

## **Church of Scotland Social Care Council (“CrossReach”)**

### **About us**

1. This submission is made on behalf of the Church of Scotland Social Care Council (“CrossReach”), Scottish Charity No SC011353.
2. We are one of the largest voluntary sector care providers in Scotland, operating a broad range of services across the country both in residential and community settings. Since 1869 we have, through the predecessors of the present Council, provided specialist resources to further the caring work of the Church by getting alongside people facing significant challenges in their lives and making a positive difference. We offer this support through providing care homes and day care for older people, dementia services, children and family services, substance abuse services, generic and specialist counselling, homelessness services, and support to people with learning disabilities or who are caught up in the criminal justice system. Each year we provide care and support to approximately 11,000 people across the country.

### **Support for principles behind the Bill**

3. We wholeheartedly endorse the policy aim behind the Bill, in acknowledging and providing tangible recognition of harm caused by historical child abuse in various care settings in Scotland. We accept that we have at times failed to protect some of the children entrusted to our care and, having apologised to all those affected, are keen to see that the provision made through the Bill allows us, along with a wide range of civic and charitable organisations, *“to participate meaningfully in this national collective endeavour to recognise the harms of the past”*.
4. We work to a set of values which include transparency, offering dignity, and valuing others for their individual worth. We have invested time and resources in working with survivors both through the National Confidential Forum and with individuals who have engaged directly with us so that we can know more about the impact of abuse on their lives and respond from a position of better understanding. We have already made financial reparation where that has been asked for but understand from our wider engagement that redress comes in a number of different forms including acknowledgement, apology and support. Our preferred option would always be able to engage with those harmed in our care, wherever possible, so that opportunities to reconcile are maximised and that remedy can be made in the most appropriate way and in line with the needs and choices of the individual.
5. We have had positive engagements with the policy team behind the Bill and would support their position that contributions should be sought from all of those who have been involved in the care of children. We do, however, have a number of concerns about how the Scheme will apply in practice and believe that some of the proposals being put forward will work against organisations in the charitable sector. We are not sure that the right balance has been found to allow charities like CrossReach to commit to making large upfront contributions and

to also be able to continue to deliver life changing support to individuals and to communities of the type which we offer today.

## Concerns relating to implementation

### How will “fair and meaningful” contributions be assessed?

6. Section 13 of the Bill requires the Scottish Ministers to prepare and publish a statement of the principles by which a fair and meaningful contribution will be assessed. The Policy Memorandum says that these principles will set out in detail the methods used to determine contribution amounts and the process used to assess contributions, and that the communication of the contribution amounts will play a critical role in providing the necessary transparency for survivors. We think that these principles are of such fundamental importance that they should be subject to Parliamentary scrutiny and debate, and set out in the Bill itself.
7. We are concerned that the current methodology being used to assess contributions will result in a lack of consensus which may threaten the achievement of some of the policy aims of the Bill. Our recent discussions with the policy team have resulted in a number of questions about the algorithm they are employing, the principles of which are outlined in the Financial Memorandum. We believe that some of the methodology being used is neither reliable nor appropriate and would want to engage on a more individual basis which takes a wide view of all of the known factors and use that as a foundation for assessing future contributions. We do however believe that transparency is important and that the basis for assessing contributions in this way should be available for public scrutiny.
8. One of the conclusions of the Human Rights Framework for Justice and Remedies for Historic Child Abuse published by the Scottish Human Rights Commission in 2010 was that “*institutions should contribute to reparations to the extent to which they are accountable*”. We agree with this. It is therefore critically important that agreement in good faith is reached with potential contributors on proportionate financial parameters for their accountability.
9. There is no mechanism in the Bill for the apportionment of responsibility to a number of different organisations, where two or more are “named” within an application. An individual may have resided very briefly in one home but perhaps suffered abuse in more than one location and whilst under the care of several organisations. We think that the broad principles of how accountability is apportioned in such circumstances should be published and that this should not be left to be worked out on a case by case basis.
10. There is also no mechanism in the Bill to distinguish between children who were in care long term and those who were very temporarily in care. This is important where ‘overall numbers’ are being used to assess contributions and potentially skews the data when considering proportionality.

## Supporting wide participation

11. Whilst the Scottish Government's determination to underwrite the full costs of the Redress Scheme is welcomed, initial approaches to charitable organisations such as CrossReach have flagged up that significant up-front payments towards these costs, based on an actuarial approach, will be sought to allow 'entry' to the Scheme.
12. The actuarial assumption takes no account of an organisation's ability to pay, or any costs already incurred as part of an organisation's own redress. In order to make the payments it is likely that we would have to fall back on reserves, already depleted through several years of austerity and by the Covid-19 pandemic, or call on insurance. With insurers still facing civil action, and no definite waiver in place, we understand that there is a high likelihood that they will not underwrite this Scheme. Large upfront contributions to the Scheme are therefore likely to entail cuts in support elsewhere
13. As we, along with many other charities, have made it clear that we would want to participate, we suggest that any barriers to participation are removed, and that the Scheme should enable individual charities to come forward with a meaningful and voluntary financial contribution, following full discussion of all known factors.
14. We also believe that all organisations accepted into the Scheme should work to some additional core principles including genuine apology and competent support to access records.

## Non-financial redress

15. The Bill is concerned largely with financial redress and does not (other than the reference to provision of emotional or psychological support in section 86) address the many other ways in which social care agencies such as CrossReach can contribute to the Scheme and to the rehabilitation and support of survivors.
16. We endorse the intent of the Bill that the legislation is seen in a wider context of truth and reconciliation and believe that the primary focus on financial contribution in such circumstances is not productive. Whilst we fully support the principle of financial redress, knowing that it is of critical importance to many survivors in terms of remedy, there are other ways in which organisations can provide redress which include apology; supportive access to records; provision of work experience or volunteering opportunities to learn new skills; emotional or therapeutic support. Understanding redress in its wider context allows for a more individually tailored approach to be taken and is consistent with the overall notion of remedy.

17. In some other countries, care provider organisations have funded support services, separate from any contribution to financial redress. This reflects principle 7 of the Van Boven principles of international human rights law adopted by the UN, namely that: “*Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition*”. We believe that the Scheme, as presented, fails to make sufficient provision for any form of reparation other than financial compensation.
18. The requirement in section 91 of the Bill for contributors to make an annual report on wider redress actions conflates the provision of financial and non-financial support. This in effect imposes a dual burden on contributors, and presents additional challenges – regardless of the provisions of sections 13 and 14, to which we return below – for charities who wish to support the aims of the Scheme in a tangible way but cannot, in doing so, prejudice their very existence.
19. As was noted in the SHRC submission on the pre-legislative consultation on the Bill, the purpose of a financial redress scheme is to compensate victims and survivors for the impact this abuse had on their material and non-material well-being, as part of a package of reparations, which taken together are able to provide an effective remedy to survivors of historic abuse.

#### Proposed changes to charity and trust law

20. Section 13 of the Bill purports to legislate so as to treat all financial contributions as being within a charity’s charitable purposes and not contrary to its interests. Section 14 allows the Scottish Ministers, after consulting OSCR, to issue regulations regarding charities’ use of restricted funds to make financial contributions to the Scheme. It anticipates that this will either be by making provision for the charity to apply to permit this or that it might just be permitted by automatic operation of law.
21. We have grave reservations about such sweeping changes to trust and charity law in Scotland. The overriding obligation of charity trustees is to act in the best interests of the charity, not simply in a way which is “*not contrary to its interests*”. It is not reasonable for this duty to be legislated away so as to require a charity to make a payment which is likely to render it unable to fulfil its core purpose. The blanket imposition of the section 13 provision regardless of individual circumstances is at odds with the fundamental duty of trustees to exercise their discretion on a case by case basis.
22. There is already a procedure in place, in terms of Chapter 5A of the Charities and Trustee Investment (Scotland) Act 2005, for the reorganisation of restricted funds in appropriate circumstances. We do not accept that there is a good policy ground for creating a new procedure which will apply only for the specific purpose of allowing payment to the Scheme. Doing so is wholly unreasonable in itself, and fails to meet a basic test of proportionality. It also sets an unwelcome public policy precedent. If monies held in trust for one purpose can

be applied to a totally different purpose in this case, why not in other cases also?

23. Were section 15 of the Bill to provide a less robust process to allow trustees to disregard the wishes of donors of restricted funds, there would be a devastating impact on public confidence in the charity sector. This would primarily, in the short term, affect social care charities who can ill afford to lose public donations. In the medium to longer term, it would impact the whole sector if potential donors fear that their expressed wish as to the application of a financial gift may be set aside by future legislation.

### Waiver

24. We acknowledge that many survivors are unhappy with the requirement that they waive current and future claims against contributors as a condition of receiving payment under the Scheme. We recognise that there are concerns about this undermining their human rights and their recourse to justice. We do however believe that the concept of waiver is an essential element of the Scheme as currently drafted and support its inclusion on the ground that it will further support organisations to make a genuinely fair contribution by allowing us to engage with insurers, on the basis that they would be protected from civil claims.
25. Since waiver only protects those organisations who pay the contribution required by the Scottish Government, this emphasises the critical importance of achieving consensus on this issue.
26. Recognising the difficulties with waiver, as proposed, we would be interested in exploring any alternative which better protects the rights of survivors but achieves the same end.

### The process to be followed by Redress Scotland

27. Before contributions are agreed, it is important that contributors can be satisfied that the process to be followed by Redress Scotland will be robust and credible. We accept that it will be for Redress Scotland to put in place its own procedures and structures, but it is important that the Bill should as a minimum stipulate that information will be sought from named organisations, who will have a full opportunity to comment on the evidence produced by an applicant and submit their own evidence, before an application is determined. This we believe is reasonable for any case where the settlement figure is likely to be over £20,000, in which case the burden of payment will fall to the contributor as the Government's commitment is to the first £10,000 only.
28. We are concerned by the statement in para 228 of the Policy Memorandum that "*by agreeing to participate in the Scheme, contributing organisations will thereby be taken to have accepted the determination of applications by Redress Scotland*". The Human Rights Framework for Historical Child Abuse adopted by the SHRC says that: "*Care should be taken in designing the entire remedy*"

*framework of the need to uphold the rights of persons who may be accused. The right to a fair trial and a fair hearing is an absolute right, so cannot be limited. At least, everyone with an interest should have the opportunity to make representations and to have their side of events heard". This is a fundamental issue of fairness.*

### Insurance

29. We urge the Scottish Government to engage in discussions with insurers to establish whether a framework might be agreed to establish satisfactory parameters around compensation payments in the absence of a finding of legal liability.

### **Summary**

30. Our charitable purposes are about safeguarding people in vulnerable situations, now and for the future. This includes a commitment to survivor support through a variety of different services and an acknowledgement of harms done in the past, but our resources are limited and the scale of our financial contribution to the Scheme cannot be such that we are forced to withdraw support from those currently being cared for in our communities.
31. We remain fully supportive of the principle behind the Redress Bill and its aspiration to underpin the human rights of those who have been abused in care to seek justice. However, we are concerned that the Bill as it stands may not in fact achieve its aims for the reasons which we have set out. We are keen to see these issues addressed so that we can participate in the Scheme in the spirit in which we entered discussions at the outset.
32. We would welcome the opportunity to provide oral evidence to the Committee to support this written submission.

**Viv Dickenson**  
**Chief Executive Officer, CrossReach**  
**1 October 2020**