

## **REDRESS FOR SURVIVORS (HISTORICAL CHILD ABUSE IN CARE) (SCOTLAND) BILL**

### **THE SCOTTISH GOVERNMENT'S RESPONSE TO THE EDUCATION AND SKILLS COMMITTEE'S STAGE 1 REPORT**

1. What follows is the Scottish Government's response to the specific points or recommendations made by the Education and Skills Committee in their Stage 1 Report. For ease of reference, the Committee's points or recommendations are shown separately in boxes and numbered in line with that report. The Scottish Government's response is given directly underneath those boxes.

#### **PURPOSE OF THE BILL**

49. In considering the Bill at Stage 1, the Committee has sought to ensure that its recommendations reflect the desire for victims/survivors to be treated with dignity, respect and compassion. The Committee recommends that the Scottish Government considers including a statement on the face of the Bill recognising these qualities and the need for them to be applied across each element of the redress scheme.

2. The redress scheme has been designed with survivors' needs and expectations at the forefront, and it aims to ensure that applicants are treated with dignity, respect and compassion. The scheme has been strongly influenced by engagement and consultation with survivors, and we are committed to survivors' voices remaining an integral part of the Bill process and as scheme development progresses. We welcome and agree with the Committee's acknowledgment of the importance of these values, and commit to considering further how we can best achieve the intended objective.
3. The Survivor Forum which will be established in parallel with the Bill is itself an example of the intention to treat survivors with dignity, respect and compassion. Additionally, it will provide an effective way for survivors to let us know whether applicants to the scheme feel they are in fact being treated in accordance with these values.
4. We are taking a trauma informed approach to the design of the scheme and as regards the staffing involved in delivery. This approach supports these important values, and promotes respect and understanding.

#### **DEFINITION OF ABUSE**

50. The Committee notes the evidence it heard that the definition of abuse set out in section 17 is inconsistent with section 1 of the Limitation (Childhood Abuse) (Scotland) Act 2017 and as a result this may exclude some types of relevant abuse from the scope of the Bill. The Committee recommends that the Scottish Government should review the evidence received by the Committee on this point ahead of the Bill's Stage 2 consideration.

5. In their written submissions both Digby Brown and the Association of Personal Injury Lawyers proposed that “means” should be replaced with “includes” in order to fully align the definition of “abuse” in the Bill with that in section 17A of the Prescription and Limitation (Scotland) Act 1973 (inserted by section 1 of the Limitation (Childhood Abuse) (Scotland) Act 2017). We note however that the Scottish Human Rights Commission welcomed the exhaustive definition in its report of 7th October 2020 on the grounds that this approach complies with the international framework in this area.
6. Whilst the definition of “abuse” in the Bill is a broad one, we considered that an exhaustive rather than an inclusive definition was better for legal certainty and noting the different context of the definition in section 17A of the 1973 Act. Bringing something within the definition of abuse in section 17A is the first step towards a successful claim (as the person raising the action will still ultimately need to establish before a court that there was an injury resulting from the abuse), rather than it being a conclusive factor in determining eligibility, as is the case for abuse under the Bill.
7. While we are of the view that the current definition in section 17(1) of the Bill is broad enough to include all of the types of abuse intended including the various examples submitted in evidence during Stage 1 scrutiny of the Bill, we will bring forward an amendment to align it with the definition in section 17A of the 1973 Act. To fall within the inclusive definition, it will still be necessary to show that the behaviour in question constituted “abuse”.

51. The Committee also notes the suggestion that the Scottish Government should consider whether cross-border UK placements should be brought within the scope of the Bill, where such placements were arranged by a Scottish Local Authority and the child's home authority retained a duty of care towards them. Again, the Committee encourages the Scottish Government to consider this proposal ahead of Stage 2.

8. In its written submission East Lothian Council noted that the Bill does not cover abuse occurring in placements in England which were made by Scottish local authorities. While this was not a frequent occurrence, they point out that it did happen on occasion. We will give further consideration to this issue in advance of Stage 2. Some abuse which occurred outwith Scotland will already be covered by the Bill, as the definition of resident in relation to a relevant care setting under section 20 is intended to cover situations where a child was temporarily absent from the regular care setting, although still under its care.

52. The Committee notes stakeholders' wishes that specific actions and behaviours be recognised as abusive for the purposes of the proposed redress scheme.

53. The Committee acknowledges that the Scottish Government draft Assessment Framework (published after the Committee's call for evidence closed) includes many of the types of abuse which stakeholders suggested should be included. The draft Assessment Framework is discussed in more detail later in this report.

54. The Committee recommends that the Scottish Government reflects on the evidence heard by the Committee and continues its dialogue with victims/

survivors and victim/survivor groups to ensure that all types of abusive behaviour relevant to this Bill, including peer to peer abuse, are recognised in the final version of the Assessment Framework.

9. We will continue to develop the drafting of the Assessment Framework and to reflect on the evidence heard by the Committee during Stage 1. The Assessment Framework will be one of the key guidance documents for the scheme. Its development will continue to be informed by the parliamentary process and by ongoing engagement with clinical psychologists with experience and expertise in the field of trauma and in particular historical child abuse. We recognise however that, while it will not be possible to account for every possible scenario, it is important that survivors can see their experiences reflected within it. We consider the Framework and how to further develop it later in this response.

55. The Committee acknowledges the Cabinet Secretary's assurances that there will not be a blanket ban on the panel considering corporal punishment, but rather that panel members will be required to take into account the context in which it was used, including its frequency and severity.

56. Whilst the Cabinet Secretary has provided a Draft Assessment Framework which provides further detail on how corporal punishment will be approached by the Redress Scotland panel, it remains a concern to the Committee that having such a statement on the face of Bill risks giving the impression that certain types of abusive historical behaviour will in some way be condoned.

57. The Committee also notes the concern from some victims/survivors that an assessment of what was lawful would be based around what would be deemed acceptable at the time. Given that the redress scheme will span several decades, then the perception of what is 'acceptable' is likely to vary considerably and will be dependent on the panel's own understanding of the prevailing attitudes.

58. The Committee therefore recommends, in light of the evidence the Committee has heard, that the Scottish Government revisits this section of the Bill ahead of Stage 2. In doing so, the Scottish Government should consider how best to instil confidence in victims/survivors that the excessive use of corporal punishment will be covered by the scheme. Thought should also be given to the best way to communicate this information in order to avoid inadvertently deterring some victims/survivors from applying to the scheme.

10. It is not the intention that all instances of corporal punishment should fall outwith the definition of "abuse". Rather, corporal punishment administered in accordance with the law and guidance in force at the time will not be considered abusive, but where it was excessive, arbitrary or cruel, or exercised for an improper motive, this should constitute abuse for the purposes of the scheme.
11. Whilst we consider that the current drafting achieves this intention, we appreciate the force of the evidence submitted during Stage 1. We will therefore consider an amendment to this provision, with a view to setting out more expressly the dividing line between corporal punishment which will be considered abusive for the purposes

of the Bill, and that which will not. We appreciate the need for clarity and do not of course wish inadvertently to discourage people from applying to the scheme.

## RELEVANT CARE SETTINGS

59. The Committee recognises the challenges faced by the Scottish Government in creating a redress scheme which will meet the needs of children who were abused in care in Scotland.

60. The Committee also appreciates the disappointment expressed by some victims/ survivors that their abuse will not be recognised by the redress scheme, simply as a result of them being placed a care setting by their parent or guardian. It may not always be clear to the person who is applying for redress how they came to be in a particular care setting, for example, if they were too young to understand this at the time or where care records have been lost or destroyed.

61. The Committee notes that in the past it was common practice for parents to place their children in voluntary care, and many children found themselves in residential establishments for religious reasons, due to a disability or as a result of a scholarship.

62. As many noted in evidence to the Committee, the abuse those children suffered was no less than that experienced by children who were placed there by the state.

63. The Committee is sympathetic to the fact that children placed by their parents or guardians should have the same expectation and entitlement to redress and remedy as those placed there by the state.

64. The Committee recognises that there is a need to clearly define the limits of the redress scheme. However, the Committee believes that there should be scope for Redress Scotland to be able to consider some cases on an exceptional basis where, save for the requirement to have been placed in a setting by the state, victims/survivors would otherwise have been eligible for redress. Particular consideration should be given to those whose abuse took place at a time where placing children in voluntary care was common practice, as well as those for whom the circumstances surrounding their placement are unclear.

65. The Committee recommends that, in light of the evidence it has heard, the Scottish Government should revisit the Bill's current eligibility criteria ahead of Stage 2.

12. The definition of “relevant care settings” has been challenging in terms of knowing where to draw the boundaries, but we believe it is important to draw clear lines, and we believe we have struck the right balance in defining this aspect of the eligibility criteria. We acknowledge the Committee’s concerns and welcome this opportunity to clarify the Bill’s eligibility requirements in relation to children who were placed in care by family members. Children who were placed in children’s homes by family members are not excluded from applying to the scheme. However, consistent with

the underlying purpose of the scheme, we are considering whether, using the power in section 21 of the Bill, care arrangements which were temporary in nature such as short term holiday or respite care should be excluded.

13. The scheme does however seek to exclude arrangements where there was no exercise of public functions involved in either the provision of the accommodation or the reason for the child being there. The scheme recognises the acute vulnerability and distinct circumstances of children who were cared for in the residential settings covered by the scheme. Some children were placed in residential care because family circumstances meant that they could not be looked after on a day to day basis by their family. For others, the intervention or involvement of a public authority or voluntary organisation exercising public functions meant that children were accommodated outwith the family environment. In both circumstances, children were vulnerable to abuse and did not have the protection of their families and this should have been provided by the care settings taking on this role. These circumstances are different to children who may have been in the same setting but on a different basis, such as fee paying pupils at boarding schools. This scheme focusses on those abused as children when they were in care, but should not be taken to diminish any abuse suffered by others.
14. We have sought to reflect this in the Bill through broad definitions concerning relevant care settings consistent with the purpose of the scheme.
15. We believe that if we created a provision for exceptional cases then it would leave the eligibility criteria open-ended and non-transparent for applicants and may create further uncertainty or inconsistency in the treatment of potential cases arising, thereby potentially undermining the scheme and being inconsistent with its purpose. It is a difficult issue, but as the Committee acknowledges, we must define the limits of the eligibility criteria and we believe this is an appropriate limit to set.
16. Through the regulation-making power in section 18(4) of the Bill we have sought to create some flexibility to be able to adjust the meaning of residential institutions in anticipation of future cases arising without undermining the scheme and consistently of course with its underlying purpose.

66. The Committee notes the Scottish Government's wish to retain flexibility in delivering redress to victims/survivors, including in respect to the definition of a 'residential institution' 3 . The Committee considers, however, that there is already sufficient information available to identify most institutions in which children were likely to have been resident. As such, any amendments to the definition of a 'residential institution' should be a very rare occurrence.

67. The Committee is mindful of the impact a change in definition might have on victims/survivors who might reasonably have expected to apply to the scheme, but now may no longer be able to do so.

68. The Committee therefore recommends that a no-detriment approach should be taken in relation to any regulation-making powers in the Bill. This would ensure that changes made via regulations could only be made for the purposes of widening eligibility, rather than seeking to restrict access to the scheme. The

Committee believes that Redress Scotland should play a key role in advising Scottish Ministers of which additional settings should come under the remit of the scheme.

69. The Committee notes and welcomes the Scottish Government's intention to ensure these regulations are scrutinised by the Scottish Parliament under the affirmative procedure.

17. We acknowledge the Committee's point that only in very rare circumstances should amendments be made to the definition of "residential institutions" and this is the intention. Despite this, we must remember the complexity of the care setting landscape, particularly as it existed many decades ago; therefore it is important that we keep a level of flexibility available for any necessary amendments.
18. The Committee recommends that the regulation-making power in section 18 of the Bill (the exercise of which would require Parliament's approval through affirmative procedure) should be a no detriment provision. Section 18(4) of the Bill is already intended to operate as such, which is why it only talks in paragraph (a)(i) about "adding" and not also "removing". We will consider further whether amendment to the wording of this provision could reinforce that.
19. In contrast, it is important to note that the sole purpose of the regulation-making power in section 21 of the Bill is to enable exclusions to be made to the eligibility criteria where consistent with the underlying purpose of the scheme. Therefore this provision cannot be recast as a no detriment provision. However, section 21 is only intended to be used before the scheme is live, as we want to avoid the situation where different results are reached based on whether someone applies early or late on in the scheme's lifespan. In the Bill's accompanying documents and in stage 1 evidence to the Committee we have indicated it could be required, for example, to exclude certain types of peer abuse which would otherwise be within the scope of the scheme (e.g. one-off fights between peers which were not known about by the relevant care setting).
20. In regards to the Committee's point on Redress Scotland advising Scottish Ministers on the settings which should be included under the remit of the scheme, Ministers will always consult as appropriate, including with Redress Scotland. To provide further reassurance, however, we can consider further whether an express provision requiring such consultation should be included on the face of the Bill.
21. The Committee should also note that Scottish Ministers are already under a duty under section 10 to cooperate with Redress Scotland in relation to the functions conferred under the Bill.

## **QUALIFYING DATES**

70. The Committee notes the evidence it has heard from victims/survivors and wider stakeholders about the current cut-off date to qualify for redress under the proposed redress scheme, including the impact this is likely to have on victims/survivors who experienced abuse between 1 December 2004 and 17 December 2014.

71. The Committee considers that using the earlier date is likely to arbitrarily exclude some victims/survivors who would otherwise benefit from the scheme.

72. The Committee recommends that the eligibility dates used for both the redress scheme and the Scottish Child Abuse Inquiry should be aligned and that the Scottish Government should provide further information regarding the financial implications of doing so ahead of Stage 2.

22. As the Committee has noted, the cut-off date within the Bill was proposed as this was when the then First Minister, Jack McConnell, made a public apology to survivors. This date is also reflective of the fact that, by 2004, significant changes had been made in child protection legislation, policy and practice, that meant that the context of the care and regulatory systems were no longer comparable to that which existed historically, when some children were so badly let down.
23. This is an important distinction. We are clear that the abuse suffered prior to 2004 arose from systemic failures and during a time when their welfare was not prioritised as it should have been. As a result, any complaints made were less likely to be believed or result in any action. Survivors from this time period have also faced a series of obstacles to accessing justice through the civil or criminal courts over a long period of time. We do not believe that the systemic failings which clearly contributed in past decades persisted beyond 2004, and while those abused in care after 2004 may still face challenges in accessing justice through the traditional routes, these are not to the same extent as for those abused before that date.
24. We are not complacent about the situation for children in care abused after 2004 but with increased understanding of children's needs, rights and greater regulation and improved standards, we believe the nature and context in more recent times are very different. We have recognised the continued need for monitoring and review as demonstrated by our commitment to the recent Independent Care Review.
25. We do recognise the evidence the Committee has heard regarding those survivors who were only in care after 1 December 2004. We accept that having different dates around eligibility between the redress scheme and the Scottish Child Abuse Inquiry might appear to disadvantage those who were abused in care between 2004 and 2014 who would otherwise be eligible for redress. However, whilst the Inquiry and the redress scheme are both important steps in Scotland's journey as a nation to acknowledge and face up to the past, each serves a different purpose.
26. We believe the focus of the redress scheme should remain on historical abuse, recognising all the facts and circumstances and challenges of that period.
27. We thank the Committee for highlighting this important issue and will continue to consider our position in advance of Stage 2.

## EVIDENTIAL THRESHOLDS/DRAFT ASSESSMENT FRAMEWORK

73. The Committee recognises the significant challenges faced by the Scottish Government in creating an Assessment Framework which avoids creating a hierarchy of abuse, whilst also providing a clear rationale for awarding each payment level.

74. Whilst the current payment levels have large gaps between them, the Committee is conscious that there is a need to recognise that some experiences of abuse may have been more severe than others and that the panel should have some discretion in the level of payment it awards.

75. At the same time, the Committee is mindful of the effect such large variations in payment levels may have on victims/survivors, particularly in relation to the validation of their abuse.

76. The Committee recognises that the Assessment Framework will provide further detail of how the Redress Scotland panel's decision-making will function in practice.

77. The Committee is concerned by the current lack of detail in the draft Assessment Framework, and in the absence of liability being established by the redress scheme, recommends that the framework should provide further information about the amount/type of evidence required to be supplied by victims/survivors in order to access each payment level.

78. The Committee carefully considered the evidence it heard regarding alternative methods of assessing awards, including the possibility of bandings being used, rather than payments at fixed levels. The Committee notes the range of views shared in both written and oral evidence on this topic.

79. Whilst acknowledging and supporting the desire for the redress scheme to be up and running as soon as possible, the Committee believes this Assessment Framework is instrumental to the operation of the scheme and, as such, should be enshrined in secondary legislation and subject to Parliamentary scrutiny under the affirmative procedure.

80. The Committee also notes that, whilst the redress scheme is designed to have lower evidential requirements than civil litigation, that payments are significantly lower than those that would potentially be available to (post-1964) victims/survivors via that route.

81. It is not for the Committee to recommend the levels at which payments to victims/survivors should be set. The Committee notes, however, that there is general dissatisfaction amongst victims/survivors at the current levels set out in the Bill.

82. The Committee recommends that ahead of Stage 2 the Scottish Government revisits the payment levels and awards currently set out in the Bill, taking into account the evidence the Committee has received, and that any increase in



payment levels or other costs in the scheme should be reflected in a revised Financial Memorandum.

### **Payment structure and levels**

28. We note the Committee's recommendations in regards to the payment structure.
29. We have heard evidence that the level of the increase between the different payment levels may have a negative effect on survivors, particularly in relation to the validation of their abuse.
30. We remain satisfied that a smaller number of payment levels allows the distinction between each one to be clearer. This is based on advice from experts with whom we have engaged in developing the scheme. We remain concerned that a wider range of payment levels may result in different payments being offered for similar experiences. Having distinct payment levels, rather than ranges, appropriately reduces discretion and enhances transparency and consistency in the scheme and the decision-making within it. However, we accept that the gap between payments is too great. We want to provide fair payments according to a fair structure and so we will revisit the level of the increase between the different payment levels.
31. We have also listened to the evidence from survivors and other stakeholders that the scheme offers lower levels of payment to survivors compared to both court and other redress schemes.
32. Payment levels were informed by other redress schemes for historical child abuse in care, but it is hard to compare one scheme with another. They are all set up with different rules about who is eligible, what is needed to apply, the processes involved for survivors and how decisions are made.
33. As noted by the Committee, the payment levels available in Ireland were higher than our proposals. That largely reflects the different approach which was pursued in a different jurisdiction. What we are seeking to avoid, is duplicating the adversarial nature of processes often associated with much higher payment levels. As the Committee heard, this was what happened in Ireland and was often experienced very negatively by survivors and created extremely high legal costs. We deliberately want to create an alternative to a court process, which aims to be less likely to cause distress to survivors.
34. The redress scheme is an alternative remedy for survivors. It does not follow the same rules and procedures as court and is not designed to achieve the same outcome as a court process. Redress payments may be lower for some survivors under the scheme than would have been awarded by the courts. For others, the opposite may be true.
35. We know that redress will not be suitable for every survivor and that some survivors will want to pursue court action, either to seek a higher payment or because the experience of civil litigation is expressly what they want. For those who cannot or do not wish to, the redress scheme offers a faster, trauma-informed, more straightforward route to a financial payment.

36. It also offers a remedy for pre-64 survivors of abuse who would not otherwise be able to pursue action through the courts.
37. We have however listened to the evidence and accept that some survivors are concerned and have expressed dissatisfaction. We will continue to reflect on this and reconsider the maximum payment level offered.

### **Evidence and the Assessment Framework**

38. We note the Committee's recommendation in relation to the inclusion of evidence requirements in the Assessment Framework guidance document. The purpose of the Assessment Framework document is to provide guidance on the assessment of the abuse suffered and not the type of evidence required to support applications. This is because we think that it is appropriate for evidence to be covered in a separate guidance document.
39. We do however recognise the importance of providing further clarity around the standard of proof and the approach taken to the consideration of evidence, this is addressed further on in our response.
40. We want survivors to know that the redress scheme will be a non-adversarial process. Applicants will be supported throughout the process and assisted in obtaining the information needed to support their applications.
41. The Bill is not prescriptive as to the evidence that applicants will require to apply for redress. This recognises the challenges some survivors face in evidencing historical abuse and, learning from the Advance Payment scheme, the redress scheme will be flexible in its approach to the evidence accepted.
42. We will produce guidance to Redress Scotland to underline that decision makers should take into consideration all relevant information about the circumstances of the account, other known civil or criminal cases, published findings from the Scottish Child Abuse Inquiry, and any other relevant sources available in order to consider the overall coherence of these.
43. In that guidance, which will also be published and laid before Parliament, we will set out more details on the evidence required. It is anticipated that applicants for both payment types (fixed rate and individually assessed) will need to provide documentary evidence of being in care to demonstrate that they are eligible. Applicants for fixed rate payments will also need to provide a brief statement of their abuse. Individually assessed payment applicants will provide a more detailed statement of their abuse and supplementary information in support of their application.
44. With reference to recommendation 79, although we agree that the Assessment Framework document is integral to the operation of the scheme, and we are grateful for the Committee's suggestion, we consider it undesirable to include it in secondary legislation. As this is a detailed operational document, it will require to be amended from time to time (for example, if new scenarios of abuse come to light through

Redress Scotland's experience), and being in regulations would not allow it to be updated as frequently or easily as will be necessary for operational use.

45. We also note, that given it is statutory guidance, there is already a requirement under section 97(4) of the Bill for the guidance document to be laid before the Parliament, providing the opportunity for scrutiny. We consider that approach preferable, rather than a prescriptive approach being taken.

## THE APPLICATION PROCESS

83. The Committee notes the content of the draft Assessment Framework and that many of the factors raised by victims/survivors throughout the Committee's Stage 1 consideration of the Bill have already been taken into account. The Committee recommends that the Scottish Government carries out further consultation with victims/survivors and victim/survivor groups on the draft Assessment Framework ahead of a final version being published.

46. We are pleased that the draft Assessment Framework addresses a number of the issues raised in Stage one evidence. We have been developing the Framework with the advice and assistance of a number of clinical psychologists with experience and expertise in the field of trauma and, in particular, historical child abuse, and have discussed the draft with the Review Group. That engagement will continue and we will give further consideration as to how we can engage with survivors more widely, acknowledging that this can be a difficult and distressing element of the redress scheme so care is required in how we seek their views.

84. The Committee recognises that for many victims/survivors, their journey in disclosing abuse may just be beginning. Expecting victims/survivors to be able to share intimate details of their abuse with the panel, when they may not have shared this with anyone else, including their family, may mean that some victims/survivors may not apply to the scheme. The Committee recommends that the Scottish Government should have these victims/survivors in mind when designing support mechanisms (discussed in more detail in the Support Needs of Victims/Survivors section of this report).

47. We recognise the challenges that might emerge for individuals applying to the scheme in terms of the emotional impact of thinking about applying and the process itself. As the Committee notes, for some, applying for redress may be the first step in their journey to acknowledge and disclose the abuse they suffered as a child.
48. Case workers dealing with survivors will all be trained in working in a trauma informed way and will always work with empathy and compassion.
49. Access to emotional support will be available. We understand that the nature and level of support required will vary and the scheme will need to be responsive and flexible in its response.
50. The scheme will also offer practical support to access records, but we know that any document relating to time in care can be more than a piece of paper. It is a vital link with the past, it is about an individual, their childhood and circumstances. Individuals

can discover things for the first time, or receive records containing gaps or inaccuracies. We also know that no, or very little, information being available can be as upsetting as receiving lots of information.

51. We understand the different emotional issues that can emerge in relation to accessing, receiving and making sense of records. It might be fairly straightforward for some applicants but for others, much more challenging. The scheme will offer emotional support to those who need it.

85. The Committee notes the statements in the draft Assessment Framework that supporting documentation and evidence provided in respect of an application may include 'previous statements/evidence given in other proceedings' and 'findings of fact published by the Scottish Child Abuse Inquiry in relation to the care setting.'

356. However, the Committee would welcome further detail regarding what weight will be attributed to such statements, including in relation to the other documentation that might be required to support an application.

52. As noted above, we understand the challenges faced by survivors, and others, in obtaining evidence of abuse that happened a long time ago. We know that many survivors will not have told anyone what happened to them at the time, or if they did, that it may not have been recorded or acted upon. In setting evidential requirements, it is important that we do so without creating barriers or burdens on survivors, and others which are unrealistically high. The scheme will be flexible in the evidence that can be considered in support of an application.

53. The weighting of different evidence sources will be a matter for Redress Scotland to consider on a case by case basis but we propose that guidance may have a role to assist. For example, some sources of evidence would seem of unquestionable value, such as evidence of a criminal conviction in relation to the abuse described in a redress application, and it would not be reasonable to require anything further in those applications. We do not however, expect that the vast majority of applicants will have that level of evidence and the guidance will address the flexibility required in considering different types of evidence.

87. The Committee would also appreciate clarification of whether the Scottish Government has identified any potential barriers to victims/survivors sharing evidence provided to the Scottish Child Abuse Inquiry in this context.

54. Survivors have told us that they would like to be able to access their statements to the Scottish Child Abuse Inquiry for the purpose of supporting their application for redress and to prevent them from having to repeat their account.

55. Having regard to the sensitive and/or personal nature of many aspects of the evidence given to the Inquiry, Lady Smith, Chair of the Inquiry, has issued a General Restriction Order under section 19 of the Inquiries Act 2005 which restricts the disclosure of that evidence. Under the terms of that Order, disclosure could be permitted if the Chair considers it appropriate to do so. Given the importance of this issue to survivors, we do intend to explore whether disclosure for the purpose of

supporting a redress application might be permitted, and if that is possible, in what way it should be made available.

## **BURDEN OF PROOF**

88. The Committee notes the Cabinet Secretary's suggestion that the burden of proof required for the redress scheme will be 'significantly lower than the standard of proof in a civil case.

89. However, it remains unclear exactly which standard will be used, what its status will be in law, how this will interact with the draft Assessment Framework and what implications it will have in relation to determining both the fixed and individualised payment awards. The Committee would welcome clarification from the Scottish Government of these points ahead of Stage 2.

56. We note the Committee's reference to comments made by the Deputy First Minister during the evidence session on 4 December. These comments were made reflecting on the difference between redress and civil action, particularly around the barriers that survivors currently face in relation to the latter, for example, the rules of evidence and the need to establish liability, which are not part of the redress scheme.
57. We do share the Committee's view that it is vital to ensure that survivors, organisations and their insurers are confident that decisions on redress applications will be based on a clear and appropriately robust standard of proof.
58. We are carefully considering what that standard should be in order to deliver the necessary fairness and rigour to the process without being unachievable for survivors.
59. We are drawn to the standard being reflective of the civil standard of proof, and not the much higher criminal standard of proof. The civil standard is known as the balance of probabilities, but it is also described as being able to establish that it was 'more likely than not' that something occurred.
60. This standard is used by the civil courts, and is therefore robust and well recognised. However, the non-adversarial nature of the scheme, the support offered to applicants, including practical support to assist with evidence gathering, and the fact that liability will not need to be established, means that survivors will not experience the same barriers that they would have potentially had to encounter through a civil litigation process. This will result in a much more accessible, trauma-informed, survivor-focussed approach. Guidance on how to apply the standard of proof will be produced.
61. Providing clarity on the standard of proof being applied will help to ensure applicants, organisations and insurers have faith in the robustness of the scheme. We will consider how best to provide that clarity, whether in the Bill by amendment at Stage 2 or whether this should be a matter for guidance, perhaps by inclusion within the Assessment Framework.

62. We accept that those who will rely on the Bill must be reassured that it provides clarity, transparency and robustness to ensure survivors receive the recognition and acknowledgement they have waited so long for. Survivors and survivor groups have called for a standard of proof to be included in the Bill to give them confidence in the integrity of the scheme and to provide an additional layer of protection against fraudulent applications. The need for integrity and credibility of the scheme is linked to survivors' need to be acknowledged and believed.
63. Redress Scotland's decision-making should be guided by the Assessment Framework, which is designed to support transparent and consistent decision-making so that survivors, participating organisations and insurers can have confidence in the scheme. Including the standard of proof within the Bill may strengthen that confidence.
64. We recognise the challenges that might emerge for insurers and organisations in trying to balance the need to establish liability in order to trigger insurance indemnity and support current services, while faced with a desire to do what is right and contribute to the scheme. However, this cannot detract from the fact that the scheme does not determine any issue of fault or negligence. As noted below, we will work with organisations to make sure that the contribution can be structured over time to protect current services.

90. The Committee also believes that those applying to the scheme should have a clear picture of the key principles used to establish whether an application is genuine (including whether there is a presumption that they will be believed) and that these principles should be set out on the face of the Bill.

65. We believe survivors, and we have designed a sensitive and trauma-informed scheme empowered to support them gather the evidence they need to obtain the redress they are entitled to.
66. Decisions on applications will be taken independently of government by panels of Redress Scotland, who will have the benefit of guidance issued under section 97 of the Bill. We understand the need for transparency and consistency around the decision-making process and the Assessment Framework guidance document seeks to provide that in relation to individually assessed redress payments.
67. We are further considering whether the inclusion of a standard of proof on the face of the Bill would further strengthen the confidence of survivors, providers and others in the processes and outcomes of the scheme.

## **LIABILITY**

92. The Committee notes the points raised by legal stakeholders in relation to Bill's current approach towards establishing liability, and in particular how this may present challenges to the Redress Scotland panel in verifying whether abuse took place. The Committee therefore encourages the Scottish Government to reflect on this evidence ahead of the Committee's consideration of the Bill at Stage 2.

68. We note the concerns raised in evidence by the Faculty of Advocates to the Committee that the terms of Section 34(3) of the Bill, which provides that Redress Scotland should not consider or make determinations on issues of fault or negligence, and Section 34(6) of the Bill, which provides that neither an offer, nor failure to make an offer, is to be taken as a finding that someone acted or failed to act in the way described in the application for redress, could be interpreted in such a way that it prevents Redress Scotland from considering whether it is satisfied that an applicant was abused and meets the eligibility criteria or threshold of an individual payment.
69. That is not how the provision is intended to be interpreted and we will bring forward an amendment at Stage 2 to clarify matters.
70. Section 34(3) intends to put beyond doubt that Redress Scotland will not make findings of liability, such as those found in civil court judgments, when making determinations on redress applications. That is not the purpose of the scheme. Instead the purpose of the scheme is to provide tangible recognition of abuse and a survivor focussed and non-adversarial route to redress.
71. This does not mean that Redress Scotland cannot consider whether it is satisfied that an applicant was abused and meets the eligibility criteria. Indeed making such determinations is obviously essential to the scheme. It is entirely possible for Redress Scotland to make a finding that there was abuse, without deciding that there was liability for that abuse. We note that the concerns relate to the drafting and not to the principle behind the provision and we are content to clarify the drafting at Stage 2.
72. We are also exploring, in response to other recommendations of the Committee, how to make provision for the standard of proof which will require to be met in order for an application to be successful, with the aim of bringing further clarity and transparency to the Bill and ultimately to the robustness and credibility of decisions of Redress Scotland. We have provided more detail on our proposed approach in an earlier section of this response.

### **COMPULSION TO PROVIDE INFORMATION/EVIDENCE**

93. The Committee also welcomes the Scottish Government's commitment to support survivors to access their records, including the powers of compulsion.

94. The Committee suggests that ahead of the redress scheme being launched, those holding historical care records should review their processes to ensure that for victims/survivors, the experience of accessing their files is as swift and straightforward as possible.

73. We welcome the Committee's endorsement of the proposed approach to assisting survivors in obtaining records, including the provisions in the Bill giving Ministers a power to compel specified information for the purposes of the determination of a redress application or review. It is anticipated that this power will only be used when all other requests by the survivor (or someone working on their behalf) have failed.

We recognise that it is essential for survivors that there is an adequate mechanism to facilitate the provision of records where co-operation has not been forthcoming.

74. As noted in the evidence sessions, we have learned a significant amount about sourcing and accessing records from the operation of the Advance Payment Scheme, this will be of great benefit in offering advice and practical support to applicants for redress.

## **CAPACITY OF APPLICANT**

95. The Committee appreciates that for some victims/survivors, the receipt of a large sum of money may lead to risk, either in relation to their own well-being or the potential for exploitation. The Committee believes, however, that these risks can be managed within the scope of existing legislation and that section 49 of the Bill is therefore redundant and should be removed.

96. The Committee recognises that some victims/survivors will require support to access the redress scheme, including in making an application.

97. As any redress is designed to benefit only victims/survivors (and in some circumstances their next of kin), the Committee believes that those offering support to access the scheme should be carefully vetted and should have no financial interest in the process (for example, a firm offering to make an application in exchange for a percentage of a victim's/survivor's award).

98. As such, the Committee recommends that the Scottish Government should clarify exactly who will be eligible to make an application to Redress Scotland on behalf of a victim/survivor and who will be excluded from doing so.

99. The Committee welcomes the Cabinet Secretary's commitment to offering a wide range of support to victims/survivors and would suggest that individual victims/survivors are best placed to identify the support which would be of most help to them. This could include independent financial advice, advocacy or the provision of written information. Again, consideration should be made of any potential safeguarding concerns, including in relation to any third parties seeking to benefit from assisting victims/survivors to apply to the scheme.

75. Section 49 of the Bill was designed in response to concerns raised by those working with vulnerable groups to ensure that sufficient mechanisms were in place to deal with safeguarding issues that might arise when giving large, lump sum payments to vulnerable people. The provision was not intended to cut across existing legislation or to confer too much discretionary power onto Redress Scotland although we accept the evidence that the Committee has heard that it has been interpreted as doing that.
76. We will therefore consider how we can address the concerns raised, whilst still providing protection for vulnerable applicants. If it is possible to do that whilst removing Section 49 then we will do that, otherwise we will bring forward appropriate amendments to limit the application of the section.



77. We know many applicants to the scheme will have additional vulnerabilities which require extra care and consideration. Whilst we will consider the removal of Section 49 of the Bill as recommended by the Committee, it will be our priority to ensure that all applicants have the support and consideration they deserve in relation to their application and redress payment. We will work with those who originally suggested the provision with a view to providing an alternative way of ensuring suitable support and safeguards are in place. We will explore whether this can be dealt with operationally, by developing guidelines for staff to ensure that any concerns over the exploitation of an applicant can be addressed in an appropriate and proportionate manner.
78. In relation to paragraph 98 of the Stage 1 Report, we acknowledge the Committee's recommendation regarding the need for clarity on who will be eligible to apply to the scheme on behalf of a survivor and who should be excluded from applying on a survivor's behalf.
79. We understand the Committee's concern and we will consider how this information could be effectively dealt with in guidance. There is a need for care to ensure that we do not unintentionally restrict an applicant's choice of who they can ask to apply on their behalf. Therefore we will consider this recommendation further as part of our ongoing work on scheme design.
80. For survivors, having someone to apply on their behalf is a form of assistance and support which helps to make the application process less traumatic and manageable. It also gives applicants additional support if they have accessibility needs. This has been a fairly common request in the Advance Payment Scheme and we would like to continue to offer this option to survivors in the statutory scheme. Our intention is that those working on the redress scheme will raise their concerns if they have reason to doubt the intentions or actions of the person applying on behalf of an applicant. This would also apply in instances where a power of attorney or financial guardian was applying on behalf of an applicant and their intentions or actions drew concern. We commit to providing further information on the practicalities of this prior to Stage 2.
81. We welcome and agree with the Committee's acknowledgment of the importance of having a wide range of support available to applicants and the need for this support to be tailored to the individual's choice. As previously mentioned, we will continue to work with survivors and existing support services to create the best possible package of support for applicants to the redress scheme to ensure our applicants are safe and supported.

## **COMPOSITION OF REDRESS SCOTLAND PANEL**

100. The Committee recognises the value in Redress Scotland panel members fully understanding the potential barriers victims/survivors might face in applying to the redress scheme, particularly in relation to how past trauma may manifest itself.

101. The Committee considered whether there should be a requirement for someone with survivor experience to appear on each Redress Scotland panel.

102. The Committee's view, however, is that, whilst there should be no barrier to a suitably qualified victim/survivor applying to become a panel member, there should not be a presumption towards each panel having victim/survivor representation.

103. Instead, the Committee encourages the Scottish Government to explore ways in which the “strong survivor voice” identified in the Bill's Policy Memorandum and the Survivor Forum can best inform the development of Redress Scotland's work, including how they will ensure survivors are engaged in the setting up and ongoing operation of the scheme.

82. We are committed to survivors’ voices remaining an integral part of the Bill process. We will also ensure that survivors’ needs are at the heart of the design and development of the scheme, including the development of the application process and support mechanisms. We will do this by engaging directly with survivors to test out prototype application materials and processes and iteratively improve them based on their feedback. This research will build upon what we already know from past consultation exercises and the Advance Payment Scheme, as well as engagement with third sector survivor support organisations, and with public authorities delivering redress schemes elsewhere. All engagement with survivors will be carried out by trained, specialist staff to ensure participants are treated with dignity and sensitivity.
83. In the coming months, we plan to work with survivors to develop a Survivor Forum. We believe that this will offer the best medium for survivor input to the delivery of the scheme after it opens for applications.

104. The Committee recognises that Redress Scotland's key role is as a decision making body, with the administrative functions of the redress scheme fulfilled by the Scottish Government. The Committee acknowledges that a Chair and at least five other panel members will be appointed to Redress Scotland, with a small secretariat supporting their work.

105. The Committee requests further clarification from the Scottish Government of how Redress Scotland will be governed, including measures to scrutinise its performance and hold panel Members accountable across the lifetime of the scheme.

84. Redress Scotland will be subject to a number of statutory duties and other obligations which will ensure its good governance, without compromising its independence.
85. It will have a “framework document” which sets out the parameters within which it must operate, and the accountability and governance regime with which it must comply. The framework document will provide for the sponsorship relationship with the Scottish Government, roles and responsibilities (e.g. for the Chair, board members and the accountable officer), and audit, reporting and performance management requirements. Once agreed by the Scottish Ministers, the framework document will be published on the Redress Scotland website and copies will be provided to the Scottish Parliament Information Centre.

86. The Bill requires Redress Scotland to produce a corporate plan which sets out its objectives (schedule 1, paragraph 15 of the Bill). This will provide the basis for measuring performance, monitoring finances and reporting progress. The corporate plan will be agreed by the Scottish Ministers, published on the body's website and laid before Parliament. In its annual report (which requires to be published and laid before Parliament) Redress Scotland will provide an assessment of the achievement of its objectives, referencing the outcomes set out in its corporate plan (schedule 1, paragraph 17(1) of the Bill).
87. Redress Scotland must also comply with the Public Finance and Accountability (Scotland) Act 2000, which provides for the proper handling and reporting of public funds. The Scottish Public Finance Manual, issued by the Scottish Ministers, will also be directly applicable to Redress Scotland. The Scottish Government will complete an annual statement of assurance, regarding Redress Scotland's operations, corporate documentation, effectiveness and financial practices. A copy of Redress Scotland's annual accounts must be sent to the Scottish Ministers and then to the Auditor General for Scotland for auditing (schedule 1, paragraph 16 of the Bill).
88. The Bill as introduced does not provide for a Chief Executive, as we originally considered that Redress Scotland would not need this, given its size. However, having considered the issue further (including with the Education and Skills Committee), we propose to recruit and appoint one. We agree this will promote good governance, with the panel members holding the Chief Executive to account and the Chief Executive remaining responsible for the efficient use of resources in line with relevant legislation, guidance and corporate plans.
89. Redress Scotland panel members will be selected, in compliance with requirements for gender representation under the Gender Representation on Public Boards (Scotland) Act 2018. Once appointed, panel members will be provided with *On Board: a guide for members of statutory boards*, published by Scottish Government, to help them understand their role and fulfil their responsibilities effectively. A comprehensive induction and training schedule will also be developed to support them.
90. As Redress Scotland will be listed in schedule 3 of the Ethical Standards in Public Life etc. (Scotland) Act 2000, it will be required to produce a code of conduct for its members. This will follow the Model Code of Conduct for members of devolved public bodies, approved by the Parliament in 2014. Its code of conduct will need to be approved by the Scottish Ministers and thereafter Redress Scotland members will need to comply with it. The Ethical Standards framework is overseen by two independent organisations, the Standards Commission for Scotland and the Commissioner for Ethical Standards in Public Life in Scotland, who will consider any alleged breaches of the body's code. The 2000 Act will also require Redress Scotland to create a register of members interests.
91. Redress Scotland will be subject to additional legislation which is also applicable to other public bodies and intended to ensure transparency and good governance, such as the Freedom of Information (Scotland) Act 2002, under which the body will be required to develop a publication scheme, to be approved by the Scottish Information

Commissioner, and respond to specific requests for information. Redress Scotland will also be required to create a records management plan and manage public records in compliance with the Public Records (Scotland) Act 2011.

92. Additionally, under the Scottish Public Services Ombudsman Act 2002, the body will require to develop a complaints handling procedure, which complies with the model developed by the Scottish Public Services Ombudsman.

## **ROLE OF INSURERS**

106. The Committee recognises that, as the redress scheme has lower evidential thresholds and will not establish fault or liability in relation to abuse experienced by an applicant in the way that a civil court would, it is currently very unclear which, if any, insurance providers would pay for an organisation's contribution to the scheme and on what basis that payment would be made.

107. The Committee notes the Scottish Government's view that the position of insurance companies 'is a significant factor for many potential contributors, including some who may otherwise struggle to make the fair and meaningful contributions required to justify the extension of the waiver to them' and that the waiver scheme (discussed later in this report) is predicated on the idea that organisations will be incentivised to contribute to the redress scheme as victims/survivors will not be able to raise a civil action once the waiver is signed.

108. The Committee remains unconvinced, however, that without the contributions of insurers, this provision will function as anticipated, as whilst insurers would be likely to pay for a civil award (where liability is established), there is no such certainty in relation to redress payments.

109. Given the voluntary nature of the redress scheme, the Committee has heard no evidence to suggest that insurance companies will contribute to the scheme on behalf of their policyholders, meaning the full costs of contributions from care providers are likely to have to be met from their own funds.

110. The Committee therefore recommends that the Scottish Government revisits this key element of the Bill, in light of the evidence the Committee has heard.

93. We believe there is collective benefit to the insurance sector supporting contributions to the Redress Scheme and assisting organisations to face up to their moral responsibility and the delivery of justice to survivors through an alternative to an adversarial court type process.
94. We recognise that, just as we cannot compel contributions in the absence of liability, we cannot compel insurers to fund redress payments on behalf of these organisations. We encourage insurers to support organisations seeking to participate in the redress scheme and be part of a collective, national response to the widespread failures of the past.
95. We note the point raised by the Committee that whilst insurers would pay for a civil court award (where liability is established), there is no such certainty in relation to

redress payments. That reflects evidence submitted by the Association of British Insurers' suggesting 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.

96. The redress scheme is not founded on processes to determine liability. The scheme takes a different approach to evidence and provides a faster, more survivor focussed and non-adversarial route to financial payment than court.
97. Section 34 of the Bill intends to put beyond doubt that Redress Scotland will not make findings of fault or liability, such as those found in court judgments, when making determinations on redress applications. That is not the purpose of the scheme.
98. We have however noted the concerns raised and are exploring, in response to this and other recommendations of the Committee, how we can reflect the standard of proof on the Bill, bringing further clarity and transparency to the Bill and ultimately to the robustness and credibility of decisions of Redress Scotland.
99. We appreciate that despite the complex and fractured historical insurance landscape, where organisations have varied amounts of cover which may not apply consistently across the time periods covered by the scheme, the position of insurance companies is a significant factor for many potential contributors. The Scottish Government cannot intervene in contractual relationships we were not party to, but we believe it is in the interests of the insurance sector to support contributions to the Redress Scheme, and we engage with them to that end.
100. Those with responsibility for the care of children in the past have a moral responsibility to do the right thing today and have the opportunity to be part of a national, collective endeavour to address the wrongs of the past with compassion, integrity, fairness and respect. We will work with organisations to make sure that the fair and meaningful contribution can be structured over time to be sustainable, protecting current services without compromising the moral responsibility to do the right thing for survivors.

## **SUSTAINABILITY OF CARE PROVIDERS**

111. The Committee has heard evidence that, as currently envisaged, the Scottish Government's approach towards 'fair and meaningful' contributions will mean that some organisations which would otherwise have been willing contributors to the scheme, will ultimately choose not to contribute.

112. The Committee recognises that there is a moral obligation on care providers responsible for historical abuse to contribute to the scheme. In order to maximise participation of such organisations, the Committee recommends that the principles of 'fair and meaningful' be amended to 'fair, meaningful, affordable and sustainable' and the methodology used to calculate these payments should be transparent and appear on the face of the Bill.

113. The Committee recommends that this methodology should specifically take into account a) any payments or contributions in kind an organisation may have already made to provide redress/remedy to victims/survivors and b) the affordability of the payment, specifically in relation to whether it will negatively impact on an organisation's ability to continue to deliver services today and in the future. Consideration should also be made of whether payments could be 'capped' to allow organisations certainty that they will not exceed an agreed level.

101. In seeking to deliver Scotland's national redress scheme, we look to those responsible for care in the past to collectively play their part in such a significant national endeavour. The design of the scheme is intended to encourage and facilitate contributions to redress payments to survivors from those organisations who wish to respond to their moral obligations. In developing this Bill, the approach we have consistently taken is that addressing the harms of the past should not create further harm. This is significant in relation to a number of the points raised by the Committee in this section.
102. We have undertaken an extensive programme of engagement with care provider organisations and other relevant bodies in order to fully understand their circumstances and their views on the development of a redress scheme. This is in the context of consultative exercises that have strongly confirmed that survivors wish to see providers contribute to any redress scheme. Indeed, the pre-legislative consultation for this Bill highlighted very clearly how important and emotive an issue this is for a great many survivors.
103. We acknowledge the challenging financial circumstances that many charitable organisations find themselves in, particularly in relation to the current pandemic and its impact on charitable giving. Many of our discussions with organisations have focussed on how the provision of contributions can be made meaningful but also manageable within the organisation's operating context and reflecting the needs of their current service users. We also recognise that the issue of addressing historical child abuse in care through financial redress is characterised by uncertainty as the time periods involved and sensitive subject matter make application rates very difficult to predict. It is important then to consider how that uncertainty should be balanced between all organisations who recognise their moral obligation to contribute to addressing the harms of the past as part of a collective national endeavour.
104. We welcome all efforts by care providers past and present and all other relevant organisations to provide redress in all its appropriate forms. The Bill takes account of previous awards made to survivors when considering the assessment of redress payments. However, we do not believe that non-financial redress can be accounted for within an assessment of a meaningful provider contribution. With regard to "in kind" contributions, or non-financial redress, for example in the form of providing apology or paying for an individual to have access to therapeutic support, we would be concerned about any potential adverse impact on survivors were they to discover that support given freely in the past was now being considered as part of a financial transaction. It would also be extremely challenging to place a financial value on the many and varied forms of non-financial redress offered in the past and to decide

where the lines would be drawn about what should or should not be considered within this category.

105. We acknowledge the Committee's request that consideration be given to the issue of capping payments to the redress scheme. Given the experience of other redress schemes, this matter must be considered with great care. As the Committee heard in evidence, in Ireland capped contributions were agreed on the basis of an estimation of redress payments that would be made, but that estimate turned out to be significantly lower than actual redress payments made, meaning the contributions initially agreed were considered to be woefully inadequate by many. Capping the contribution shifts all of the risk and uncertainty onto the Scottish Government and ultimately the taxpayer. Any move towards the introduction of a cap would need to be undertaken against a backdrop of the best available evidence but considerable uncertainty would remain. We also note that in terms of future litigation, organisations already face significant uncertainty but at an even higher cost for them and for survivors, as well as the potential for significant delay
106. We note the committee's recommendation that the Fair and Meaningful Principles be amended to include affordability and sustainability. The Scottish Government will carefully consider the potential benefits of amending the Fair and Meaningful principles in this way and will develop options to maximise provider participation in advance of Stage 2.
107. We also note the Committee's recommendation that the methodology to calculate "fair, meaningful, affordable and sustainable" financial contributions should appear on the face of the Bill. We do not consider that this is appropriate given the level of detail that would be required, given the wide ranging circumstances of a large number of possible contributor organisations. However we will consider alternative routes to provide the transparency that the Committee is seeking including laying the final set of principles before the Scottish Parliament.
108. We will write to the Committee with further proposals regarding the Fair and Meaningful principles which must be published in accordance with section 13 of the Bill. Such proposals cannot be considered in isolation – the issue of waiver is inextricably linked, on which we provide further information below.

## **PROPOSED CHANGES TO CHARITY LAW**

114. The Committee recognises some of the challenges posed by the changes to charity law set out sections 14 and 15 of the Bill to charitable organisations who may wish to contribute to the redress scheme.

115. The Committee also notes that it will be impossible for trustees to agree to their charity participating in the scheme where this would breach their duties to safeguard the organisation's longer-term financial viability.

116. The Committee heard that a key sticking point is the Scottish Government's suggestion that contributors to the scheme will make both an initial payment and, depending on the number of victims/survivors who come forward, potentially a number of further contributions over the lifetime of the scheme. Without any

certainty from the outset as to the number of additional payments required, the overall cost of these and when they will require to be paid, trustees will be left with no choice but to advise against their organisation's involvement in the scheme.

117. Whilst the Committee appreciates that these changes have been mooted as a means of allowing more charitable organisations the flexibility to participate in the scheme, it is concerned that it may, in fact, have the opposite effect and deter otherwise willing organisations from taking part.

118. The Committee heard evidence from some care providers that attempting to use restricted funds for any other purpose than a donor's wishes would potentially undermine charities' relationships with funders and potentially lead to a reduction in future funding.

119. The Committee recognises that engagement with the Bill will create a potential conflict for charity trustees and therefore recommends that the Scottish Government responds to the evidence received by the Committee on this aspect of the Bill ahead of the Committee's consideration at Stage 2.

109. We note the Committee's comments in regards to Sections 14 and 15 of the Bill and the recommendation to respond to the evidence given to the Committee.
110. We have listened to the evidence of care providers and other stakeholders on Section 15 of the Bill relating to restricted funds regulations and, whilst the original policy intention was to empower charities and remove potential barriers to participation, on reflection, we are content that for the purposes of maintaining confidence in charitable donating, Section 15 should be removed from the Bill.
111. We have also heard evidence from some that it will be impossible for trustees to agree to their charity participating in the scheme where this would breach their duties to safeguard the organisation's longer-term financial viability. Whilst we understand this position, there are some charities who do wish to contribute to the scheme and are in a position to make a contribution.
112. We maintain that Section 14 is necessary in order to allow those charities who do wish to do the right thing and contribute to the scheme, to do so quickly and easily. Given that contributing to the scheme is voluntary, this is considered to be a proportionate measure.
113. There are potential barriers within the Charities and Trustee Investment (Scotland) Act 2005, for example, the list of charitable purposes (which does not include a contribution to the redress scheme) and the charity test, that prevent a charity from being able to make a contribution to the scheme. Section 14 provides that making a financial contribution to the redress scheme will be treated as being in furtherance of the charity's charitable purposes and consistent with the charity's constitution and that making such a contribution is to be treated as providing public benefit.
114. The reason that we took this approach is that the redress scheme is a one-off, exceptional, time-limited scheme which is designed to provide some measure of



financial redress for the historic wrong of child abuse, and for which many survivors consider that some charities bear a large measure of responsibility given the types of relevant care setting covered by the Bill. We consider that there is sufficient policy justification for this legislative change.

115. We have fully engaged with OSCR in drafting this provision. We maintain that it is the most workable way of enabling those charities who do wish to contribute to the scheme, to be able to do so. Given that the lifetime of the scheme will be 5 years, albeit with the prospect of being extended, we would not wish to hinder those organisations who do want to contribute from making a swift and easy contribution.

## **WAIVER**

120. Whilst the Scottish Government's stated intention is to create a redress system which would offer more choice to victims/survivors, the overwhelming view conveyed to the Committee by victims/survivors was that the waiver restricted their choices and therefore they felt it should be removed.

121. The Committee also spoke to many care providers at Stage 1 and heard no evidence to suggest that the waiver would incentivise them to participate in the redress scheme.

122. The Committee therefore believes that the overwhelming evidence is that the waiver provision, as currently drafted, will not function in the way in which the Scottish Government hopes. The Committee would welcome further clarity from the Scottish Government as to the primary policy objective of the waiver, i.e. has it been included as a means of encouraging payments from care providers, of avoiding 'double payments' to victims/survivors or both?

116. We thank the Committee for its consideration of waiver and welcome the opportunity to clarify the primary policy objective behind its inclusion within the Bill.
117. The primary policy objective of the waiver is to facilitate the delivery of a redress scheme that responds to the wishes of survivors by including provider contributions. Currently, the only way for survivors to obtain financial redress from those responsible for their care when they were abused, is to raise and win a civil action or to agree an out of court settlement. We are not seeking to persuade those who want to choose that route away from doing so, indeed in recent years we have brought forward changes in legislation to make litigation more accessible to survivors of historical child abuse.
118. However, notwithstanding those changes, litigation is not possible or preferable for all survivors. Survivors have told us that they want a redress scheme as an alternative route but have also been very clear that the scheme should include provider contributions. For many survivors, the quality of the redress scheme we design, will, to a large part, depend on seeing their provider make a fair and meaningful contribution.

119. Our balanced judgement, is that the inclusion of waiver is the most effective way to secure contributions and facilitate the meaningful participation of organisations in the national redress scheme.
120. We have sought to make the waiver fair. Crucially, the waiver only applies to those organisations that make a fair and meaningful contribution.
121. A survivor would not have to waive their rights to pursue litigation where a provider does not contribute. In those circumstances, there are no offset provisions within the legislation to allow any subsequent court award to be reduced by the redress payment already obtained – because we do not consider that a provider who has not contributed to the scheme should be able to benefit by having an award made against them reduced. So where a survivor’s care provider did not contribute to the redress scheme, the survivor would be entitled to receive a redress payment and then also to pursue litigation and, if successful, they would be entitled to keep both payments.
122. Given the sensitive nature of this policy, the importance of contributions to survivors and the significant sums of taxpayer expenditure involved, we have endeavoured to fully explore all the evidence available to us on the best way to secure meaningful contributions to the scheme. As the Committee notes, this has included looking at examples of other redress schemes being delivered elsewhere, and we have not found any examples of contributions beings secured without a waiver.
123. We are grateful for the Committee’s focus on waiver in its evidence sessions and we acknowledge that the Committee heard a wide range of views leading the Committee to raise a number of questions as to the effectiveness of the waiver to secure contributions.
124. In addition to the oral evidence heard, we would also point to the written evidence submitted to the Committee by several care providers which made direct reference to the significance of the waiver from the perspective of organisations considering the provision of financial contributions. For example:
- the written submission from Aberlour states: *‘We welcome the inclusion of waiver provisions within the Bill which would achieve fairness between the survivors of child abuse and care providers. The requirement for the signing of a waiver would not only create legal certainty but would be a significant step towards bringing a form of closure to survivors.’*
  - the written submission from Quarriers asserts that: *‘Quarriers supports the Scottish Government’s proposed waiver because it prevents compensation being paid twice and creates the incentives necessary to support the participation of insurers.’*
  - the Crossreach / Church of Scotland evidence says that: *‘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.'*

125. Given the breadth, and at times conflicting nature, of some of the evidence heard by the Committee in its examination of waiver, we will reflect on this issue in advance of Stage 2, to ensure that we remain satisfied that it is the best way to achieve the policy objective of obtaining provider contributions to the redress scheme.

123. The Committee is concerned that what may at first appear to be a binary choice for victims/survivors (whose abuse took place after 1964) between the redress scheme and civil justice routes, in fact requires a range of factors to be taken into account including victim/survivor finances, the ability for victims/survivors to explore and understand the consequences of signing the waiver both now and in the future, and (understandable) victim/survivor mistrust of authority.

124. The Committee further notes that, as currently drafted, the Bill requires victims/survivors to make key decisions with significant consequences (e.g. in relation to whether to accept an award and sign a waiver) within a matter of weeks, at a time when they may be highly stressed and/or where it may be difficult to source appropriate advocacy or legal support.

125. For example, section 47(3) of the Bill states that an offer of a redress payment is valid only for 12 weeks from the date on which the offer was received by the applicant and if the applicant wishes a review of this decision, they must request this in writing to Scottish Ministers within 4 weeks of receiving that offer.

126. Whilst there are provisions built into the Bill to allow for those decision-making periods to be extended in exceptional circumstances, it is not clear what might constitute such circumstances and the Committee would appreciate further detail of this, ahead of Stage 2.

126. The timescales in the Bill as introduced were intended to reflect the fact that redress is an alternative to civil litigation, with processes designed with the needs of survivors at their heart, to help and support access to redress payments through trauma informed practices significantly quicker than civil litigation. We thank the committee for highlighting the evidence heard that the periods currently provided for in the Bill for acceptance of an offer of redress, and for request of a review, could potentially cause unnecessary additional distress for applicants.
127. Throughout development of the redress scheme provided for by the Bill, it has been a priority to deliver justice to survivors in a way which seeks to meet their needs. For many, it will be a significant step to apply for a redress payment. In considering whether to accept an offer of payment, it is important that survivors do not feel rushed, that they are able to receive independent legal advice and carefully consider their choices.

128. On considering the evidence the committee has heard, we will commit to bring forward amendments at Stage 2 to increase the 12 week acceptance period to 26 weeks/6 months, and the 4 week review request period to 8 weeks.
129. The provisions around setting longer acceptance periods where there is a good reason for that, is intended to account for circumstances such as the applicant being in hospital and unable to respond within the timescales. We hope that this flexibility, as well as the commitment to extend the time periods reassures the Committee that survivors will have the time they need.
130. We do not wish survivors to feel under any pressure to accept redress payments and sign the waiver, and nor are we trying to influence survivors away from civil litigation. The scheme is about providing choice. We want the waiver to operate fairly and transparently.
131. We have listened carefully to the concerns and criticisms of the waiver, which we hope is demonstrated by our commitment to extending the time periods.
132. We have also considered concerns we have heard about the waiver attaching to an interim payment, before the survivor knows what level of the final award they are to be offered. We are considering ways to address that and it may be that by relying on the ability of Redress Scotland to prioritise applications from elderly and unwell survivors, we can dispense with the need for interim payments. This would mean that applicants for individually assessed payments, would only be asked to sign a waiver when they know what their full award has been assessed as. We will consider this further and bring forward an amendment at Stage 2 if appropriate.
133. We have also heard the concerns that as the Bill stands, once granted, waivers cannot be revoked, even if an organisation included on the scheme contributor list defaults on what they agreed to pay. We have tried to minimise this risk as much as possible in the design and structure of contributions (by allowing providers to be removed from the contributor list; by having the power in Section 12(8) of the Bill to pursue contributions agreed but unpaid as a debt due to the Scottish Government; and to demonstrate good faith, by seeking an initial, albeit not full (to assist affordability), payment before an organisation is placed on the contributor list).
134. However, we have listened carefully to the concerns expressed that an applicant, may choose redress precisely because the scheme has received provider contributions; for some this will be a preferable way to hold providers to account and receive financial payments from them. For those survivors, it would be unjust if, in good faith, they signed the waiver but the organisations defaulted and failed to pay. We are therefore exploring ways to further strengthen the waiver, such as, for example, enabling its revocation in cases of default, with a view to bringing forward an amendment at Stage 2.

## **LEGAL ADVICE/LEGAL FEES**

<p>127. The Committee also recommends that the Scottish Government revisit the points at which legal advice will be available to victims/survivors to ensure that it is proactively offered when they need it most, rather than asking</p>
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victims/survivors to claim after the fact. The Committee also recommends that the Scottish Government should put safeguards in place to ensure that third parties are unable to benefit financially from assisting a victim/survivor to make an application to the scheme.

135. It is correct to say that for reasons of fairness, there is a particular point in the application process at which all applicants will be strongly encouraged to obtain independent legal advice; that point is before accepting an offer of a redress payment and signing a waiver. We understand that it is crucial that all survivors have access to the necessary information and independent advice before making the decision to sign a waiver. Funding will be provided to make sure all applicants have an equal and meaningful opportunity to obtain such advice without having to cover the costs of this themselves.
136. However Section 89 of the Bill makes clear that funding for legal advice earlier in the process is also provided, which means all survivors who apply to the scheme will have access to free legal advice throughout the process, should they wish to take this up. Applicants and potential applicants will be made aware of this.
137. It is however important to note that the redress scheme has been designed as an alternative to litigation and the application, assessment and review processes reflect that. There will be no assessment of liability (so evidence will not be required to establish it), individual applications will not be challenged by care providers and oral evidence will not routinely be required from every applicant. Case workers will be able to provide those survivors who want it with trauma-informed support and assistance throughout the application process. The application forms and guidance material will be as straightforward and as accessible as possible. Survivors will not need the assistance of a solicitor to apply for redress. Therefore the scheme provides an opportunity for all survivors to access free legal advice, but, crucially, the survivor can choose whether they apply for redress with or without legal representation.
138. We recognise that survivors may want the assistance of a solicitor from the outset of their application and funding will be provided to allow that. The scheme will be designed to support an applicant's choice in how to apply.
139. We also recognise that some survivors may only wish to seek advice on certain aspects of their application, such as a perceived lack of evidence, issues around serious previous convictions or matters relating to previous payments. Again, the Redress Scheme will fund this type of legal advice as it is being incurred in connection with a redress application, therefore providing a survivor with a choice around how much legal advice they wish to seek in support of their application.
140. We note the Committee's comments in relation to having safeguards in place to prevent third parties from benefiting financially from assisting a survivor with an application. We will look for ways to communicate the support offered by the scheme itself to assist applicants, or those thinking of applying, with their application. We would hope that reduces the need for applicants to pay for assistance or the likelihood that they would.

141. Legal fees are paid directly to the solicitor so, from the outset, the applicant should have the expectation of retaining their full redress payment. As noted above, these are complex issues and we will continue to explore the full range of safeguarding mechanisms that are open to us.

128. The Committee recognises the experiences of other redress schemes, who found costs escalated often due to spiralling legal costs, and therefore supports the capping of legal fees in relation to this scheme.

129. However, the Committee also takes on board the views of stakeholders that the current limits proposed for legal advice may be too low. The Committee encourages the Scottish Government to continue dialogue with stakeholders to ensure that the legal advice offered by the scheme can fully meet the needs of victims/survivors.

142. We welcome the Committee's endorsement of the approach to capping legal fees.

143. The illustrative caps included in the Financial Memorandum have been informed by the level of legal fees paid in other redress schemes but it is difficult to make direct comparisons. The redress scheme proposed in the Bill deliberately seeks to create a scheme that is less adversarial and solicitor led than has been seen in other redress schemes. In this way we see the scheme as a genuine survivor focussed alternative to court, not a scheme which mimics the processes of litigation. Accordingly, solicitors will have a different role.

144. We will continue to engage with stakeholders on the appropriate caps to be set in secondary legislation. We also note the Law Society's evidence that fixed fees rather than capped maximums would prove administratively easier for all concerned. We intend to explore this in advance of Stage 2.

## **ALTERNATIVES TO THE WAIVER**

131. The overwhelming evidence received by the Committee from both victims/survivors and potential contributors suggests that the case for a waiver has not been adequately made. The Committee recommends that the Scottish Government considers removing the waiver and find another way to avoid making double payments to victims/survivors.

132. In making this recommendation, the Committee acknowledges that it is asking the Scottish Government to take a different path to other redress schemes.

133. The Committee requests that, where the Scottish Government believes a waiver should still remain integral to the scheme, it provides the Committee with details of exactly how it will incentivise care providers to participate, given the evidence the Committee has heard to the contrary. This information should be available ahead of Stage 2.

145. Developing a redress scheme that acknowledges and balances the various interests, complexities and sensitivities that are inherent to such a significant issue is

not a straightforward task. We welcome the Committee's careful consideration of the important issue of the waiver and potential alternatives to it.

146. We do not believe organisations responsible for the care of the children at the time of the abuse will contribute in any meaningful way to the redress scheme unless they can be assured that they will not subsequently face action in the civil courts in respect of the same abuse.
147. We have considered the potential for workable alternatives to the waiver, particularly the issue of off-setting which has been the focus of some representations to the committee. Analysis of off-setting identified numerous difficulties including the fact that organisations could not afford to make a significant contribution to redress if they also had to hold money back to defend and settle litigation in the future.
148. Significantly, for a scheme that is designed to meet the needs of all survivors, our judgement is that off-setting would mean that there would not be an effective mechanism to obtain a fair level of payment from care providers. This would mean that the scheme, in not receiving anything other than nominal contributions (if any at all), would in particular fail to deliver a mechanism which could provide meaningful recognition of the abuse suffered by:
  - pre-64 survivors
  - those survivors who do not have the evidence to go to court
  - those survivors who do not want to go to court
  - those survivors who are elderly or unwell and who might not live long enough for a court action to conclude.
149. We want to design a redress scheme which effectively delivers the meaningful participation of organisations that are morally responsible for the past.
150. Our analysis to date has led us to conclude that, while there is no perfect solution to the issue of incentivising meaningful contributions, the waiver presents the most viable opportunity to secure a scheme where survivors receive redress from providers without facing the processes and potential traumas of civil court. The significance of the waiver is reflected in the written evidence of several organisations including the Scottish Charity Regulator (OSCR):
151. *We consider the requirement for any applicant to sign the specified waiver to be extremely important for charities.....Without the certainty that a waiver could provide, it would be more difficult for charities to commit to a significant contribution, as there would still be a risk of awards of damages being made against them by the Courts. If the charity did not have relevant insurance cover, these payments would have to be made from the charity's reserves and this could have a detrimental effect on the charity, its services, and therefore its beneficiaries.*
152. We do however acknowledge the evidence heard by the Committee and will continue to reflect on our analysis in advance of Stage 2.

## NEXT OF KIN PAYMENTS

134. The Committee welcomes the inclusion of the next of kin payment in the Bill as a means of both recognising the abuse experienced by a survivor and the impact this may have had on their family.

135. The Committee is open to the idea that higher levels of next of kin payments may be justified in certain circumstances and recommends that the Scottish Government revisit the next of kin provisions in the Bill to establish whether individualised payments could also be available to next of kin, where there is sufficient evidence to merit this. Individualised payment levels are discussed in more detail in the 'Draft Assessment Framework' section of this report.

153. We welcome the support from the Committee on the inclusion of provision in the Bill for next of kin payments. While we understand that next of kin may have been negatively impacted as a result of the abuse suffered by the survivor, the purpose of next of kin payments is to recognise the abuse suffered by the deceased survivor and to acknowledge that the survivor died before having the opportunity to receive a redress payment.
154. We are satisfied that the level of payment within the Bill for next of kin payments is the appropriate approach to achieve that purpose and provides the right level of recognition, while maintaining our primary focus on the survivors living today.
155. Financial redress is not the only form of acknowledgement and other aspects of the Scottish Government's response to historical child abuse in care, such as the Scottish Child Abuse Inquiry, looks at the experience of all those who suffered abuse.
156. We will also explore how we can deliver apology to next of kin, which we know is an important element of non-financial redress. We are still developing our proposals as to how this can best be delivered.

136. The Committee notes the importance of next of kin payments to both victims/survivors and relatives of deceased victims/survivors, and that the current cut-off point of 17 November 2016, appears likely to severely restrict applications. The Committee therefore recommends that the eligibility date for next of kin payments should be aligned with eligibility for the rest of the redress scheme.

157. The next of kin payment within the redress scheme aims to acknowledge those survivors who may have formed a reasonable expectation that a redress scheme was to be established, and that they would meet the eligibility criteria, but who died before the scheme opened, or before their application could be fully considered. We had considered that such a reasonable expectation could have been formed on the date the Deputy First Minister made a statement to the Scottish Parliament on 17 November 2016 announcing a formal consultation on redress.
158. However, we note the recommendations made by the Committee and the evidence received during Stage 1 that the current cut-off date for next of kin applicants is likely



to restrict applications including some of those who fought and advocated tirelessly for a redress scheme. We have reflected on this and consider that 1 December 2004, the date of Jack McConnell's apology may also represent an appropriate date for the forming of a reasonable expectation of eligibility to any future Government scheme aimed at providing recognition and redress to survivors of historical child abuse in care in Scotland. This is the time at which Scotland began to face up to its past and to recognise the experience of survivors of historical child abuse in care. An appropriate Stage 2 amendment will be brought forward for consideration.

137. The Committee is content that the evidential requirements for next of kin payments mirror those in place for victim/survivor applications.

138. The Committee recommends that the same principle should be applied should this section be amended to allow next of kin to make individualised payment applications.

159. We thank the Committee for endorsing our approach in applying the same evidential requirements to next of kin and survivor applications. This process ensures the robustness and integrity of the scheme is maintained. As noted when Scottish Government officials gave oral evidence to the Committee on 30 September 2020, we are giving careful consideration as to how next of kin applicants can meet the necessary evidential requirements. We are of the view that a next of kin applicant simply providing evidence that they were told by their partner or parent that they had suffered relevant abuse, would not be sufficient to maintain the integrity of the scheme. We anticipate that guidance will outline that the next of kin applicant will have to provide evidence of a documented account from the survivor, such as a statement to the police or another disclosure that had been appropriately recorded.

160. As noted above, our position on individually assessed payments for next of kin is that it would not be in keeping with the primary purpose of the scheme, which is to provide recognition and redress to survivors who are still living with the impact of abuse.

139. The Committee recommends that to ensure consistency with section 26(2)(a), section 26(2)(b) of the Bill should be amended to ensure that where there is no surviving spouse or civil partner, that a cohabitant should be required to have lived with the victim/survivor for a minimum period of 6 months before being able to apply for a next of kin payment ahead of the deceased victim's/survivor's children.

161. We thank the Committee for raising this, and we will ensure that an appropriate Stage 2 amendment will be brought forward on this matter. This amendment will require all cohabitant applicants to demonstrate a period of 6 months' cohabitation with the survivor immediately before the survivor's death in order to adopt a consistent approach in all cases.

## **PAYMENTS TO SURVIVORS WHO HAVE COMMITTED SERIOUS OFFENCES**

140. The Committee believes that a balanced approach has been taken towards the question of whether those with serious convictions are eligible to receive a redress payment.

141. The Committee recognises that there are often patterns to offending behaviour and that some of this behaviour may be rooted in trauma. However, the Committee also recognises that there are some crimes so serious in nature that it may not be in the public interest for an individual to benefit from a redress scheme payment. The Committee believes that the approach taken in the Bill towards applicants with serious convictions is therefore appropriate.

142. The Committee agrees that it is important that such decisions are taken on a case by case basis, as set out in the Bill, rather than all applications automatically being denied. The Committee recommends that any guidance accompanying this section of the Bill should be trauma-informed and reflect the evidence the Committee heard regarding serious offences directly linked to abuse (e.g. the murder or serious assault of an abuser).

162. We note the Committee's careful and sensitive consideration of this aspect of the Bill. We welcome the Committee's conclusions that the approach adopted in the Bill is appropriate and share its understanding of the importance that future guidance fully recognises the complexities of these issues.

## **SUPPORT NEEDS OF VICTIMS/SURVIVORS**

143. The Committee recommends that the Scottish Government takes a trauma informed approach towards the provision of support to victims/survivors and next of kin. Support should be available to those who are considering accessing the scheme, are in the process of making an application or who require after-care, having already made an application. Specific note should be taken of the potential impact on victims/survivors when accessing their care records.

144. Providers of such support should be carefully vetted to ensure that victims/survivors are safeguarded throughout the whole process.

145. The Committee recommends that victim/survivor choice should be at the heart of any support mechanisms created by the Bill, tailoring support to what victims/survivors themselves would find most helpful. This should offer the flexibility to allow victims/survivors to access existing support networks, where they would find this beneficial.

146. The Committee welcomes the Scottish Government's commitment to create a Survivor Forum to inform the development of many processes set out in the Bill. The Committee suggests that the Survivor Forum should play a key role in developing the support mechanisms victims/survivors will require to access the redress scheme.

147. Victims/survivors generally spoke very highly of the support provided to them by the Scottish Child Abuse Inquiry (SCAI). The Committee recommends that the Scottish Government should engage with the SCAI team in order to understand their approach towards support.

163. We agree with the recommendations and suggestions from the Committee. We plan to build on our experience of the Advance Payment Scheme, a service that understands trauma and its impact, the need for a skilled workforce as well design and delivery that is trauma informed and where choice where possible is a core component.
164. We are keen to continue to engage with all relevant sources that will help shape the delivery of support and are pleased that the Committee has highlighted the value of securing views from the new survivor forum and recommended engagement with the SCAI support team. We are already working on design and implementation to ensure in a broader sense that relevant learning, survivor views and the experience of others can be harnessed. We plan to work with survivors to help shape the survivor forum and intend that when it is established, it will play a key role in shaping developments and contribute to continuous improvement.
165. We will explore the vetting process suggested by the Committee. Given we will be responding to a broad range of different individual needs and a spectrum of different providers we will need to think carefully about how good practice guidance, agreed service specifications or standards of delivery and monitoring processes might go some way to achieving this.

## **APOLOGIES/NON-FINANCIAL REDRESS**

148. The Committee recognises that non-financial redress often extends far beyond the provision of emotional support and a meaningful apology and is something that should be tailored to victims'/survivors' individual needs. The Committee recommends that the Scottish Government reflects on the type of support that has been offered to victims/survivors by other redress schemes with a view to replicating examples of good practice in a Scottish context.

149. The Committee recognises that any apology offered to a victim/survivor should be meaningful and offered at an appropriately senior level of an organisation. The language of that apology should be both dignified and respectful. It should demonstrate accountability for the abuse experienced by the victim/survivor and where possible, it should reflect the victim's/survivor's own needs, in terms of what would help them find closure.

150. The Committee recommends that training and guidance on meaningful apologies should be provided by the Scottish Government to care providers to ensure that all victims/survivors of historical child abuse in care receive a meaningful apology that is tailored to their personal circumstances and needs. The provision of this training and guidance should not be conditional on organisations making a 'fair and meaningful' contribution to the redress scheme

166. In terms of non-financial redress we welcome the recommendation to learn from the experience of schemes elsewhere in relation to non-financial redress. We have existing contacts and evidence sources to utilise and as we progress developments we hope to use these to further refine thinking.
167. Similarly in relation to apology, the Committee's suggested components, how it should be delivered and by whom are very welcome. We recognise that a forced apology is no apology at all. We are keen to take forward the development of practice guidance working together with survivors to make sure that an apology was meaningful in this highly sensitive area.
168. As the Committee's evidence demonstrated, views on apology can be very individual; its meaning, the approach, and indeed if one is wanted at all, will be, and should be, down to the survivor. We note the Committee's recommendation that all care providers should have access to the guidance and training to allow them to deliver an effective and meaningful apology. This will broaden the opportunity for survivors to pursue this option, offer consistency and improve quality. However, our learning from survivors would suggest that whilst some individuals will welcome an effective apology from a care provider, others may view a significant difference between those delivered with accompanying contributions to the financial redress scheme and those delivered without. We will further consider this recommendation as we further design the scheme.

#### **IMPACT OF REDRESS PAYMENTS ON BENEFITS**

151. Noting the Scottish Human Rights Commission's request that any redress payments should be disregarded as income for the purposes of benefits payments, the Committee recommends that the Scottish Government should continue its dialogue with the UK Government to ensure suitable arrangements are in place, prior to the redress scheme being open for applications.

152. The Committee further notes that redress payments should be disregarded as income for a range of other purposes, including for care home fees and any benefits payable via Social Security Scotland, and recommends that the Scottish Government should consider the circumstances to which this disregard could most usefully be applied.

169. We accept the Committee's recommendations regarding the need to secure disregards for the redress payments in relation to benefits, tax and social care entitlements. We intend to secure disregards for all redress payments, including those received by next of kin and nominated beneficiaries. We will continue to engage with our Scottish Government officials, the UK Government and devolved administrations to ensure disregards are in place prior to the opening of the scheme.
170. We agree with the Scottish Human Rights Commission's view that these redress payments should not be considered as additional income for the purpose of benefits, tax and social care calculations. It is of the utmost importance that survivors are not negatively impacted by receiving a redress payment. We will provide an update on our engagement with the relevant departments as this work progresses.

## DURATION OF REDRESS SCHEME

153. The Committee recommends that in order to allow victims/survivors sufficient time to access the redress scheme, the Scottish Government should consider extending the scheme beyond its initial 5 year duration.

154. Section 29(2) provides for a regulation making power to allow the Scottish Government to extend the period during which Redress Scotland can consider applications. The Committee recommends that this should be amended at Stage 2 to place a statutory obligation on the face of the Bill which would require the Scottish Government to review whether the scheme should be extended.

155. The Committee recommends that this review should take place no later than 4 years after commencement of the scheme, and the Bill should specify which factors will be considered in reaching a decision whether to extend or end the redress scheme and that this should be subject to Parliamentary scrutiny via the affirmative procedure.

171. As the Committee note in their recommendations above, the Bill as introduced allows the Scottish Ministers to extend the duration of the redress scheme by regulations (with the approval of Parliament through the affirmative procedure). However, we agree with the conclusion of the Committee that the duration of the scheme should not present a barrier to participation for survivors, and this is why the power to extend the duration of the scheme was included in the Bill.

172. We accept the Committee's recommendations on these matters in light of the evidence considered during Stage 1 and will therefore bring forward amendments to adjust the default lifetime of the scheme from 5 years to the later of either 5 years, or the lifetime of the Scottish Child Abuse Inquiry plus two years, and to introduce a statutory obligation to review the length of the scheme after the Inquiry has concluded. These amendments will ensure that the scheme runs for an appropriate period of time.

## FINANCIAL MEMORANDUM

130. With the caveat of the Committee's recommendation to produce a revised Financial Memorandum in the event that substantive changes are made to payment levels or the way in which awards are made, the Committee is otherwise content with the content of the Bill's Financial and Policy Memoranda

156. The Committee understands the rationale behind the estimates set out in the Financial Memorandum, given that it provides for three potential scenarios and takes into account the experiences of other redress schemes, however, the Committee notes the real uncertainties which exist in relation to the costs associated with the redress scheme.

157. The Committee recommends that, should any substantive changes be made to the financial elements of the Bill (for example, the level of payments or the scheme's eligibility), then the Scottish Government should produce a

revised Financial Memorandum and that this should be available ahead of Stage 2.

173. We are continuing to refine our estimates as the Bill progresses through Parliament. We have used the best knowledge and data available to produce these estimates, however uncertainties do remain due to the nature of the subject. We will continue to work with the Government Actuary's Department to refine our data, assumptions and predictions wherever possible. This work will now reflect the amendments we have committed to in response to the Committee's recommendations.
174. We again acknowledge the unavoidable uncertainty and unpredictability of the costs of the scheme and the inability at this stage to provide information on the impact of financial contributions from third parties on the overall cost to Scottish Government.
175. We note and agree that the Committee will need details of the financial implications of any proposed amendments to the Bill lodged at Stage 2 in order to fully consider and scrutinise those amendments. We will provide these details ahead of Stage 2 for the Committee's consideration. Once the Bill has been amended at Stage 2, a full revised Financial Memorandum will be provided, in line with the usual requirements.

#### **ADVANCE PAYMENT SCHEME**

158. The Committee acknowledges the Scottish Government's intention for the new redress scheme to be functioning as soon as possible. The Committee recommends that, as an interim measure, the Scottish Government should consider reducing the qualifying date for the Advance Payment Scheme with immediate effect.

159. The Committee acknowledges that in making such a recommendation, it did not take evidence on the financial implications of this change, nor the impact it might have on the uptake of the Advance Payment Scheme.

176. We continuously monitor the capacity of the Advance Payment Scheme to consider whether it could widen the eligibility criteria to include younger survivors. This is in accordance with the recommendation made by the InterAction Action Plan Review Group in 2018.
177. Any changes to the scheme must be compatible with the exceptional nature of the powers that underpin this non-statutory scheme. We must also acknowledge that any expansion of the scheme may impact on the quality of service that survivors receive, including the time taken to conclude applications, and this could potentially undermine the underlying principle of the scheme, which is to provide advance payments to eligible survivors who may not live long enough to benefit from the statutory scheme.
178. We commit to continue to monitor the uptake of the Scheme, alongside monitoring progress towards the opening of the new redress scheme and to report back to Parliament should our position change.

## RESPONSE TO DPLRC RECOMMENDATIONS

187. The Education and Skills Committee agrees with the findings and recommendations of the DPLR Committee.

189. It recognises, in particular, the DPLR's concern that the negative procedure does not provide adequate opportunity for scrutiny of the form and content of the waiver, in light of the subject matter and the potential implications for applicants.

179. The DPLR Committee made two recommendations in relation to the Bill.

180. The first is in relation to Section 40 of the Bill, which is the power to adjust redress payment amounts in consequence of inflation. The DPLR Committee welcomed our explanation that if the Scottish Ministers consider it to be appropriate to adjust the payment levels because of a material change in the value of money, payment levels may be increased only, and it is intended that these would be adjusted using the ratio published by the Treasury, known as the Gross Domestic Product deflator. This is the same method which is proposed for the adjustment of relevant previous payments under Section 41(5) of the Bill. We undertook to the DPLR Committee that we would give consideration as to whether the Bill ought to be amended to specify this measurement within Section 40. We will further consider this and if necessary we will bring forward an appropriate amendment at Stage 2.

181. The second recommendation of the DPLR Committee relates to the proposed use of the negative procedure for regulations made under Section 46 of the Bill on the form and content of waiver. The DPLR Committee remains concerned that the negative procedure does not provide sufficient parliamentary scrutiny in light of the subject matter and the potential implications for applicants.

182. Having considered the matter carefully, in particular with regard to other comments and recommendations made in relation to the waiver, we would be content to bring forward an appropriate amendment at Stage 2 to amend the Bill to make these regulations subject to the affirmative procedure.

## OVERALL CONCLUSIONS ON THE GENERAL PRINCIPLES OF THE BILL

160. The Committee acknowledges that victims/survivors have been fighting for redress for many years and this scheme is designed to provide an accessible alternative to civil litigation. For victims/survivors who were abused prior to 1964, the scheme will provide a way of accessing reparation for their abuse, where previously there was none.

161. The Committee welcomes the efforts that have been made by the Scottish Government to work with victim/survivor communities to shape many aspects of this Bill and hopes that this engagement will continue as the Bill progresses.

162. However, the Committee also recognises that this redress scheme will not provide the solution all victims/survivors are seeking and that some victims/survivors may still wish to pursue a different route.

163. The Committee also acknowledges that some survivors will be unable to benefit from this scheme, due to the way in which they found themselves in care.

164. The Committee believes that, whilst there are some fundamental issues with the Bill's waiver provisions and the way in which 'fair and meaningful' contributions to the scheme are calculated, the Bill provides a straightforward, easy to access scheme and that will play a vital role in helping victims/survivors obtain the redress and remedy to which they are entitled.

165. The Committee commends the general principles of the Bill to the Scottish Parliament and recommends that they be agreed.

166. The Committee looks forward to considering the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill at Stage 2.

183. We welcome the Committee's conclusion that the Bill "*provides a straightforward, easy to access scheme and that will play a vital role in helping victims/survivors obtain the redress and remedy to which they are entitled.*"
184. As the Committee notes, for survivors who were abused pre 1964, the scheme offers a route to redress where currently they have none.
185. We accept that the redress scheme will not provide the solution for all survivors and that some may continue to seek reparation through the civil courts. Indeed that is the way the scheme has deliberately been designed, as an alternative to civil action not a replacement for it. The scheme is not intended to persuade or pressure those who currently have the right to take civil action, away from that route, if that is what they want to do. Instead the scheme offers them a choice and an authentic alternative route to redress which is swifter, non-adversarial and more certain than litigation.
186. The Committee has carefully examined the proposed boundaries on eligibility of the scheme which have been put in place to reflect the scheme's purpose – to provide tangible recognition of the historical abuse of children in care in Scotland.
187. In line with that purpose, the eligibility criteria underpinning the scheme reflects the complexities in the provision of care in the past and its evolution over time, including the role of public authorities and other voluntary organisations exercising public functions in relation to arrangements by which children came to be placed in care by their families.
188. We are grateful to the Committee for its careful consideration of the Bill and welcome the Committee's endorsement of its general principles and recommendation that they be agreed.