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Convener, Education and Skills Committee
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Dear Convener

**Redress for Survivors (Historical Child abuse in Care) (Scotland) Bill**

Thank you for your letter following my evidence session with the Committee on 4 November. I am pleased to have the opportunity to follow up in writing on some of the points raised and I hope this letter provides the additional information the Committee is looking for. I have also included some additional points which I hope give further assistance to the Committee.

As consideration of the Bill continues, I look forward to working with the Committee to deliver a collective, national response to the widespread failures of the past. By working together I hope we can produce a scheme that is transparent and offers reassurance to survivors that their experiences are being acknowledged and heard by all involved, and that reliable redress is available, should they wish to access it.

The Committee will have recognised from the evidence that has been submitted that it is vital that this scheme encourages the organisations involved to contribute. This is what survivors want to see. It is important, and in keeping with the collective ethos of the scheme, that this is achieved. I consider the waiver is the best way to do so. For clarity, we do not know of any redress scheme where providers make contributions but receive no waiver. Neither can we find any schemes that secure contributions by using an offsetting model.

***Calculation of contributions***

***Fair Contributions***

The draft Fair and Meaningful Principles have been sent to, and published by, the Committee. I would welcome the Committee's view on the principles as they currently stand and how we

can ensure the approach to contributions is transparent for survivors and manageable for organisations, whilst being fair to both.

The core principle behind the approach to contributions is that participating organisations should contribute to all individually assessed redress payments in cases where they are named in an application as the place where abuse occurred and a payment is made, above a £10,000 Scottish Government contribution. For example, where in relation to such an application, Redress Scotland determined that a £40,000 payment to the survivor would be appropriate, the organisation would contribute £30,000. This approach ensures that contributions relate directly to payments to survivors.

The Scottish Government will pay all the costs of setting up and delivering the redress scheme, the costs associated with providing support to survivors during the application process, legal costs for survivors to apply and costs associated with delivering non-financial redress, such as therapeutic support.

The Scottish Government will pay in full the cost of redress payments to survivors if the organisation that provided their care does not make a fair and meaningful contribution to the scheme, or where the organisation no longer exists and no successor organisation contributes.

As noted above the Scottish Government will also make a financial contribution to the redress scheme equivalent to £10,000 per redress payment.

The intention is to seek contributions from organisations that ultimately reflect the totality of individually assessed redress payments for cases where they are named in applications as the place where abuse occurred. It is therefore the number of survivors who come forward and decision making by Redress Scotland over the life of the scheme which will determine the total overall fair contribution. We will look to agree an appropriate structure for the contribution to be delivered in a way which is both manageable for organisations and transparent for survivors.

In seeking agreement to participate in the scheme, the intention is to be fair to all survivors who accept redress payments, and to organisations by recognising their commitment to address their historical legacy through the operation of the waiver. We will look to ensure that the fair contribution is deliverable for them in a way which is not to the detriment of vulnerable service users today.

Importantly, the contribution will be regularly reviewed to ensure it continues to reflect uptake of the scheme. That review could include the level and frequency of payments, the time over which the total contribution would be delivered or other factors. The review mechanism will be designed to account for circumstances where fewer or more survivors than anticipated accept redress payments and will be built into the contracts that participating organisations agree to at the outset.

In taking into account principles of fairness and transparency for survivors, and the manageability of contributions for organisations, there is a careful balance to be struck between securing an appropriate initial contribution to the scheme in order for the organisation to be included on the contributor list, a schedule of contributions to be agreed and reviewed to

take account of the uptake of the scheme by survivors as the scheme progresses, and the matters of affordability which have been raised with the Committee.

Organisations will need to agree to make regular payments that demonstrate their continuing commitment to the scheme and justify their continued inclusion on the contributor list. This means ultimately paying at an agreed rate, and over an agreed period of time, reflecting the totality of all individually assessed payments over £10,000 in relation to applications referring to that organisation.

***Initial Assessment***

In seeking to provide survivors with the reassurance that relevant organisations will be contributing fairly to their redress payments, and therefore that it is fair to recognise that contribution through the operation of the waiver, we have undertaken work to ensure that initial contributions made into the scheme are of an appropriate amount before any redress payments are made. No organisation will be added to the contributor list without agreeing and commencing an adequate financial commitment from the outset, but equally we seek to ensure that the total contribution is deliverable over time.

These initial assessments also provide the opportunity for us to work with organisations to develop payment schedules that can be agreed and reviewed across the lifetime of the scheme. I do consider that it would be appropriate to consider payment plans extending beyond the scheme, particularly in circumstances where doing so would protect current services to the vulnerable and other key functions provided by relevant organisations.

The initial assessment is a calculation aimed at determining the appropriate initial contribution to the scheme, using information from the organisation involved, the Government Actuary's Department (GAD), and the Scottish Government, including:

- The number of children accommodated by the organisation
- The ages and years in which these children were admitted to the organisation, where known
- An estimate of how many former residents of the organisation may still be alive in 2021
- The potential number of survivors of abuse who may apply to the scheme
- The payment levels available in the redress scheme.

All of these factors combined allow us to make an initial assessment of what a fair contribution from the organisation may be. Whilst the assessment looks to take into account the best available information, it is however by its nature subject to multiple uncertainties and should not be thought of as a target, quota or a fixed figure to be agreed.

The assessment will only be used to propose an initial contribution to the scheme and an initial payment schedule for inclusion in any agreement to participate. Payment schedules for the payment of contributions will be regularly reviewed once the scheme is in operation so that contribution amounts can take account of the reality of application rates. This will also be reflected in the terms of agreements reached with each organisation.

***Contractual models in development***

We currently envisage that two different types of contractual model will be offered to contributors.

With the first, following the initial assessment, contributors will be asked to agree to pay a proportion as an initial contribution to the scheme, and to pay the remaining instalments in accordance with a contractually agreed payment schedule.

Both the initial contribution and the payment schedule will be agreed. In order to ensure that the initial assessment accurately reflects the amount of money paid out by the scheme in respect of applications which name that contributor, they will also be asked to agree to a regular review of the remaining instalments until the close of the scheme. As a result of a review, the remaining instalments could be adjusted up or down, but organisations will ultimately be agreeing to pay for all individually assessed payments beyond the Scottish Government £10,000.

With the second model (intended for very small organisations, or those likely to be named in very low numbers of applications resulting in payments, under the scheme), contributors will be asked to agree to a specified sum by way of an initial contribution. Thereafter, the Scottish Government will fund payments relating to that contributor in the first instance but will seek reimbursement from it on a regular basis. Accordingly, if the contributor choses this model, they will be asked to agree to pay a specified sum by way of an initial payment, and to pay such further contributions as may be required by the Scottish Government until the close of the scheme. Should any part of the initial contribution remain unused in relation to payments made under the scheme, the contributor will be reimbursed.

With both models, contributors will also be informed that they will be added to the list maintained under section 12 of the Bill when the initial contribution is received. They will also be made aware of the circumstances in which they may be removed from that list. This is further set out in the draft Fair and Meaningful Principles document which has been shared with and published by the Committee.

The contributor list will be published and kept up to date so that survivors have clarity as to whether any waiver to be signed and returned by the applicant would apply in respect of that organisation.

### *Scottish Government commitment to fund payments*

The Scottish Government will meet the cost of the first £10,000 of every redress application which results in an offer of a redress payment. The Scottish Government will also meet the cost of any applications for which a relevant organisation is named and has not contributed, or no longer exists and there is no contributing successor organisation.

Survivors will not be disadvantaged by any organisation not contributing and all determined redress payments will be paid regardless of contributions being received. The Scottish Government commits to funding redress payments regardless of contributions.

### *Discussions with Insurance Companies*

On 31 January 2020 Scottish Government officials held an information event on the development of the statutory scheme for representatives of the insurance industry. Provider organisations were asked to put forward the names of companies they felt should be invited and a wide range of organisations were contacted. 31 individuals attended the event from 22 different bodies connected to the insurance industry, including insurers, brokers and legal representatives. The event involved presentations on the background to the redress scheme, the wider legal context and the development of the redress scheme and associated legislation.

Scottish Government officials have met representatives of the Association of British Insurers (ABI) on two occasions. These meetings along with the ongoing engagement with provider organisations have highlighted a number of important factors, namely, that:

- the historical insurance landscape is complex and fractured
- organisations have varied amounts of cover and this may not apply consistently across the time periods covered by the scheme
- some organisations believe that having paid insurance premiums, they should not also have to pay redress

Since the information event took place in January all attendees have received information briefings on the development and progress of the Bill as have been issued to all key stakeholders. These documents are in the public domain and available on the Scottish Government website: https://www.gov.scot/publications/financial-redress-for-survivors-of-child-abuse-in-care-frequently-asked-questions/.

These documents include general briefings on the waiver but there has been no exchange of written correspondence or documentation covering the issue of liability or conditions that would lead to insurance contributions.

The redress scheme is not founded on processes to determine liability nor would it be appropriate for the Scottish Government to intervene in historical contractual arrangements between organisations. The making of contributions therefore, or insurers assisting organisations to do so, does not involve a formal acceptance of legal liability, although it may be that the ethos and spirit of participation in the scheme is worthy of further consideration.

I also note the points in the Association of British Insurers' evidence submission regarding the complexity of insurance provision for claims of historical abuse, and that the Bill as currently drafted is not clear whether the level of evidence required for a redress payment meets the standard required under civil law to trigger an insurance policy.

To give greater transparency and clarity to the scheme we are open to considering how best to reassure survivors, organisations and insurers as to the standard required, and to bringing forward amendments if necessary.

This approach may give reassurance to survivors and could assist organisations in their discussions with insurers. The inclusion of such an amendment could serve to highlight the

potential prospect of litigation that these organisations may be facing and the positive intention of the waiver.

We remain keen to encourage insurers to do what they can to facilitate financial contributions to the scheme from organisations.

***Waiver***

The need for redress has arisen because we know that some survivors either cannot, or choose not to, go to court. For survivors who do not have litigation open to them, the existence of a waiver will either not be relevant or will not be a critical aspect of the scheme. For others, there will be a decision to make. We are not taking anything away from those survivors – instead we are giving them an option that did not previously exist. They are free to pursue court, just as they can do now, nothing in the Bill changes that.

As was highlighted in the evidence session on 4 November, there are many risks and challenges with pursuing litigation, which many survivors may not want to face. For those survivors who cannot, or do not wish to go to court, our redress scheme will offer a faster, trauma informed, more straightforward route to financial payment. We know that the scheme will not be suitable for every survivor, and that some survivors will want to pursue court action. That choice will still be available for survivors to consider prior to accepting a redress payment and having had the opportunity to receive legal advice.

The redress scheme is transparent from the outset about the potential payment levels available and the processes to get there. It comes with support throughout the application process and other measures of non-financial redress such as apology and therapeutic support. It comes with funded legal advice that is not deducted from the redress payment, and the scheme as a whole will be a faster and non-adversarial alternative to court which looks to provide a viable choice to applicants given the uncertainties of pursuing court action.

Redress is designed as an alternative to court, not something that should be pursued in addition to court. As such, waivers are a common feature of other redress schemes around the world. In some ways it is not dissimilar to when court actions conclude or out of court settlements are reached, often that means that the matters are considered settled and cannot be re-raised.

It is however important to note, that the waiver would only affect litigation in respect of organisations that make fair and meaningful financial contributions. In this way, the scheme has been designed to deliver what survivors have told us they want - financial contributions to the redress scheme from those organisations they view as responsible for the abuse. In the pre-legislative consultation, 94% of respondents were in favour of having responsible organisations contribute to the cost of the scheme. 95% of individual respondents supported this approach, along with 89% of organisations[1]. Securing financial contributions is also consistent with adopting a human rights based approach to redress.

[1] In addition to the pre-legislative consultation in 2019, the 2017 survivor consultation conducted by CELCIS found that 94% of respondents were of the view that care providers ought to contribute to a financial redress scheme.

A scheme without contributions from other organisations would mean survivors who wish to seek acknowledgement and financial redress from organisations other than the Scottish Government, would need to do that by taking civil action. We know that there are many reasons why some survivors are unable or would choose not to pursue this route.

The waiver supports third parties to proactively, publicly, and as part of a collective national response, face up to the profound injustices of the past by considering and crystallising their potential exposure to civil litigation for historical abuse (at least insofar as those who accept redress payments are concerned) and, in return for that, avoid the financial and reputational risks of costly, lengthy and adversarial litigation.

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

We believe the waiver proposed, which only affects litigation in respect of organisations that make fair and meaningful financial contributions, is a fair and proportionate mechanism. Other redress schemes have adopted a different approach. For example, in Northern Ireland, all subsequent litigation is prohibited regardless of financial contributions to the scheme.

Without waiver, potential contributors would need to consider their exposure to litigation across individual cases and how this would impact them if they were to meet that cost in addition to their contribution to the redress scheme. Such consideration is complex and requires an examination of actual and potential liability in respect of an unknown number of future claims, both in terms of awards that made be made, but all legal expenses which they may not be able to recover.

The clarity offered by the waiver allows the consideration to move away from an assessment of exposure on an individual basis and instead encourages commitments to be made to a unified, inclusive response to address systemic failure. Again, I believe the potential inclusion of an amendment concerning the standard of proof could help assist organisations in the assessment of the risk they may potentially face without a waiver.

The purpose of the waiver is not to allow parties to reduce or escape liability, but is concerned with offering a degree of certainty over costs, which can be redirected to the redress payments themselves. To allow survivors to pursue both redress and litigation diminishes the scheme's capacity to provide an adequate national response. A scheme without waiver, and therefore without the likelihood of fair contributions which reflect payments to survivors throughout the scheme, would not result in that collective response. It would instead be a purely taxpayer funded scheme, leaving survivors potentially under the expectation that they would pursue litigation to receive the tangible recognition and acknowledgment from organisations that inclusion of the waiver encourages.

In considering the waiver, it is essential that survivors receive the independent advice they need as to its content and consequences. The Bill provides that every survivor will have an opportunity to obtain funded independent legal advice, up to a capped maximum level.

Subject to the views of the Committee, I would be open to considering the time limits provided for the acceptance or rejection of an offer of a redress payment, during which time this advice is obtained, and whether additional time would assist applicants.

***Consideration of alternatives to waiver***

It would be possible to develop a redress scheme without provision for waiver whilst also preventing double payment for the same matter. The Bill could have provided that any payments made under the scheme are offset, or deducted, from any future award of damages by a court (in respect of successful actions arising from the same abuse) or out of court settlement. This option has been suggested by some organisations in the written and oral evidence received by the Committee.

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

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

I would refer to my earlier comments that the redress scheme has arisen to provide a remedy for those who cannot or do not want to pursue litigation. It was never intended as an additional process for all survivors, something that is done over and above taking court action. The Bill does however strike a balance, and allows those who have already concluded a court process or received an out of court settlement to still apply to the redress scheme (with any prior award received being deducted from any redress payment to be made). It was however, never intended to operate in the reverse – that survivors should first apply for redress as an interim measure in their pursuit of litigation, unless of course, an organisation has not made a financial contribution to the scheme.

We have not been able to identify any redress scheme anywhere in the world where providers make contributions but receive no waiver. Neither have we seen any scheme that secures contributions by using an offsetting model.

Another point which has been raised by Committee members in evidence sessions is the possibility of compelling financial contributions from organisations. My officials have explored this option in great detail. Our judgement is that in order to create obligations to compel financial contributions to the redress scheme, we would have to create a scheme which made binding determinations on fault or negligence more akin to a court type process. For pre 1964 cases, we are not able to reverse the legal effect of previous rules on prescription though the Bill does at least provide pre 1964 survivors with access to financial redress not previously available to them, and for cases after that date, the approach would not be consistent with the survivor focussed, trauma informed, non-adversarial scheme we want to create as a real alternative choice than the court process. We do not want to simply mimic the court process, we already know that does not work for all survivors.

It is important to state that the waiver will not allow organisations to escape the past. It offers them an opportunity to acknowledge their responsibility for historical abuse which occurred whilst children were in their care for the benefit of survivors. Our approach to contributions means the waiver only applies to organisations playing their part for survivors by contributing to redress payments now, rather than requiring them to go to court.

***Capacity***

Section 49 of the Bill was developed following concerns regarding risk and vulnerability being raised throughout the 2019 pre-legislative consultation exercise by both organisations and survivors. Organisations who work with vulnerable populations suggested that consideration should be given to the potential safeguarding issues which may arise following receipt of payment for some vulnerable applicants.

The tensions between an applicant's rights, including self-determination with potential risk of self-harm or exploitation by others is recognised. Underlying all of this is a genuine intention for this scheme to have a positive impact on all survivors, including the most vulnerable. We will develop guidance for Redress Scotland, following further consultation with experts as necessary, to ensure that this section is only used when absolutely necessary and with respect to the rights, wishes and needs of an applicant. We also plan to signpost recipients of a redress payment to financial advice, where they will have the option to access support and advice on how to manage their payment.

In drafting section 49, we have taken into account provisions in other legislation[2] and schemes[3]. It is intended to provide Redress Scotland with a broad and flexible power to give directions relating to the payment and management of redress payments awarded under the scheme where considered appropriate for the benefit of vulnerable applicants.

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[2] For example, section 13 of the Children (Scotland) Act 1995 which provides the court with a broad power to make orders relating to the payment and management of awards of damages to childrenhttp://www.legislation.gov.uk/ukpga/1995/36/section/13.

[3] Such as the criminal injuries compensation scheme. In relation to the redress scheme in the Republic of Ireland, section 13(8) of the Residential Institution Redress Act 2002 also provides broad powers to deal with the management of payments under that scheme in respect of vulnerable applicants: http://www.irishstatutebook.ie/eli/2002/act/13/enacted/en/html

There is no intention to create a new legal framework for adults with incapacity or vulnerable applicants and section 49 in no way cuts across the existing Adults with Incapacity (Scotland) Act 2000.

As indicated, Redress Scotland can only make such directions where satisfied that this would be for the benefit of applicants and only where that is considered to be appropriate. In exercising the power, Redress Scotland should of course take into account any representations from applicants or their representatives. In any event, any such direction would also be subject to review, in accordance with section 50, so that the applicant has the ability to challenge any such direction.

This subsection was drafted to ensure protections could be in place for vulnerable applicants who may or may not have formal incapacity or guardianship orders in place. We know that due to the impact of the abuse suffered by applicants, there is a possibility that they may suffer from addictions, have been or are homeless, may still be in care (17-18 year olds) or generally be more vulnerable to exploitation by others. It may be that next of kin applicants are also vulnerable and may be further impacted still by bereavement. Because of this we wanted there to be an additional safeguard in place for the benefit of a range of potentially vulnerable applicants who may be given a redress payment under the scheme.

We intend to publish guidance for Redress Scotland decision-making panels using the power in section 97 of the Bill. This will reinforce that this power should only be utilised where there has been sufficient engagement with the applicant and/or their representatives (where possible), to allow them to make an informed decision as to whether the use of these powers would be appropriate. This guidance will be developed to ensure applicants are fully informed and supported when making decisions about how their payment is managed. In order to ensure that this process is sufficiently thorough, this Bill provides that an applicant can request a review of decisions in relation to payment and management made by the panel.

***Survivors on Redress Scotland decision making panels***

Some Committee members raised the possibility of including survivors on the Redress Scotland panels making decisions in individual redress applications. I understand that this has been raised by some survivors in the responses to the call for written evidence and in the recent evidence sessions.

There is no doubt whatsoever that survivors have a vital role in influencing the development and delivery of many important aspects of the scheme. However, in relation to survivors taking decisions on the appropriate level of redress for other survivors, we need to be mindful of concerns raised by survivors in the previous consultation. Issues noted included the potential triggering and emotional impact, perceived impartiality and fairness, and how access to such sensitive personal information would be managed.

Survivors have also provided views on the range of skills, knowledge and experience necessary for panel members and highlighted that panel members should be independent and have the trust of applicants to ensure confidence in the scheme. Survivors have also shared a broad range of suggestions and concerns about the process as to how any survivor representatives might be selected as well as offering individual or organisation names as

suggestions. That is not to say that someone with a survivor background cannot apply for a panel member position, but the full range of survivor perspectives must be taken into account. It is also important to note the other areas of the scheme where survivor advice and input was felt to be important, such as support for applicants, paperwork and processes, awareness raising, accessibility, feedback and on-going learning. We have, within the Policy Memorandum, proposed a Survivor Forum to allow for this.

On reflection, I believe that the Survivor Forum offers the best medium for survivor input to the delivery of the scheme. The Survivor Forum is not on the face of the Bill as we did not consider this was legally necessary and we wished to retain flexibility as to how it might operate once the scheme is open. We plan to work with survivors to develop the Survivor Forum over the coming months. However, I would be open to consider any recommendation from the Committee as to whether there should be a commitment in the Bill to ensure the survivor voice is fed in to the scheme along with a statement of values around how we will operate. I am committed to survivors' voices being integral to the remainder of the Bill process and also to the design and development of the scheme, including the development of the application process and support mechanisms.

I would be happy to engage further with the Committee on any of the points raised in the letter in advance of the Stage One report.

Yours sincerely

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