

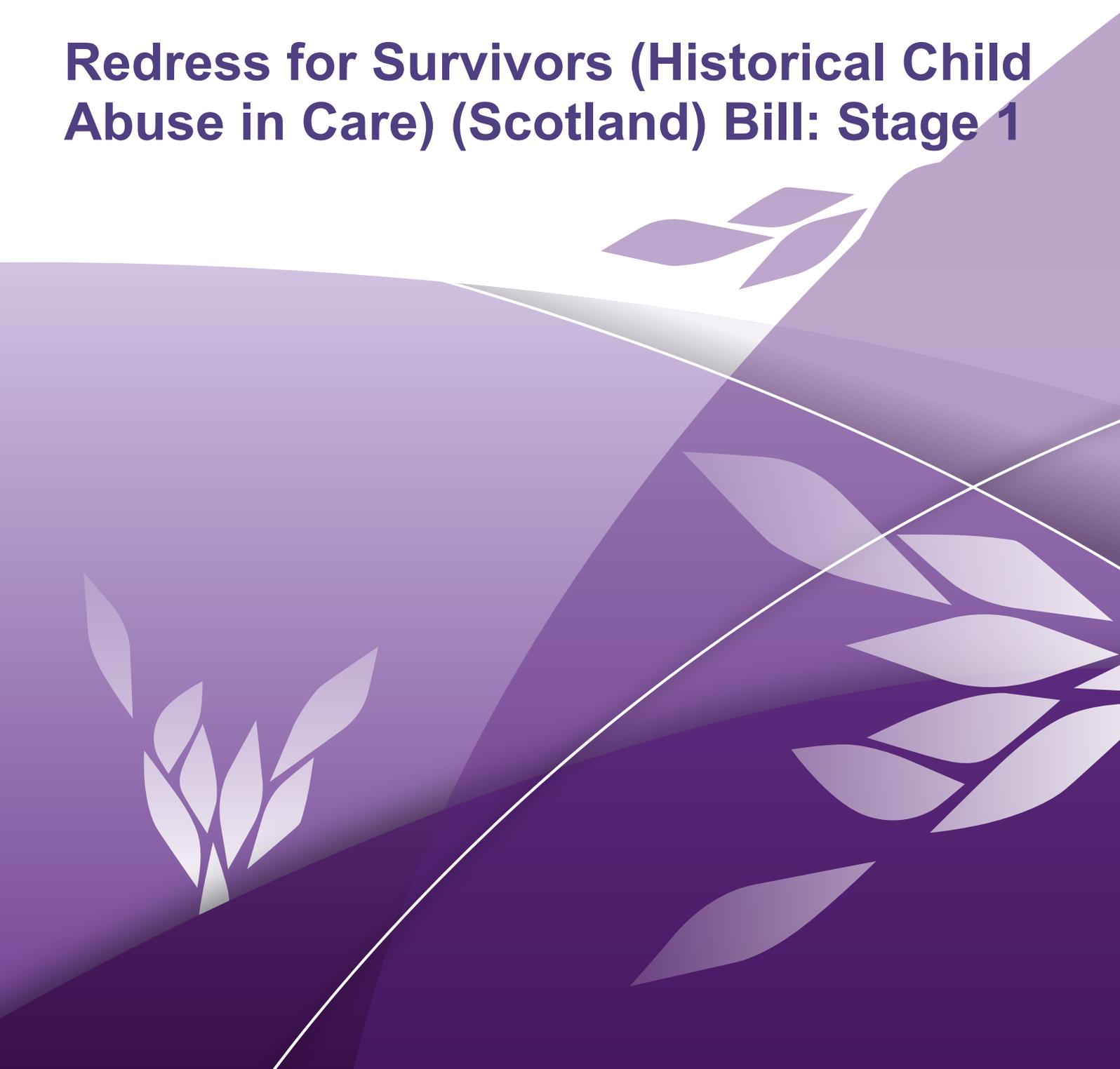


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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill: Stage 1



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Contents

Introduction	1
Overview of the Bill	2
Delegated Powers	3
Annex	6

Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Gil Paterson
Scottish National Party



Convener
Bill Bowman
Scottish Conservative
and Unionist Party



Deputy Convener
Stuart McMillan
Scottish National Party



Michelle Ballantyne
Scottish Conservative
and Unionist Party



Mary Fee
Scottish Labour

Introduction

1. At its meetings on 24 November and 1 December 2020, the Delegated Powers and Law Reform Committee considered the delegated powers in the [Redress for Survivors \(Historical Child Abuse in Care\) \(Scotland\) Bill](#) (“the Bill”).
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.
3. The Scottish Government has provided the Parliament with a [memorandum on the delegated powers provisions in the Bill](#).

Overview of the Bill

4. This Scottish Government Bill was introduced on 13 August 2020. The lead committee is the Education and Skills Committee.
5. The Bill seeks to establish a financial redress scheme for survivors of historical child abuse in care in Scotland, and, in some circumstances, their next of kin. The main purpose of the scheme is to acknowledge and provide tangible recognition of the harm suffered as a result of historical child abuse whilst residing in a relevant care setting in Scotland.
6. The Bill will also provide survivors with access to some non-financial elements of redress such as emotional and psychological support. There will be a five year window during which applications can be made to the scheme. In order to retain some flexibility, this period may be extended by the Scottish Ministers by regulations.

Delegated Powers

7. The Bill confers 23 powers to make subordinate legislation on the Scottish Ministers. The [Delegated Powers Memorandum](#) (“DPM”) sets out the Scottish Government's reasons for taking these delegated powers in the Bill and the parliamentary scrutiny procedures that have been chosen.
8. The Committee first considered the legislation on Tuesday 24 November 2020 and was content with 20 of the 23 delegated powers in the Bill. However, it subsequently wrote to the Scottish Government with questions on the remaining 3 powers. The Committee's letter and the Scottish Government's response can be found in the **Annex**.
9. The Committee's consideration of the response from its meeting on 1 December 2020, along with its recommendations in relation to these remaining powers, are highlighted below.

Section 40 – Power to adjust redress payment amounts for inflation

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

10. Section 40 provides that the Scottish Ministers may increase the redress payment levels to account for inflation.

Committee consideration

11. In its letter to the Scottish Government, the Committee asked what measurement would be used to calculate inflation should redress payment amounts require adjustment.
12. The Scottish Government responded that it is intended that the payment amounts might be adjusted using the ratio published by the Treasury, known as the Gross Domestic Product deflator. It stated that it will consider whether to specify this measurement within section 40.

Recommendation

13. **The Committee welcomes the Scottish Government's explanation of the measurement which it intends will be used to calculate inflation for the purpose of section 40 as well as its commitment to consider whether it would be appropriate to include this specification in the Bill.**

Section 46 – Form and content of waiver

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

14. Section 46 permits the Scottish Ministers to make provision by way of regulations about the form and content of the waiver that is to be signed and returned by an applicant under section 45, and also the information to be provided to the applicant in relation to the waiver and its effects. The Scottish Government states in its DPM that the form and content of the waiver will not alter the principle of the waiver or its implications for applicants and therefore it considers that it is appropriate that the negative procedure should apply to regulations made under this section.

Committee consideration

15. In its letter, the Committee asked the Scottish Government why it considered that the form and content of the waiver will not alter the principle of the waiver or its implications for applicants as provided for in the Bill.
16. The Scottish Government responded that the principle of the waiver is set out in section 45 of the Bill and therefore is subject to significant parliamentary scrutiny. It stated that section 46 does not include any power to alter section 45 or the purpose and principles of the waiver. Further, it stated that its assessment is that the provisions of the Bill when taken as a whole means that the Bill itself ensures transparency and clarity around the implications of the waiver.
17. The Scottish Government added:
 - ” Our intention would be that, in practice the form and content of the waiver and information to be provided to applicants in relation to the waiver and its effects, would be in plain, easily understood language, which would enable the applicant to consider whether to sign and return it in light of any independent legal advice obtained.
18. While noting the Scottish Government's assurances, the Committee considers that the form and content of the waiver could have a significant impact on individuals' decision making regarding applying to the scheme. Therefore, whilst it is usually appropriate for regulations regarding form and content to be made under the negative procedure, in this case the subject matter is of such sensitivity that the Parliament may wish to have a higher level of scrutiny available to it.

Recommendation

19. **The Committee highlights the Scottish Government's response to the lead committee and notes that it remains concerned 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 on applicants.**

Section 89(6) - Assessment of amount of payment

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

20. Section 89 provides that, on receipt of a request for payment of legal fees, the Scottish Ministers must send the request to Redress Scotland to assess and then arrange payment of the amount (if any) which Redress Scotland assesses is due.

Committee consideration

21. In its letter to the Scottish Government, the Committee asked whether it considered that it would be appropriate that the affirmative procedure should apply when first setting the “relevant maximum”, and thereafter the negative procedure should apply.
22. In its response, the Scottish Government noted the Committee’s concerns that capping legal fees could have a significant impact on an applicant and their subsequent redress payment. Nevertheless, the Scottish Government highlighted that the provision in Section 89(5) allows for increases on those limits to be applied for and granted on a case by case basis by Redress Scotland. Also, Section 90(2) of the Bill allows for solicitors to seek a review of a decision by Redress Scotland not to grant an increase. The Scottish Government therefore considered the negative procedure is appropriate in this case, given the flexibility which already exists in the Bill in respect of maximum legal fees.
23. In light of the above, the Committee was satisfied that the Bill contains sufficient flexibility in relation to the relevant maximum amount of legal fees that may be paid. It therefore considers it appropriate that the negative procedure applies to regulations made under this section.

24. The Committee is content with the delegated power in section 89(6).

Annex

24 November 2020 – correspondence from the Delegated Powers and Law Reform Committee to the Scottish Government

The Delegated Powers and Law Reform Committee considered the above Bill at its meeting earlier today and seeks an explanation of the following matters:

Section 40 - Power to adjust redress payment amounts for inflation

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

While the Committee considers that the power to make regulations in section 40 is acceptable in principle and is also content that it is being subject to the negative procedure, it asks the Scottish Government:

1. What measurement will be used to calculate inflation should the power require to be used?

Section 46 – Form and content of waiver

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

The Committee acknowledges that the principle of the waiver is subject to the approval of Parliament by virtue of its inclusion on the face of the Bill. Nevertheless, it considers that the form and content of such a waiver could have implications for applicants.

The Committee accepts that in general, the negative procedure is usually appropriate in respect of such a power regarding form and content. However, for this power, the Committee asks the Scottish Government:

2. Why it considers the form and content of the waiver will not alter the principle of the waiver or its implications for applicants as provided for in the Bill?

Section 89(6) - Assessment of amount of payment

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

The DPM states that this power will allow the Scottish Ministers:

- to set out appropriate maximum payment amounts applicable to fee payment requests; as well as

- the flexibility to alter the amounts of payment available in respect of legal fees, as needed to take account of inflation and in light of knowledge and experience gained from the practical operation of the scheme and to ensure legal fees do not escalate, without the need for further primary legislation.

The Committee considers that it is appropriate that Scottish Ministers have the power to alter the amounts of payment available in respect of legal fees. However, the Committee notes that the capping of legal fees, by setting a “relevant maximum”, could have a significant impact on an applicant and their subsequent redress payment.

The Committee therefore asks the Scottish Government:

3. Whether it considers that it would be appropriate that the affirmative procedure should apply when first setting the “relevant maximum”, and thereafter the negative procedure should apply?

25 November 2020 – Response from the Scottish Government to the Delegated Powers and Law Reform Committee

Thank you for your letter of 24 November following the Delegated Powers and Law Reform Committee’s consideration of the Bill. We have used your numbering and respond to the questions raised as follows:

1. Measurement used to calculate inflation under section 40

Section 40 provides that the Scottish Ministers may increase the redress payment levels to account for inflation. Whilst inflation may not be a significant issue over the period of the scheme, it is prudent to have the power to adjust payment levels should it become appropriate.

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 will 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). We will give consideration as to whether the Bill ought to be amended to specify this measurement within section 40.

2. Form and content of the waiver

Section 46 permits the Scottish Ministers to make provision by way of regulations about the form and content of the waiver that is to be signed and returned by an applicant wishing to accept a redress payment, and also the information to be provided to the applicant in relation to the waiver and its effects. As noted by the Committee, the negative procedure is usually appropriate in respect of such a power regarding form and content of documents, given that these are essentially more detailed technical matters designed to facilitate in practice, the principles of legislation approved by Parliament.

The principle of the waiver is set out in Section 45 of the Bill and has rightly already been subject to significant parliamentary scrutiny in terms of evidence heard during Stage one consideration. Section 46 does not include any power to alter Section 45 or the purpose and principles of the waiver.

We are committed to ensuring that there is transparency on the face of the Bill as to the extent and effect of the waiver. Our assessment is that the provisions of the Bill when

taken as a whole, including sections 45 and 46, as well as the duty of the Scottish Ministers under sections 88 and 89 to provide funding for applicants to obtain independent legal advice and assistance on a range of matters connected with making a redress application, including whether to accept an offer of a redress payment and sign a waiver under section 45, means that the Bill itself ensures transparency and clarity around the implications of the waiver.

Our intention would be that, in practice the form and content of the waiver and information to be provided to applicants in relation to the waiver and its effects, would be in plain, easily understood language, which would enable the applicant to consider whether to sign and return it in light of any independent legal advice obtained.

3. Procedure for setting “relevant maximum” in respect of legal fees

We note the Committee’s concerns that capping legal fees could have a significant impact on an applicant and their subsequent redress payment.

As noted above, section 88 places a duty on the Scottish Ministers to fund legal fees reasonably incurred up to maximum limits. Importantly however, Section 89(5) allows for increases on those limits to be applied for and granted on a case by case basis by Redress Scotland. Section 90(2) of the Bill also allows for solicitors to seek a review of a decision by Redress Scotland not to grant an increase. We believe that this provides a proportionate approach to legal fees which gives applicants a meaningful opportunity to obtain independent legal advice and to meet the costs of that whilst managing the risk of escalating legal fees which we are aware has arisen in relation to some other countries’ redress schemes.

We are therefore of the view that the negative procedure is appropriate for the initial setting as well as any review of the “relevant maximum” given the safeguards and flexibility contained within the provisions on the assessment of legal fees.

It is also important to note, the redress scheme proposed in the Bill deliberately seeks to create a scheme that is a genuine alternative to court, not a scheme which mimics the processes of litigation.

There will be no findings of liability under the scheme (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. Moreover, by virtue of section 85, the Scottish Ministers 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.

However, the Bill recognises and makes provision for those survivors who do want the assistance of a solicitor from the outset of their application. The scheme is designed to support an applicant’s choice in how to apply; and the survivor can choose whether they do this with or without legal representation.

