FINANCIAL REDRESS FOR HISTORICAL CHILD ABUSE IN CARE

RESPONSE ON BEHALF OF THE FACULTY OF ADVOCATES

TO SCOTTISH GOVERNMENT PRE-LEGISLATIVE CONSULTATION

NOVEMBER 2019

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PRE-LEGISLATIVE CONSULTATION: FINANCIAL REDRESS FOR HISTORICAL CHILD ABUSE IN CARE

1. **We are considering the following wording to describe the purpose of financial redress: "to acknowledge and respond to the harm that was done to children who were abused in care in the past in residential settings in Scotland where institutions and bodies had long-term responsibility for the care of the child in place of the parent". What are your thoughts on this? Do you agree? If no, what are your thoughts on purpose?**

The Scottish Government has already committed itself to the establishment of a statutory financial redress scheme for survivors who were abused as children in care in Scotland. The Advance Payment Scheme is already operating. The Scottish Government regards the financial redress scheme as part of a wider package of reparations for survivors of historic child abuse.

In that context, we agree with the proposed wording of the purpose of the financial redress scheme apart from in two respects. First, we would delete the words "respond to" and substitute "provide some financial compensation for". We consider that to be a better description of what is intended.

Second, we consider that "in place of the parent" should be deleted. The compensation should be to children abused while in residential care. If the institutions were providing care in a residential setting that would entail responsibility for the care of the child, and that should be sufficient rather than additionally requiring that the institutions were caring for the child "in place of the parent'.

2. **Do you agree with the proposed guiding principles? Would you suggest any additions or amendments to the proposed principles?**

Yes, we agree with the proposed guiding principles.

In addition, we consider that an aspect of the principle of fairness to the potential

applicants is the importance of properly managing expectations, by making the pre-application information to potential applicants clear as to what is likely to be required prior to any payments under the scheme. Also, the present statement within the principle of fairness that applicants should be offered choice is not clearly understandable, unless reference is made to the proposed two separate stages of payments.

3. **Do you agree with the proposed approach in relation to institutions and bodies having long term responsibility for the child in place of the parent?**

We refer to our response to Question 1, and the suggested deletion of "in place of the parent". We note that the definition of 'children in care' within the Terms of Reference of the Scottish Child Abuse Inquiry is wider than what is proposed as the definition of 'in care' under the scheme. Given the concerns over historic child abuse in Scotland and the wish to make reparation for that, we do not consider it appropriate to restrict the definition of 'children in care' in the manner proposed. As the Pre-Legislative Consultation itself recognises, such a restriction would exclude children who for example attended fee-paying boarding schools and those in long term care at hospital for medical or surgical treatment. Given that such children were cared for in a residential setting away from their parents, they were vulnerable to abuse for which their parents were not responsible and presumably of which their parents were unaware. To exclude such children from the scheme and require them to seek reparation through other legal processes is unfair. It would compromise the survivor-oriented approach to redressing historical child abuse while in care, and create a 'survivor hierarchy' wherein only some survivors of abuse in residential care are provided with redress under the scheme.

4. **Subject to the institution or body having long term responsibility for the child, do you agree that the list of residential settings should be the same as used in the Scottish Child Abuse Inquiry's Terms of Reference?**

We refer to our response to Question 3. We consider that the list of residential settings should be the same as that used in the Scottish Child Abuse Inquiry's Terms of Reference, without qualification.

5. **Where parents chose to send children to a fee paying boarding school for the primary purpose of education, the institution did not have long-term responsibility in place of the parent. Given the purpose of this redress scheme, applicants who were abused in such circumstances would not be eligible to apply to this scheme. Do you agree?**

No. We refer to our responses to Questions 3 and 4. A residential fee paying boarding school would have had responsibility for the care and education of the child. The care would have been given in a residential setting. Although the parents could have chosen not to send the child to that school, once the child was there the parent would have had no control over the care given, and that would have been the responsibility of the school. Discriminating against children who were abused in such a residential setting, by not allowing their inclusion in the scheme, is unfair. The children had no control over being placed in such a setting. To require such children who were abused to seek financial redress through other legal processes, rather than through the scheme, is unfair.

6. **Where children spent time in hospital primarily for the purpose of medical or surgical treatment, parents retained the long-term responsibility for them. Given the purpose of this redress scheme, applicants who were abused in such circumstances would not be eligible to apply to this scheme. Do you agree?**

No. See the responses to Questions 3, 4 and 5. To discriminate against children who were abused while in long-term care in hospital is unfair. The children had no control over their placing in hospital for necessary treatment. While the children were in hospital, although their parents would have been consulted about the medical or surgical treatment given, parents would have had no control over the circumstances under which children were abused there. Requiring such children to seek financial redress through other legal processes, rather than allowing them to be eligible under the scheme, is unfair.

7. **We intend to use the same definition of abuse as the Limitation (Childhood**

Abuse) (Scotland) Act 2017 for the purpose of the financial redress scheme. This includes sexual abuse, physical abuse, emotional abuse and abuse that takes the form of neglect. Do you agree?

Yes. We agree that the definition of abuse in terms of the 2017 Act is potentially wider than that in the Terms of Reference of the Scottish Child Abuse Inquiry. Given that the scheme is to provide financial redress without the need to raise civil proceedings, it would be consistent with that purpose to use the wider definition of abuse.

We note that the proposed definition does not restrict the qualifying abuse to abuse inflicted by a person in a positon of trust or authority, or with the knowledge of such a person. As a result, abuse by another child would qualify. Potentially this widens the number of applicants, but the Scottish Government may be content with that- this is a policy decision.

8. **In our view 1 December 2004 represents an appropriate date to define 'historical' abuse for this financial redress scheme. Do you agree?**

The proposed date of 1 December 2004 seems rather arbitrary, given that it appears to be based on the date of the public apology made by the First Minister. We note, however, that there were statutory improvements in the monitoring and regulation of care from 2001 onwards. Given the purpose of the scheme, the fact that evidence should be more readily available in relation to recent child abuse and the removal of the usual time limits for bringing civil claims for child abuse, a date prior to the date of the commencement of the scheme seems appropriate. In the absence of further information as to the basis for the suggestion of the date of 1 December 2004 or as to any more appropriate date, we do not comment further.

9. **Do you have any comments you would like to make in relation to child migrants who also meet the eligibility requirements of this redress scheme?**

We agree that child migrants who fulfil the eligibility for the scheme should be entitled to apply under the scheme.

10. Do you have any comments about the eligibility of those with a criminal conviction?

We agree that a criminal conviction should not be a bar to an application under the scheme. We consider that the scheme is intended to redress the harm caused by violations against children, rather than requiring consideration of the adult's character in determining whether such redress should be made.

11. Do you have any other comments on eligibility for the financial redress scheme?

We refer to the responses to Questions 3- 6 above.

12. What options might be available for someone who has been unable to obtain a supporting document which shows they spent time in care in Scotland?

12.1 Recovery of available records

We consider it important that the redress scheme undertakes a key role in assisting potential applicants to obtain supporting documentation that will enable applications to be made. We recommend that the redress scheme is vested with powers to recover records held by external bodies such as social work, education, health services and the police. We further consider that, in addition to recovery of documents from public bodies, the redress scheme must have the power to recover documents from any organisation that has records relating to the residential care of potential applicants. The application process must be accessible. It will be of great importance to applicants that the scheme works to timescales that provide responses within the shortest achievable timescales without compromising the rigour of the scheme. Timescales must be agreed and published in order that applicants have their expectations of turnaround times managed.

12.2 Affidavit or oral evidence

For institutions where records are known to have been destroyed or in other circumstances where records are not available, affidavit or witness testimony should be accepted as a second source of evidence to confirm that the applicant was in care. Potential support for the applicant's testimony could be provided by fellow residents of care institutions, by friends or family members who either have personal knowledge that the applicant was in care or to whom the applicant previously disclosed that they were in care. In our opinion the disclosure must have been made to the third party prior to April 2019, save in exceptional circumstances. That date is recommended as it is the date of the inception of the advance payment scheme and attendant publicity.

13. Do you think the redress scheme should have the power, subject to certain criteria, to require that bodies or organisations holding documentation which would support an application are required to make that available?

Yes, see the response to Question 12. In our opinion it is vital that the redress scheme can recover documentation that will enable applicants to access the scheme. A statutory framework to enable the scheme to recover documents from any source would appear to be the most effective method by which to achieve this goal.

14. For Stage One, what evidence do you think should be required about the abuse suffered?

14.1 A signed declaration by the applicant that they suffered abuse, but no other supporting evidence

14.1 Answer qualified- see below Yes

14.2 A short written description of the abuse and its impact Potentially

14.2 Answer qualified- see below.

14.3 Any existing written statement from another source which details the abuse

14.3 Answer qualified- see below. Potentially

14.1 and 14.2

The fact that a Stage One payment can be made under the Advance Payment Scheme with only a signed declaration that abuse was suffered, with no other detail or evidence in relation to the abuse, suggests that a policy decision has been made to allow maximum access to Stage One payments under the Advance Payment Scheme. Without further information, we are unaware whether or not the intention was for this policy to only apply in the circumstances of the applicants to the Advance Payment Scheme, namely those with a terminal illness or aged 70 or over, or whether it should also apply to the applicants to the redress scheme. If the policy decision remains the same for the redress scheme, then a signed declaration alone will suffice.

If the evidential requirements for a Stage One payment are more demanding for the redress scheme, there may be complaints that this discriminates on the basis of age. That said, the redress scheme will be open to many more applicants than the Advance Payment Scheme. Changing the policy so as to vary the evidential requirements for Stage One payments might be considered necessary, to reduce the scope for potential abuse of the redress Scheme. Making payments on the evidence of a signed declaration alone could render the redress scheme open to criticism, and result in a potential loss of public confidence. Criticism and loss of public confidence in the redress scheme could negatively impact applicants to the scheme. Were there to be a public perception that awards were being made on an unsubstantiated basis, successful applicants could perceive criticism of the scheme as criticism of them or their award. This could be harmful to applicants who might absorb such criticism personally. One variation of the present policy could be to require a short written description of the abuse suffered and its impact, in addition to the signed declaration.

14.3 If there is written evidence of the abuse from another party, independent of the applicant’s declaration, that may be sufficient instead of the short description of the abuse / its impact by the application envisaged at 14.2.

In situations where usually a short written description of the abuse would be required, but the claim is being made by next-of-kin, a written statement by the deceased's relative which details the abuse suffered and its impact on the deceased, and explaining the circumstances by which the relative became aware of the abuse suffered by the deceased, should be acceptable.

15. **Do you have any additional comments on evidence requirements for a Stage One payment?**

We note that the word 'evidence' is used in the Pre-Legislative Consultation. We suggest that the word 'evidence' should be avoided when the scheme is drafted, and replaced with 'information'. The word 'evidence' is used in the civil and criminal courts, and may be perceived by applicants as a barrier to accessing the scheme.

16. **For Stage Two, what additional evidence of the abuse and of its impact, should be required for the individual assessment?**

Any existing written statement from another source which details the abuse? Yes

Oral testimony of the abuse and its impact Yes

Short written description of the abuse and its impact Yes

Detailed written description of abuse suffered and its impact Yes

Documentary evidence of impact of the abuse (from one of the undernoted)

- **Existing medical and/or psychological records OR** Yes
- **New medical and/or psychological assessment** Yes

Supporting evidence of the abuse/ impact from a third party Yes

We consider that any of the items listed could be relevant additional evidence for Stage Two payments. Whether one or more of these is required to support the applicant's claim for a Stage Two payment is a matter of policy.

17. **Do you have any comments on evidence requirements for Stage Two payment?**

17.1 We recommend Stage Two payments should be supported by a second source of evidence of the harm suffered. As indicated in the response to Question 16, a very broad range of available sources should be accepted.

17.2 In our opinion any information contained in records or affidavits which provides evidence of either abuse or of prior disclosure of abuse by the applicant should be treated as a second separate source of evidence. This approach allows the information in the records and affidavits to support the applicant's current disclosure of abuse suffered. When evaluating both the evidential value of historic disclosure and of more recent disclosure, if both accounts are broadly consistent, such that the finder of fact holds that it is more probable than not that the abuse took place, the applicant should be regarded as having provided sufficient information to warrant an award being made.

17.3 Rather than provide documentary or affidavit evidence, or in the absence of any such evidence, the applicant may undergo a medical or psychological assessment by a medical practitioner. In that circumstance, if the medical practitioner finds the applicant to be broadly credible and reliable, such that he/she accepts that it is more likely than not that the abuse took place, that medical opinion should be treated as a second source supporting the applicant's testimony allowing a Stage Two payment to be made. It is observed that considerable costs could be incurred if the redress scheme funds medical assessments for all applicants for Stage Two payments, but costs are a policy consideration.

17.4 Provision for oral testimony

The majority view from the survivor consultation in 2017 was that an applicant should be able to give oral testimony of abuse and its impact if they are unable to provide documentary evidence. We note, however, that in some redress schemes in other countries, oral hearings have only been used in specified circumstances, for example when a case was complex and could not be resolved based on documentary evidence or when a payment offer was rejected by the applicant. We consider that it is important

that applicants should allowed to give oral testimony if this is necessary for their applications.

17.5 The Pre-Legislative Consultation does not address the issue of the standard of proof. We suggest that for Stage Two payments at least, the standard of proof should be the balance of probabilities, meaning that it is more likely than not that the claimed abuse in care took place. This specified standard would help protect the scheme from abuse.

18. Do you think applicants should be able to give oral evidence to support their application? Yes

If yes, under what circumstances might it be available?

See the response at 17.4. We recommend that applicants should be entitled to give oral testimony in all circumstances - their right to be heard should have absolute protection under the scheme. This is considered to be highly important to safeguard the survivor's role at the centre of the scheme. Whilst there may be some applicants who prefer to apply via written testimony, those who want to be heard orally should be given the opportunity to be heard. Alternative methods of giving testimony should be made available to the applicant, and examples of how this might be achieved are undernoted:

- The scheme should be set up so as to enable the financial redress authority to appoint legally qualified individuals who are experienced in assessing credibility and reliability of witnesses, who can undertake evidence gathering in a role akin to that of the Children's Reporter. This would enable the applicants to give a personal account of their experience at a neutral setting such as at their home, at their solicitor's office, or at an appropriate venue. It would be necessary for the applicant to have their own legal representative present during this process, to ensure fairness and appropriate levels of security for all involved. The Reporter would then produce a pro-forma report for the Court on the evidence, on the internal and external consistency of the evidence, on the demeanour of the applicant or any other criteria thought to be relevant.

- Applicants should be allowed to give their account to a panel of three members appointed by the statutory body, to include one legally qualified member with experience of dealing with vulnerable witnesses, one member with social work qualifications and experience, and one psychiatrist experienced in dealing with survivors of trauma. Special measures such as remote link, CCTV within the building or screens and/or a supporter should be made available to those who wish additional protection during the process.
- Applicants should be allowed to give their account to a Commissioner, i.e., an individual appointed by the panel.

19. Do you have any views on whether the length of time in care should be factored into the Stage Two assessment?
If so, how?

We consider that the length of time in care may be relevant in consideration of the severity of harm and abuse inflicted upon the applicant. The extent to which the length of time in care may affect the Stage Two assessment will depend on the individual circumstances of each case. Each case will undoubtedly turn on its own facts. The length of time in care as a stand-alone factor may not be of great assistance in determining the appropriate level of award. However, the period of time in care during which the abuse was sustained is a legitimate and appropriate factor to be taken into consideration in deciding the appropriate level of financial redress.

20. Do you have any views on the balance the assessment should give to different types of abuse (physical, emotional, sexual, neglect)?

We consider that all abuse and harm inflicted within the definition of abuse (sexual abuse, physical abuse, emotional abuse and abuse that takes the form of neglect) should be considered on a case by case basis and the level of financial redress assessed as appropriate to each application. Abuse of any type can be of varying degrees of severity and impact an applicant in different ways. There should be equal consideration given to all types of abuse and no particular emphasis on any one form

within the scope of the scheme.

21. What are your views on which factors in relation to the abuse and its impact might lead to higher levels of payment?

The severity of harm and abuse inflicted upon applicants and its impact will require to be considered carefully on a case by case basis. Factors to be considered in assessing the level of payment will include the type of abuse, the frequency and severity of abuse, the impact of abuse, the loss of opportunity as a result of the abuse and its impact. The age of the individual and their relationship to the abuser are also factors to be considered. There may be cases where the applicant has sustained significant lasting physical and mental effects. The severity of the abuse or the impact of the abuse may have significantly impacted the ability of the applicant to obtain and sustain employment. The applicant may have incurred costs for medical treatment or mental health counselling as a consequence of the abuse sustained. The applicant may require future medical treatment or mental health counselling. In accordance with principles of fairness and natural justice, the greater the severity, duration and impact of the abuse, the higher the financial redress should be.

22. Do you think:

• the redress payment is primarily for the abuse suffered No

• the redress payment is primarily for the impact the abuse has had No

• both the abuse suffered and the impact it has had should be treated equally Yes

Please explain your answer.

Reference is made to the answer to Question 21. We consider that the scope of financial redress must be for both the abuse suffered and the resulting impact on the individual applicant. Each case will undoubtedly turn on its own merits. Each individual will have his / her own response to the trauma.

23. How do you think the scheme should ensure all parties are treated fairly

and that the assessment and award process is sufficiently robust?

We consider that the scheme should be designed in such a way so as to take account of key principles of fairness, compassion and respect for the dignity of the applicants. The scheme should be administered in a consistent, fair and transparent way to ensure its integrity and effectiveness. Prior to making an application and at appropriate points during the application process, individuals should be provided with access to legal advice (see the responses to Questions 29 and 30). The processing of applications should proceed without unnecessary delay and applicants should be given realistic time frames for the likely processing of their applications. In respect of the information required in support of an application, reference is made to the responses to Questions 14-18. There should be a mechanism for review if the applicant disagrees with the level of financial redress awarded.

24.Do you agree that anyone who has received a payment from another source for the abuse they suffered in care in Scotland should still be eligible to apply to the redress scheme? Please explain your answer.

Yes. We are of the view that individuals should not be automatically excluded from seeking redress through the scheme because they have previously been financially compensated. It would be arbitrary and unnecessarily exclusionary that an applicant meeting the requirements under the proposed framework is barred from applying based on previous efforts at having their abuse recognised. Potentially, however, there may be legal complications in some situations, where for example applicants have accepted a payment in settlement of a civil court action and given an undertaking not to make any further claim against the defender in that action, and the defender is an institution who contributes to the scheme.

24. Do you agree that any previous payments received by an applicant should be taken into account in assessing the amount of the redress payment from this scheme? Please explain your answer.

Yes. In our opinion, where an applicant has been awarded a monetary payment in the past, this should be considered in assessing the amount of redress payment to avoid double compensation.

25. **Do you agree applicants should choose between accepting a redress payment or pursuing a civil court action? Please explain your answer.**

No. We do not consider that applicants should have to choose between accepting a redress payment and pursuing a remedy in the civil court. There is likely to be a limit to the level of financial redress that an applicant can ultimately obtain from the scheme. Applicants who have claims that are worth more should not be prevented from pursuing such claims through a civil remedy.

Those who have already pursued a civil court action prior to the introduction of the scheme should not be prevented from making an application. Reference is made to the answers to Questions 24 and 25.

26. **We are proposing that the redress scheme will be open for applications for a period of five years. Do you agree this is a reasonable timescale? Please explain your answer.**

Yes. We consider that this is a reasonable time frame to allow applications to be submitted.

27. **Should provision be made by the redress scheme administrators to assist survivors obtain documentary records required for the application process? Please explain your answer.**

Yes. See the answer to Question 12.

28. In your view, which parts of the redress process might require independent legal advice? Please tick all that apply.

In making the decision to apply Yes

During the application process Yes

At the point of accepting a redress payment and signing a waiver? No (see explanation)

We consider that legal aid should be made available to applicants to cover the cost of independent legal advice at appropriate points during the application process. In civil actions before the courts, legal aid is means-tested. It is a matter of policy whether or not legal aid for advice on applications under the redress scheme should be similarly means-tested.

Legal advice should be available when the applicant is considering making an application.

If all that is required at Stage One is a signed declaration by the applicant that they suffered abuse, it may be that there is no reasonable requirement for independent legal advice at that stage in the process, i.e., when the application is actually being made. However, if a further description and/or another source is required in support of Stage One, there may be a requirement for independent legal input to assist the applicant.

It seems reasonable that at Stage Two the applicant will require to obtain additional information. On that basis, applicants should be provided with access to independent legal advice.

We do not consider that applicants should have to choose between accepting a redress payment and pursuing a remedy in the civil court (see response to Question 26). On that basis, there would be no requirement for independent legal advice to sign a waiver.

29. How do you think the costs of independent legal advice could best be managed?

As noted in the response to Question 29, although there should be independent legal advice available, whether that is provided by free legal aid or by means tested legal aid is a matter of policy and we do not propose to comment further.

31. What are your views on our proposed approach to allow surviving spouses and children to apply for a next-of-kin payment?

We do not take a view on the policy behind the proposed approach. We do, however, suggest that policy-makers consider exactly who should fall within the definition of "surviving spouses and children". For example:

- It would be worth clarifying the point at which a spouse or child must be "surviving". This would avoid uncertainty where, for example, a spouse dies while an application is pending.
- With regards to "spouse", consideration should be given as to whether this term is too narrow. For example, the Succession (Scotland) Act 1964 refers, at section 1, to "a surviving spouse or civil partner". It also makes discretionary provision for cohabitants.
- With regards to 'children', consideration should be given to (i) including adoptees as at section 23 of the 1964 Act and section 14 of the Damages (Scotland) Act 2011, and (ii) putting step-children on the same footing as blood-children as at section 14(2)(b) of the Damages (Scotland) Act 2011.

32. We are considering three options for the cut-off date for next-of-kin applications (meaning that a survivor would have had to have died after that date in order for a next-of-kin application to be made). Our proposal is to use 17 November 2016.

- **17 December 2014 - the announcement of the Scottish Child Abuse Inquiry**
- **17 November 2016 – the announcement of the earlier consultation and engagement work on the potential provision of financial redress**

- **23 October 2018 – the announcement that there would be a statutory financial redress scheme in Scotland**
  What are your views on which date would be the most appropriate?

The proposed dates are somewhat arbitrary, although this may be inevitable. We consider the selection of a particular date to be a policy choice.

33. **We propose that to apply for a next-of-kin payment, surviving spouses or children would have to provide supporting documentation to show that their family member met all the eligibility criteria. What forms of evidence of abuse should next-of-kin be able to submit to support their application?**

It seems sensible to set the evidential requirements with reference to those for Stage One payments (once confirmed). Some adaptation may be required. For example, Question 14 refers to a signed declaration by the applicant that they suffered abuse. This would obviously have to be changed to a signed declaration by the applicant that their spouse/parent suffered abuse. It may also be worth asking for a short written description of how the applicant came to learn of the abuse suffered by their spouse/parent.

34. **What are your views on the proportion of the next-of-kin payment in relation to the level at which the redress Stage One payment will be set in due course? 25%? 50%? 75%? 100%?**

The issue with a 100% payment is that, if the deceased has a surviving spouse and, say, three surviving children, potentially the total payment will be four times higher than it would be for a living survivor if multiple applications are allowed. This may not be seen as a fair allocation of resources.

We think there is merit in the provisions that apply in the Republic of Ireland under section 9 of the Residential Institutions Redress Act 2002. That Act considers two

situations. The first situation is whether the deceased died after the cut-off date but before making an application. In those circumstances their children or spouse can apply – but only one application per deceased is permitted. The second situation is where the deceased died after making an application but before determination. The deceased's spouse or children can continue the application. In both situations awards are made to the deceased's personal representatives, who are to treat the award as if it was paid to the deceased immediately before death. The award is 100% of what would have been paid to the deceased directly. Such a 100% payment is comparable to the level of payment made to a deceased's executors for a deceased's transmissible solatium, under section 2 of the Damages (Scotland) Act 2011.

35. We think those bearing responsibility for the abuse should be expected to provide financial contributions to the costs of redress. Do you agree?

This proposition is based on the assumption that "those bearing responsibility for the abuse" are known. In reality, an entity's position may be that it bears no responsibility for abuse. Even if responsibility is accepted, the entity may dispute the nature and consequences of that abuse.

An entity should be able to rely on any legal defences that it might have. Otherwise it may be penalised for a wrong that it is not responsible for. This would potentially engage the entity's Article 1 Protocol 1 rights. The implications, however, of allowing entities to run defences should be recognised. These include that the scheme may become more complex, legalistic, and slower than was envisaged. Also, potential applicants may be deterred if entities can challenge whether the abuse actually happened.

A way to avoid these problems would be by providing that entities only have to contribute where (i) they voluntarily accept responsibility, or (ii) their liability has been or is subsequently established in litigation. If liability is subsequently established in civil proceedings, they could be required to indemnify the scheme for any payment already made. This is in some ways analogous to how the Social Security Contributions and

Benefits Act 1992 works. It would allow for contributions while giving entities the normal protections available in litigation.

36. **Please tell us about how you think contributions by those responsible should work. Should those responsible make:**
    an upfront contribution to the scheme;
    a contribution based on the number of applicants who come forward from their institution or service?
    Another approach to making a financial contribution to the redress scheme costs?
    Other comments?

Please see the response to Question 35. Depending on the approach taken, consideration will have to be given to situations where more than one entity is responsible for a survivor's abuse. This may arise where an applicant was abused in more than one institution. Provision for apportionment may be appropriate, although this introduces further complexity.

37. **Are there any barriers to providing contributions, and if so how might these be overcome?**

Please see the response to Question 35.

38. **Should the impact of making financial contributions on current services be taken into account and if so how?**

The trade-off between compensating survivors and funding current services is a matter of policy. In practical terms, though, any meaningful assessment of impact on current services is likely to be complex to assess.

39. **What other impacts might there be and how could those be addressed?**

Please see previous responses.

40. How should circumstances where a responsible organisation no longer exists in the form it did at the time of the abuse, or where an organisation has no assets, be treated?

In respect of organisations that no longer exist in the same form as at the time of abuse, and with reference to the response to Question 35, they may have a defence. Alternatively, it may be that responsibility has passed to the new organisation. The most common example of this is that local authorities are responsible for the acts of their statutory predecessors. This was provided for under statute at the time of each reorganisation.

In respect of organisations that have no assets, unless another person or organisation is also liable then the only recourse for the scheme when enforcing contributions is likely to be to insolvency law.

41. What is a fair and meaningful financial contribution from those bearing responsibility for the abuse?

In respect of whether an organisation bears responsibility for the abuse, reference is made to the response to Question 35. With regards to what is fair and meaningful, this is a matter of policy.

42. What would be the most effective way of encouraging those responsible to make fair and meaningful contributions to the scheme?

Creating obligations under statute would raise the difficulties discussed in response to Question 35.

43. Should there be consequences for those responsible who do not make a fair and meaningful financial contribution?
If yes, what might these be?

Please see the response to Question 42.

44. In addition to their financial contributions to the redress scheme, what other contributions should those responsible for abuse make to wider reparations?

This is a matter of policy, although all of the proposals listed on page 27 of the Pre-Legislative Consultation Document seem potentially useful.

45. Do you agree that the decision-making panel should consist of three members?

Yes. Three members is an appropriate number having regard to the multidisciplinary nature of the key skills and knowledge required for the panel. This provides a reasonable balance between (i) prompt responses; (ii) effective redress reflecting individual circumstances; and, (iii) keeping administrative and logistical costs to a reasonable level.

46. Do you agree that the key skills and knowledge for panel members should be an understanding of human rights, legal knowledge, and knowledge of complex trauma and its impact? Yes
Are there other specific professional backgrounds or skills you feel are essential for the decision-making panel?

Expertise in paediatrics and social work would also be desirable skills.

47. We propose that a Survivor Panel be established to advise and inform the

redress scheme governance and administration, ensuring survivor experience of the application process is considered as part of a culture of continuous improvement. Do you agree?

Yes. A survivor panel would provide legitimacy and transparency to the redress scheme and reflects best international practice:

"[i]f two of the critical aims of a reparations programme are to provide recognition to victims (not just in their status as victims, but also in their status as citizens and bearers of equal human rights) and to promote their trust in State institutions, it is essential to involve victims in the process of designing and implementing the programme". [1]

How do you think survivors should be recruited and selected for this panel?
The opportunity to apply should be widely disseminated to ensure that survivors across the country have the opportunity to apply. There should be clear criteria to ensure that the survivor panel is sufficiently diverse and representative of all those seeking redress.

48. Do you agree that the financial redress scheme administration should be located in a new public body?

Yes. The creation of a new public body would allow the scheme to be administered independently and in accordance with its own mandate. The statutory provisions creating the public body would also be subject to judicial oversight ensuring that issues relating to mandate or independence may be clarified by the courts. It should be noted, however, that the creation of a new public body represents a different approach to the current Advance Payment Scheme. It will be important to ensure that the redress scheme as a whole is coherent and is perceived as such by survivors and the wider public.

[1] UN Independent Expert to update the Set of principles to combat impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102, para. 59 (e), available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/111/03/PDF/G0511103.pdf?OpenElement

49. Do you have any views as to where the public body should be located and what it should be called?

Having regard to the factors listed in below in response 50, we suggest that the public body should be located in the central belt. We have no specific suggestion as to the name. However, in order to ensure that the pubic body is easily identifiable and accessible for survivors, we recommend that the name clearly reflects the mandate, objectives and responsibilities of the public body.

What factors should be taken into account when deciding where the public body should be?

The following factors should be considered: (i) accessibility for survivors; (ii) accessibility for panel members; and, (iii) accessibility to other appropriate bodies and institutions that carry out activities that are related to the redress scheme. If the public body is located in the central belt, measures should be put in place to ensure access and participation for survivors from other parts of Scotland.

50. How can survivors be involved in the recruitment process for these posts?

The question relates to the recruitment of the Chair and Chief Executive. There should be guaranteed participation for survivors in the recruitment processes. This should include input into the design of the terms of reference and participation in the selection and decision-making process.

How should survivors be selected to take part in this process?

Rather than seeking to select survivors of new, through a widely disseminated recruitment process, it may be appropriate to have survivor representatives from the Survivor Panel already proposed (see response to Question 47).

51. **What are your views on bringing together the administration of other elements of a reparation package such as support and acknowledgement with financial redress?**
What would be the advantages? Would there be any disadvantages, and if so, how might these be addressed?

We consider it appropriate to bring together the administration of the other elements alongside financial redress. Although financial redress for historic abuse goes some way to providing compensation for survivors of such abuse, by bringing together these other additional components, it is hoped this will help to provide the survivors with sufficient sympathy and support, both practical and emotional, as can be reasonably expected to help them better come to terms with the nature of their abuse.

The disadvantages are probably primarily practical ones in terms of setting up the service provisions and the cost and allocation of the necessary resources.

52. **Do you agree that it would be beneficial if the administration of these elements were located in the same physical building?**
What would be the advantages? Would there be any disadvantages, and if so, how might these be addressed?

To provide for a more straightforward administration of these elements, it may be preferable to have these located in the same physical building. This would make the system of seeking to take advantage of these elements simpler and easier to understand for victims who are entitled to have a system which is as user friendly as possible especially given the abuse they have gone through. It should also help reduce the cost in terms of practical efficiency and administration.

The only obvious disadvantage would be that, wherever any such single building is located, it is bound to mean that survivors who live furthest away from that location will find that more inconvenient in practical terms.

53. Should wider reparation be available to everyone who meets the eligibility criteria for the financial redress scheme?

It would seem appropriate that this wider reparation is available. Financial compensation alone may often be insufficient to allow survivors to fully come to terms with the nature of their abuse. Having an actual apology and being offered assistance with services to help them, both in practical and emotional terms, would be of benefit to them.

54. Should there be priority access to wider reparation for certain groups, for example elderly and ill?

Special measures could be put to place to ensure that those who are least able to cope with accessing the system, namely the elderly and the ill, are best equipped to do so. Often survivors of abuse are ill and/or elderly and may need that extra provision of help.

55. If a person is eligible for redress, should they have the same or comparable access to other elements of reparation whether they live in Scotland or elsewhere?

It is understood that many survivors of abuse no longer reside in Scotland (and some may have left Scotland to escape the abuse or its consequences). Given the overall purpose of the scheme, it seems appropriate that those living elsewhere be given the same or comparable access to other elements of reparation albeit that any single building dealing with it should of course be located in Scotland only.

56. To allow us more flexibility in considering how acknowledgment is delivered in the future, we intend to include provision in the redress legislation to repeal the sections of the Victims and Witnesses (Scotland) Act 2014 which established the National Confidential Forum.

Do you have any views on this?

Our views on this are neutral.

57. Do you have any views on how acknowledgment should be provided in the future?

Our views on this are neutral. A number of methods are mentioned in the Pre-Legislative Consultation Document. The survivors' input will be important.

58. Do you think a personal apology should be given alongside a redress payment?
If so, who should give the apology?

It is understood that personal apologies have been made by some relevant institutions already. The provision of a personal apology may be of importance to survivors of abuse as an acknowledgment of the wrong perpetrated upon them. Again, input from survivors will be important in determining the need for personal apologies and from whom. Input from the institutions will be important in ascertaining what they are willing to do, and which representative from an institution should provide any apology given.

59. Do you think there is a need for a dedicated support service for in care survivors once the financial redress scheme is in place?

We consider that this added element of support is very important. For many survivors, having to face up to their historic abuse often many years after the events in question itself is regularly harrowing for them. Often psychiatric symptoms which may have been relatively quiescent for many years are brought back and/or aggravated by the focus on them many years later. For those reasons, we consider it important that a robust system of support is in place to help them through that process. That help should not only be practical but also emotional and, where the need arises, help with medical treatment by way of offering specialist psychological services and therapies.

60. Do you have any initial views on how support for in care survivors might be delivered in Scotland, alongside a redress scheme?

See response to Question 59. Any such support should be put in place so as to complement the other elements mentioned in this section. It is a matter of policy as to how this is done, for example by a national counselling service.