.

Survivor participation

70. The Commission reiterates that at the core of a human rights based approach is the principle of participation, namely that people must be involved in decisions which affect their rights, and that this participation should also be at the heart of accountability mechanisms for redress. The survivors' sustained engagement in the Review Group has immeasurably strengthened the legitimacy, relevance and robustness of the Group's activities and recommendations. Furthermore, the views of survivors have shaped proposals for the redress scheme, particularly through their participation in the CELCIS consultation commissioned by the Scottish Government.
71. The Commission therefore believes the importance of and requirement for survivor involvement in the redress scheme should be included on the face of the Bill. The Commission welcomes the intention to 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."³⁸ The Commission believes this should be created in statute, perhaps linked to the independent scrutiny body suggested above. This would guarantee that survivors have a role in the ongoing monitoring and improvement of the scheme, ensuring accountability is driven by the voices and experiences of survivors themselves.

Non-Financial Redress

72. Non-financial redress plays a vital part in wider reparations packages. The Commission has commented on the support and advice provisions in the Bill above and welcomes the Scottish Government's recognition in the policy memorandum of the importance of access to therapeutic support and counselling, personal and public acknowledgement, and apology. The Bill does not offer detail on specifics around the form that non-financial redress will take, rather the emphasis is on engagement with survivors to ensure needs and expectations are met and the importance of giving detailed consideration to how any further redress will interact with services currently in place. The Commission stresses that survivors are best placed to identify and shape the support and wider reparations that should be made available to them.
73. Regarding apology, which we understand will be part of the redress scheme, the Commission reiterates the points made in its submission to the Justice Committee in May 2015 on the Apologies (Scotland) Bill, which contains detailed discussion of the different elements of a meaningful apology and the role of apologies in a wider reparations framework.³⁹ In summary, research suggests the following are crucial elements of an effective apology:
- Acknowledgement of the wrong done, including the name of the offence. The description must be specific enough to demonstrate an understanding of the offence.
 - Acceptance of responsibility for the harm done.
 - Explanation of why the offence happened, if there is a valid explanation. An offender or responsible body may simply say there is no excuse for the behaviour.
 - Expressing sincere regret.
 - Assurance that the offence will not be repeated.

74. Finally, the Commission welcomes the Scottish Government's recognition that commemoration or memorial is the only outstanding commitment from the Action Plan that has not yet been implemented. The Commission, through the Review Group and based on the views and wishes of survivors, will continue to contribute to discussions around how best this final commitment can be achieved.

Scottish Human Rights Commission

1 October 2020

¹ <https://www.scottishhumanrights.com/projects-and-programmes/historical-child-abuse/>

² Centre for excellence for Children's Care and Protection.

³ Progress has been made with the entry into force of the Limitation (Childhood Abuse) (Scotland) Act 2017; the establishment of the Scottish Child Abuse Inquiry; the National Confidential Forum; the launch of Future Pathways, Scotland's In Care Survivor support Fund; the Apologies (Scotland) Act 2016; the Public Records (Scotland) Act 2011. It should be noted that the Limitation (Childhood Abuse) (Scotland) Act 2017 does not enable survivors who experienced abuse prior to September 1964 to pursue their claims.

⁴ Consultation and engagement on a potential financial compensation/redress scheme for victims/survivors of abuse in care, Report 1: Executive summary of the consultation with victim/survivors of abuse in care. Available at:

https://www.celcis.org/files/6615/3622/6805/Report_1_Executive_Summary_06.09.18.pdf

⁵ As protected by a range of international human rights laws including Article 3 ECHR; Article 7 ICCPR. See also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁶ See 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 a person acting in an official capacity".

⁷ See also the human rights framework set out in the Commission's response to the Scottish Government consultation on the establishment of a redress scheme. Available at:

<https://www.scottishhumanrights.com/media/1940/shrc-financial-redress-submission-nov-19.docx>

⁸ *Factory at Chorzow*, PCIJ (Permanent Court of International Justice), Ser A, No 17 (1928).

⁹ 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.

¹⁰ 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, 16 December 2005 (Van Boven Principles) IX, para 15.

¹¹ See Human Rights Framework for Justice and Remedies for Historic Child Abuse, pg. 40.

¹² “Effective remedies, Childhood abuse pre-September 1964”, Scottish Human Rights Commission, November 2017. Available at: <https://www.scottishhumanrights.com/projects-and-programmes/historical-child-abuse/>

¹³ See also, in particular, Articles 7 and 18 ICCPR; Article 19 CRC; Article 15 CRPD. This list is not exhaustive and there a range of international rights that proscribe treatment covered by the definition of abuse in the Bill.

¹⁴ See Article 19 UN Convention on the Rights of the Child. See also *Z and others v UK*, no. 29392/95, 10 May 2001, in which children living in a state of neglect was held to be a breach of Article 3 ECHR. UN mechanisms share also this approach. In his report to the UN General Assembly of 2000, Sir Nigel Rodley, UN Special Rapporteur on Torture considered that neglect in residential care may amount to cruel and inhuman treatment, particularly among younger children.

¹⁵ Social model approach to disability (Article 1); Respect for inherent dignity of disabled people, freedom to make one’s own choices and full and effective participation in society (Article 3); Equality before the law (Article 5); Right to recognition as persons before the law (Article 12); Right to live independently in the community (Article 19); Protections from violence, exploitation and abuse (Article 16).

¹⁶ See *O’Keeffe v Ireland*, no. 35810/09, 28 January 2014; *X and Y v the Netherlands*, no. 8978/80, 26 March 1985 at paras 21-27; *Z and Others v UK*, no. 29392/95, 10 May 2001; *M.C. v. Bulgaria*, no. 39272/98, 4 December 2003.

¹⁷ Policy Memorandum, at paras. 215-218.

¹⁸ Van Boven Principles, IX, para 15.

¹⁹ Frequently Asked Questions, Bulletin 5. Available at: <https://www.gov.scot/publications/financial-redress-for-survivors-of-child-abuse-in-care-frequently-asked-questions/>

²⁰ Financial Memorandum, at paras 41-43.

²¹ Van Boven Principles, IX, para 15.

²² Article 14 ECHR: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

²³ This is referred to as the Court’s ‘ambit test’. See *Rasmussen v Denmark*, no. 8777/79, 28 November 1984.

²⁴ See, for example, discussion of Criminal Injuries Compensation Board payments in context of A1P1 in *MA v Decision of the Criminal Injuries Compensation Board* [2017] CSIH 46. See also *JT v First-Tier Tribunal* [2018] EWCA Civ 1735.

²⁵ See discussion at paras. 71 – 75 in *JT v First-Tier Tribunal* [2018].

²⁶ See, for example, *Molla Sali v Greece*, no. 20452/14, 19 December 2018.

²⁷ Section 49(1)(c) and 49(2).

²⁸ <https://www.gov.scot/publications/redress-survivors-historical-child-abuse-care-scotland-bill-human-rights-impact-assessment/pages/4/>

²⁹ *McGinley and Egan v UK*, nos. 21825/93 & 23414/94, 9 June 1998.

³⁰ Section 52.

³¹ Section 24.

³² Section 50.

³³ Section 60.

³⁴ Section 65.

³⁵ Section 73.

³⁶ Although independence is established in s.6, the procedures, membership and powers of Redress Scotland are detailed in Schedule 1 of the Bill. For an assessment of independence and impartiality, factors such as the manner of appointment of a body’s members, duration of term in office, existence of guarantees against outside pressure and whether the body presents the appearance of independence are all relevant. See *Maktouf and Madjanovic v Bosnia and Herzegovina*, nos. 2312/08 & 34179/08, 18 July 2013.

³⁷ Harris, O’Boyle & Warbrick, 2018, *Law of the European Convention on Human Rights*, 4th ed. Glasgow: Oxford University Press, pg. 459.

³⁸ Policy Memorandum, para 26.

³⁹ <https://www.scottishhumanrights.com/media/1274/shrcapologuesscotlandbillapril2015.doc>