

This document relates to the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill (SP Bill 79) as introduced in the Scottish Parliament on 13 August 2020

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

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.

Outline of Bill Provisions

3. 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. 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.

4. The Bill is arranged in seven Parts:

- Part 1 provides an overview of all the redress activity that will be provided for by the Act and defines “the redress scheme”;
- Part 2 establishes Redress Scotland, and makes provision about its functions and those of the Scottish Ministers in relation to the redress scheme. It also requires a list of contributors to the redress scheme to be established, and makes provision to

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facilitate charities becoming scheme contributors where they wish to do so;

- Part 3 makes provision about the core eligibility criteria for the scheme, and those which apply when the person who was abused has died and the person's next of kin wishes to make an application;
- Part 4 makes provision in respect of a number of matters in relation to the application process, including about the requirements which apply to applications for a redress payment, the different types of redress payments which can be offered (a fixed rate payment, an individually assessed payment, or a next of kin payment), the treatment of certain previous payments, for the signature of a waiver to be required where an applicant wishes to accept a redress payment, how long an offer is to remain valid, for a right to a review, the treatment of persons with serious criminal convictions, what is to happen where the applicant dies, the recovery of payments made in error and the reconsideration of determinations materially affected by error, and about how information required in relation to the application is to be obtained and kept confidential;
- Part 5 makes provision about the support which may be provided in connection with applications, the reimbursement of costs and expenses associated with an application, and the payment of legal fees;
- Part 6 makes provision about the reporting that is or can be required of scheme contributors and certain other persons in relation to their redress activity.
- Part 7 provides for the dissolution of the National Confidential Forum, and of Redress Scotland once the redress scheme has ended. It also provides for the interpretation of the Bill, the issuing of guidance and making of regulations, and for its commencement and short title.

Rationale for Subordinate Legislation

5. The Bill contains a number of delegated powers. Section 98 (regulation-making powers) provides that each power of the Scottish Ministers to make regulations under the Bill includes a power to make different provision for different purposes, and to make incidental, supplementary consequential, transitional, transitory or saving provision.

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This ensures that each of the powers in the Bill can operate effectively as required.

6. In deciding whether provisions should be specified on the face of the Bill or made by way of delegated powers proposed to be exercisable by subordinate legislation, the Scottish Government has carefully considered the importance of each matter against the need to:

- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- make proper use of valuable parliamentary time;
- take account of the likelihood of amendment;
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation; and
- anticipate unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

7. The relevant provisions are described in detail below. For each provision, the memorandum sets out:

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

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Delegated Powers

Section 15(1) – Financial contributions by charities: restricted funds

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

8. This section allows the Scottish Ministers to make provision by way of regulations about the potential use of restricted funds by charities to make financial contributions to the redress scheme. Under subsection (2) of section 15, the regulations may, in particular, provide for the circumstances in which restricted funds can be used to make financial contributions, or provide for how charities may be permitted to use such funds for this purpose, notwithstanding any condition having contrary effect. The regulations may also provide that the use of restricted funds for this purpose is to be treated as being for the purposes listed in subsection (2)(c), and may disapply any enactment or rule of law which would prevent their use in this way, and may modify any enactment (including the Bill once enacted). Before making any regulations under this section, the Scottish Ministers must consult the Office of the Scottish Charity Regulator.

Reason for Taking Power

9. Restricted funds are assets or monies which have been given to a charity for a specific purpose and which can generally only be used under particular conditions. Currently charities legislation does not allow a charity to use restricted funds for anything that does not align with the specific purposes for which those funds were given (for example, where they were given by a donor for a particular project falling within the charity's broader charitable purposes). Although a living donor can sometimes be contacted to give consent to a restriction being lifted, this does not assist where the donor has since died or otherwise cannot be contacted – such as where the donor has moved away, or the funds were collected using collection buckets and without the donors' details being taken.

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10. There is an existing power for charities to apply for a reorganisation of restricted funds under Chapter 5A of Part 1 of the Charities and Trustee Investment (Scotland) Act 2005. However, such reorganisations are not necessarily best suited to this particular situation. That system by its nature has to be able to deal with an application by any charity to use restricted funds for any charitable purpose falling within the charity's remit. In contrast, the Bill is only concerned with the use of restricted funds for one particular purpose. It is not therefore necessarily appropriate for each charity which may wish to use restricted funds to make a payment into the redress scheme to have to apply separately for permission to do so under the existing criteria. Rather, the Bill provides a bespoke solution which will avoid unnecessary duplication. There may also be times when the existing reorganisation provisions are not sufficiently flexible. For example, such a reorganisation can only proceed where the charity is unable to ascertain the wishes of the donor. There may be cases where a collection seeking funds for a particular project was held at an event. It may be possible to contact all those on the guest list to ascertain their wishes in relation to the sum they contributed, but it would be disproportionately costly to do so. In such a case, especially if there is a clear benefit to the charity in contributing to the redress scheme and thereby obtaining the benefit of the waivers which are signed by those accepting redress payments, it may be appropriate for the charity to be able to use those proceeds in a different way nonetheless.

11. Accordingly, more flexible provision needs to be made to ensure that charities can contribute to the redress scheme using restricted funds, if that is appropriate and they wish to do so. The use of delegated legislation will provide a proportionate approach to the potential use of restricted funds, with the appropriate involvement in their development by the Office of the Scottish Charity Regulator. The regulations could set out the circumstances in which restricted funds may or may not be used. This could include, for example, provisions in relation to the wishes of the person who donated the restricted funds, or criteria that charity trustees or others would have to consider or meet before allowing the use of restricted funds in this manner. Ensuring the delivery of a principle provided for in primary legislation through regulations is considered appropriate, particularly to provide an operational and potentially flexible approach rather than requiring reconsideration of primary legislation.

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Choice of Procedure

12. The affirmative procedure has been chosen because these regulations may modify any enactment, including the Bill, and to ensure that appropriate and active consideration is given to any regulations in this area in order to provide suitable reassurance to charity donors. The potential use of restricted funds in this context requires careful consideration, and should be subject to appropriate scrutiny.

Section 18(4) – Meaning Of “Relevant Care Setting”

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

13. Section 18 sets out the meaning of “relevant care setting” in the Bill for the purpose of applications for redress payments under the Bill. “Relevant care setting” is defined as a residential institution in which the day-to-day care of children was provided by or on behalf of a person other than a parent or guardian of the children resident there, and a place, other than a residential institution, in which a child resided while being boarded-out or fostered (subject to the qualification in subsection (2)). The types of establishment that fall within the definition of “residential institution” are in turn set out in subsection (3) to mean a children’s home, a penal institution, a residential care facility, school-related accommodation and secure accommodation. These terms are further defined in section 19 and include a part of an establishment or an establishment which forms part of another establishment. Subsection (4) provides the Scottish Ministers with the power to make regulations to modify the meaning of “residential institution” either by adding to or varying the descriptions of establishment mentioned in subsection (3). This power also permits the Scottish Ministers to modify section 19(1) (which sets out definitions of the different types of establishments), as they consider appropriate, whether that is in consequence of a modification to subsection (3) or not.

Reason for Taking Power

14. Knowledge about the context of historical child abuse is increasing all the time, and the scheme covers a long period during which there was

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substantial change in the legislative landscape. Additional types of residential care setting may come to light once the scheme is operational, and it is possible that adjustments may be required in the future. For example, should evidence emerge from the ongoing Scottish Child Abuse Inquiry’s hearings about another type of care setting where abuse occurred, the Scottish Ministers would wish to have the ability to add it to the definition of “residential institution”, where that would be in keeping with the purpose of the scheme as set out in paragraph 6 of the Policy Memorandum (and see also paragraphs 80 to 86 of that Memorandum). It may also become apparent that some of the existing definitions of “residential institution” could need adjustment whether in consequence of such an addition or to clarify their application, in order to ensure that potential applicants were not inadvertently excluded from applying contrary to the purpose of the scheme. This power will therefore allow the Scottish Ministers to respond appropriately if other similar types of establishment are identified in due course or to adjust existing descriptions of establishment.

Choice of Procedure

15. Regulations under this section will be subject to the affirmative procedure. This is because they would alter a fundamental aspect of the Bill, namely, the core eligibility criteria of the redress scheme. Given the importance of this matter, it is considered that this power should be subject to affirmative procedure to afford the Parliament an appropriate level of scrutiny.

Section 21(1) – Power to create exceptions to eligibility

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish
statutory instrument
Parliamentary procedure: affirmative

Provision

16. This provision provides the Scottish Ministers with powers to create specific exceptions in relation to the eligibility of applications for redress payments under section 16 of the Bill. These exceptions may relate to the identity of the person who carried out the abuse, the circumstances in which the abuse was carried out, the circumstances in which the person who was abused came to be resident in a relevant care setting, or the

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purpose for which a person who was abused was resident in the relevant care setting concerned.

Reason for Taking Power

17. As indicated in paragraph 80 of the Policy Memorandum, the eligibility criteria for the scheme need to encompass a very wide variety of care settings, reflecting the fundamental principles of the scheme as well as taking account of the changing landscape of care over the time period in question. This power has been taken to allow the Scottish Ministers to make provision about exceptions in relation to the eligibility requirements of the scheme, where this is necessary and consistent with the underlying purpose of the redress scheme established by this Bill as reflected in paragraph 6 of the Policy Memorandum. This power could be used to enable specific provision to be made in relation to certain types of abuse such as peer abuse and the context in which it was carried out (for example, a one-off fight between residents in a relevant care setting such as a children's home as opposed to systematic bullying by a peer which was condoned by the provider of the relevant care setting). It could also enable provision to be made in relation to circumstances in which a person who was abused came to be resident in a relevant care setting (such as, for example, short term private respite care in a children's home).

Choice of Procedure

18. Regulations under this section will be subject to the affirmative procedure. Again, this is because it relates to a fundamental aspect of the Bill – specifically, core eligibility criteria under the redress scheme. Given the importance of this matter, it is considered that this power should be subject to affirmative procedure to afford the Parliament an appropriate level of scrutiny.

Section 29(2) – Application period

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations made by Scottish
statutory instrument	
Parliamentary procedure:	affirmative

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Provision

19. Section 29(2) provides that the Scottish Ministers may by regulations modify the duration of the application period (five years) during which an application for a redress payment may be made as set out in section 29(1)(b), to extend the period during which an application can be made to the scheme. This power could be used either to state a longer period for which the scheme will be open (e.g. 6 years) or to state a particular end date.

Reason for Taking Power

20. Whilst at present it is considered that five years is an appropriate time for the scheme to be open for applications, and that it will also allow the Scottish Ministers sufficient time to take account of the findings of the Scottish Child Abuse Inquiry (the “Inquiry”), it is possible that the Inquiry will continue to hear evidence for a longer period than currently anticipated, or that other information (separate to the Inquiry) may come to light, with the result that the Scottish Ministers would wish to be able to address this through an extension to the redress scheme.

Choice of Procedure

21. Regulations under this section will be subject to the affirmative procedure. This is because an extension to the scheme would be a fundamental adjustment to the scheme which could result in significant further expenditure, and which therefore merits a higher level of parliamentary scrutiny. Additionally, exercise of the power would modify primary legislation (namely subsection (1)(b) of this section).

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

22. The power provided for by this section permits the Scottish Ministers to modify the amount of fixed rate payment as set out in sections 37 and the levels applicable in relation to an individually assessed payment as set

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out in section 38. This would be for the purpose of substituting such higher amounts as the Scottish Ministers consider appropriate in consequence of material changes in the value of money.

Reason for Taking Power

23. This power has been taken to allow Ministers to be able take account of the effects of inflation in future, to ensure that payments made throughout the lifetime of the scheme reflect the value of payments set now, when the Bill is being considered by the Parliament. While it may be unlikely that inflation over the period in question will make a material difference to the amounts being set now, it is considered prudent to take a power to cover this eventuality, particularly as there is the possibility of the scheme being extended beyond its original 5 year lifespan for applications.

Choice of Procedure

24. The negative procedure has been chosen in this case because, notwithstanding the fact that any modifications made would change the position as set out in primary legislation, the modifications would constitute technical and administrative amendments rather than allowing any kind of substantive change. The negative procedure is considered to provide an appropriate balance between the nature and content of regulations that would be made under this power and the availability of parliamentary time and resource to scrutinise such regulations.

Section 41(6) – Deduction of previous payments from redress payment

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

25. In accordance with subsection (4) of section 41, where an applicant to the redress scheme has already received a “relevant payment”, this is to be deducted from the payment to be offered. What counts as a “relevant payment” is currently defined in subsection (2) of this section to mean any of the following: an award of damages or compensation by a court; a payment in settlement of a claim; an award under the Criminal Injuries

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Compensation Scheme; a payment under any other statutory scheme; a payment under the advance payment scheme or any other non-statutory scheme; or any other ex gratia payment. Some of these terms are as further defined in subsection (7). Subsection (3) qualifies subsection (2) by ensuring that particular things are not caught where it would be inappropriate to do so: for example, a portion of a settlement which related to reimbursement of legal fees rather than compensation. Redress payments are also excepted as someone may have applied previously for a fixed rate payment before reapplying for an individually assessed payment. As the person will not receive the fixed rate payment element twice, it would be inappropriate for it to be deducted from any further sum the person may receive on the second application despite it being a payment under a statutory scheme.

26. Subsection (6) provides that the Scottish Ministers have the power to modify the meaning of “relevant payment” by adding a type of payment, or varying or removing one of the types of payment currently listed and, in consequence (or otherwise), modifying the definitions in subsection (7). This power would therefore allow Ministers to vary the general proposition in subsection (2), but also to vary what should be excepted from those general propositions under subsection (3).

Reason for Taking Power

27. Other types of relevant payments which are similar in nature to those already included in the definition may need to be added, removed or amended in future and a regulation-making power allows for the flexibility to respond to unforeseen circumstances or new payment types that may arise over the lifespan of the scheme.

Choice of Procedure

28. It is considered appropriate that these regulations are subject to the affirmative procedure given the importance of any such change, and the implications it could have for a person’s application and the amount of the redress payment the person will receive. Exercise of this power would amount to a change to provision currently made by way of primary legislation.

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Section 43(2)(e) – Information about previous payments from applicant

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

29. Section 43 requires an applicant to provide the Scottish Ministers with information about any relevant payment they (or the person to whom the application relates, in the case of a next of kin payment) have already received, or have become entitled to before the application is made or determined. The type of information required is set out in subsection (2). This includes the amount of the payment, the date it was made, who made it, and the circumstances in which it was made. The applicant must also provide any other information about the relevant payment prescribed in regulations made by the Scottish Ministers under subsection (2)(e).

Reason for Taking Power

30. This power provides Ministers with flexibility to specify other types of information to be provided in relation to previous payments. It provides flexibility for Ministers to adjust these requirements in the light of experience as the scheme progresses, without the need for further primary legislation.

Choice of Procedure

31. The negative procedure is considered to be appropriate as it is felt that this matter is of an administrative nature which requires a flexible approach without using up parliamentary time unnecessarily. It does not create any power to alter primary legislation or the purpose and principles of the underlying scheme.

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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

32. This section 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.

Reason for Taking Power

33. This power will allow the Scottish Ministers to make detailed provision on the form and content of the waiver, and as to the information which must be shared with applicants in relation to the waiver. It is considered that this type of detailed provision is more appropriate to be delegated to secondary legislation, rather than required to be set out in primary legislation.

Choice of Procedure

34. The negative procedure is considered to provide an appropriate balance between the nature and content of the regulations that would be made under this power and the availability of parliamentary time and resource to scrutinise such regulations. The provision does not create any power to alter primary legislation or the purpose and principles of the underlying scheme. The form and content of the waiver is a technical matter and will not alter the principle of the waiver or its implications for applicants as provided for in the Bill. These regulations will essentially allow for the terms of the waiver that are ultimately approved by the Parliament in the Bill to be implemented in practice.

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Section 59(2) – Applicants etc. with convictions for serious offences: definitions

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

35. Section 58 (applicants etc. with convictions for serious offences) provides that in respect of those seeking a redress payment with relevant previous convictions for serious criminal offences, a decision-making panel of Redress Scotland will require to consider on a case by case basis (taking into account a range of factors) whether it would be contrary to the public interest to make a redress payment to that person. Subsection (1) of section 59 sets out the definitions which apply to section 58. Subsection (2) provides the Scottish Ministers with a power to modify subsection (1) to add, vary or remove an offence listed in that provision.

Reason for Taking Power

36. This power has been taken to allow for flexibility as regards the specification of offences which are to be taken into account in this context. It may be that offences might be identified which should be included on the list, and similarly, some offences may be deemed to be no longer relevant. Having a regulation-making power will provide flexibility to respond to unforeseen circumstances and potential changes in criminal law.

Choice of Procedure

37. It is considered appropriate that these regulations are subject to the affirmative procedure. This is due to the sensitivity and importance of the subject-matter which merits a high level of parliamentary scrutiny given the potential impact on eligibility for redress payments under the Bill.

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Section 75(1) - Power to make further provision about reconsiderations

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

38. Subsection (1) of section 75 allows the Scottish Ministers to make further provision about or in connection with the reconsideration of a determination under section 72 where there has been a possible material error, and any review of a reconsidered determination under section 73. Subsection (2) sets out examples of matters which the regulations may cover, including allowing or requiring legal fees and other costs incurred in connection with a reconsideration to be reimbursed by the Scottish Ministers, allowing material changes which have occurred since the date of the original determination to be taken into account, and making provision in relation to the interaction of the reconsideration panel's determination with any offer that has already been accepted (including any waiver granted).

Reason for Taking Power

39. This power has been taken to allow Ministers to make further detailed provision about the reconsideration of a determination and any review of it, and how those processes interact with the wider provisions on redress payments in the Bill, that may be required as the scheme progresses to ensure that these function as intended.

40. Reconsiderations may take place at different times: a reconsideration may be needed where Redress Scotland realises immediately after making a determination that a fundamental error has been made, or it may be that it comes to light much further down the line that an application stated things which were not in fact correct. The outcome will vary in practical terms as a result (for example, is it that a sum is not to be offered anymore, or is it that a sum paid is to be recovered). Whether further legal assistance is required may also vary from case to case: in some cases, the reconsideration may be a simple mathematical exercise based on corrected figures, whereas in others it may be a process more like the initial determination and so more support may be needed. As the range of

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possible cases is wide, it is considered appropriate to take a power to ensure that every scenario which might arise can be properly provided for. It is also considered appropriate to supplement these provisions using a regulation-making power rather than making provision on the face of the Bill as it is hoped that the use of this mechanism will be rare and therefore making extensive provision for situations which may not come to pass may be disproportionate.

Choice of Procedure

41. Given the scope of this power and the interaction between any provision made under it and the wider Bill provisions, which may have a significant impact on eligibility assessments, it is considered appropriate that these regulations are subject to the affirmative procedure.

Section 87(1) – Reimbursement of costs incurred in connection with applications

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

42. Section 87(1) obliges the Scottish Ministers to make provision by way of regulations requiring the reimbursement by them of costs and expenses reasonably incurred by a person in connection with an application for a redress payment under section 27, where the applicant requests this. Provision must also be made allowing for reimbursement, in exceptional or unexpected circumstances, of costs and expenses reasonably incurred in connection with a proposed application by a person who did not subsequently apply. Subsection (3) sets out a number of matters in respect of which regulations under this section may, in particular, make provision, including the types of, and limits on, the costs and expenses which may be reimbursed, the form and content of, and time limits for, reimbursement requests, the information and evidence to be provided, the factors to be considered in assessing the reasonableness of the costs and expenses, and the process by which Redress Scotland may review Scottish Ministers' assessments made in accordance with these regulations.

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Reason for Taking Power

43. This power has been taken to allow the Scottish Ministers to make detailed provision as regards the reimbursement of reasonable costs incurred by a person in connection with an application. The regulations will set out the processes and information which apply to such requests. It is considered that this level of detail is appropriate to be delegated to secondary legislation. The power will also provide the Scottish Ministers with the flexibility needed to make adjustments to these processes if required from time to time as practice develops.

Choice of Procedure

44. The negative procedure is considered to be appropriate in view of the procedural and administrative nature of the provision to be made under this power. The provision does not create any power to alter primary legislation or the purpose and principles of the overall scheme.

Section 88(7) – Duty on Scottish Ministers to pay certain legal fees in connection with applications

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

45. Section 88(1) provides that the Scottish Ministers must arrange payment of the legal fees reasonably incurred by a person in making an application for a redress payment under section 27 of the Bill, where the person requests this (referred to in the Bill as a “fee payment request”). Ministers must also arrange payment, in exceptional or unexpected circumstances, of costs and expenses reasonably incurred in connection with a proposed application by a person who did not subsequently apply. Subsection (7) provides the Scottish Ministers with a power to make further provision about fee payment requests by way of regulations, including any time limits for making a request, their form and content, and the information and evidence to be provided with them.

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Reason for Taking Power

46. This power has been taken to allow the Scottish Ministers to set out further details in relation to fee payment requests, including the time limits and the content required for a request. It is considered that a delegated power is more appropriate for this rather than provision on the face of the Bill, given the detailed nature of the subject matter and the potential need to amend it in future in light of experience.

Choice of Procedure

47. The negative procedure is considered to be appropriate in view of the procedural and administrative nature of the provision to be made under this power. The provision does not create any power to alter primary legislation or the purpose and principles of the overall redress scheme.

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

48. 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. Subsection (2) sets out what constitutes legal fees reasonably incurred in making an application for a redress payment, for the purpose of assessing the amount to be reimbursed. Such fees may be reimbursed up to the “relevant maximum”. Subsection (6) provides that the “relevant maximum” is the maximum amount of payment applicable to the fee payment request, as set out in regulations made by the Scottish Ministers on the assessment of the amount of payment. Subsection (7) provides that regulations may in particular set out different maximum amounts of payment applicable to fee payment requests, and may make further provision about fees, incurred in connection with particular types of legal advice and assistance, which are and are not to be regarded by Redress Scotland as reasonably incurred for the purpose of assessing the amount to be paid.

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Reason for Taking Power

49. This power has been taken to allow the Scottish Ministers to set out appropriate maximum payment amounts applicable to fee payment requests. This power will provide flexibility to allow the Scottish Ministers 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.

Choice of Procedure

50. The negative procedure is considered appropriate because of the technical and administrative nature of the provision made under this power, which cannot be used to amend primary legislation. The negative procedure is considered to provide an appropriate balance between the nature and content of regulations that would be made under this power and the availability of parliamentary time and resource to scrutinise such regulations.

Section 90(3) – Notification and review of payment

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

51. This section provides for notification of the outcome of a legal fee payment request. The Scottish Ministers must notify the solicitor who submitted the request of the amount to be paid, as assessed by Redress Scotland, and provide a summary of Redress Scotland's reasons for that assessment. Subsection (2) sets out the circumstances in which the solicitor may request a review of the initial assessment. Subsection (3) provides that the Scottish Ministers may make further provision, by regulations, about reviews by Redress Scotland of assessments of fee payment requests, including time limits, the required content and form of a review, the outcome of reviews, the powers available to a review panel, and the suspension of fee payment pending determination of review.

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Reason for Taking Power

52. This power has been taken to allow the Scottish Ministers to make further, detailed provision about reviews of assessments of requests for reimbursement of legal fees. The regulations will set out the detailed processes which will apply to such reviews. It is considered that this level of detail is appropriate to be delegated to secondary legislation. The power will also provide the Scottish Ministers with the flexibility to make adjustments to these processes if required from time to time as practice develops.

Choice of Procedure

53. The negative procedure is considered to be appropriate in view of the administrative and procedural nature of the provision to be made under this power. The provision does not create any power to alter primary legislation or the purpose and principles of the overall redress scheme.

Section 91(7) – Annual reporting on wider redress actions

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

54. Section 91(1) sets out a requirement for a public authority, voluntary organisation or other person included from time to time in the list of scheme contributors established and maintained under section 12 of the Bill (namely those who are making or have agreed to make a fair and meaningful financial contribution towards the funding of redress payments under the Bill) to produce a redress report on the actions which that person has taken during the reporting period to redress the historical abuse of children. The Scottish Ministers must then collate the information from such reports and publish it under subsection (5). Under subsection (2), a redress report must include information about any support provided for individuals who were abused as children and such other information as the person considers appropriate. Subsection (7) allows the Scottish Ministers to specify by way of regulations, in relation to the “reporting period” as defined in that subsection, when the requirement to produce a report will come to

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an end. Otherwise, reporting periods would continue to run indefinitely, even after the redress scheme had come to an end and Redress Scotland had been dissolved.

Reason for Taking Power

55. Flexibility is needed in relation to the end of the last reporting period to ensure that this can be appropriately linked to the end of the wider redress scheme. This power will allow the Scottish Ministers to specify the date when the reporting requirement will end.

Choice of Procedure

56. The negative procedure is considered to be appropriate in view of the administrative nature of the provision to be made under this power. The provision does not create any power to alter primary legislation or the purpose and principles of the overall scheme.

Section 92(3) – Power of the Scottish Ministers to require production of report

Power conferred on: the Scottish Ministers

Power exercisable by: directions

Parliamentary procedure: none

Provision

57. Where the Scottish Ministers consider that a person to whom the duty to make a redress report under section 91(1) applies has failed to comply, or an application for a redress payment involving a person (other than an individual) who is not included in the list of scheme contributors results in an offer of a redress payment, Ministers may under section 92(3) give a direction (“a reporting direction”) requiring the person to prepare a redress report within 3 months or such longer period as Ministers specify in the direction. The person to whom the reporting direction is given must then comply with it and the fact of any failure to do so may be published (subsection (5)). Under subsection (6) the Scottish Ministers may revise or revoke a reporting direction.

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Reason for Taking Power

58. A transparent and flexible mechanism is required to enable the Scottish Ministers to ensure that persons engage with the redress reporting duty under section 91(1) where at any given time they have not already done so, or to trigger the reporting duty's application to a person not already included in the list of scheme contributors at the point where that person may have been the subject of an application resulting in an offer of a redress payment.

Choice of Procedure

59. As the function is essentially administrative in nature and could be exercised at any point of time throughout the operation of the redress scheme, it is not considered necessary or appropriate for this to be subject to parliamentary procedure. It applies only to a closed category of particular persons (and does not apply to individuals). Moreover, it is also considered that the reporting obligation under section 91(1) which would be triggered by this would not be a particularly onerous one. It is considered proportionate to have a targeted mechanism to enable the triggering of the reporting obligation to any particular organisation not already included in the list of scheme contributors which may, from time to time, be the subject of an application for a redress payment which has resulted in an offer of such a payment being made.

Section 93 - Power to make provision about additional redress reporting

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

60. This section allows the Scottish Ministers to make provision, by way of regulations, requiring a relevant person to whom the duty to make a redress report under section 91(1) applies, to include an additional statement in their annual report or equivalent document on any support for individuals who were abused as children (as provided for in section 91(2)) which they have provided during a period specified in the regulations.

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Reason for Taking Power

61. This power will enable the Scottish Ministers to require reporting on wider redress activity to be embedded as part of organisations' usual reporting cycles, whilst providing flexibility to ensure such requirements are appropriately tailored to take account of the range of existing reporting structures.

Choice of Procedure

62. The negative procedure is considered to be appropriate in view of the detailed and procedural nature of the provision to be made under this power. It is also considered that the obligation which would be imposed would not be an onerous one in light of the report that the organisation will already have prepared under section 91.

Section 95(1) – Dissolution of Redress Scotland

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

63. Section 95(1) allows the Scottish Ministers to make regulations for the dissolution of Redress Scotland, but only where the period for making applications for redress payments mentioned in section 29 (including any extension of it under section 29(2)) has ended and they are satisfied there are no ongoing applications for redress or fee payment requests under section 88, and that Redress Scotland no longer has, or will no longer have as a result of the regulations, any functions as mentioned in section 7. Regulations made under this provision may also modify or bring to an end any of Redress Scotland's functions, and may transfer any remaining functions to the Scottish Ministers or any other body. Subsection (5) provides that any regulations made under this section may also modify any enactment (including this Act). The Scottish Ministers are required to consult Redress Scotland and such other persons as they consider appropriate before making regulations under this section.

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Reason for Taking Power

64. Section 29 (application period) provides that the redress scheme will be open to receive applications for a period of five years from the date on which that section comes into force, (although that five year period may be extended by regulations made under section 29(2)). In either case, once the application period ends, there will still be work to be done by Redress Scotland, most obviously to determine any applications that remain outstanding, but potentially also to fulfil ongoing duties such as those to prepare a corporate plan and accounts. This power has been taken in order to allow the Scottish Ministers to dissolve Redress Scotland once they are satisfied that its substantive work is done (subsection (2)). However, in order to retain some flexibility as regards more ancillary matters, subsection (3) expressly provides that regulations under this section may modify, bring to an end or transfer to the Scottish Ministers or any another body any remaining functions of Redress Scotland at the same time as it is dissolved. This is to ensure an orderly winding up of Redress Scheme and the operation of the redress scheme.

Choice of Procedure

65. The choice of affirmative procedure and the level of scrutiny that this procedure provides to the Parliament reflects the significance of the dissolution of Redress Scotland and the winding up arrangements which will be required in respect of the redress scheme.

Section 97(1) – Guidance
Power conferred on: the Scottish Ministers
Power exercisable by: the Scottish Ministers
Parliamentary procedure: laid, no procedure

Provision

66. Section 97(1) enables the Scottish Ministers to issue guidance about the operation of the Bill, and subsection (2) provides that a person to whom such guidance applies must have regard to it. Subsection (3) sets out a number of matters in respect of which the guidance may (in particular) make provision, including the exercise of a function by Redress Scotland, eligibility to apply for redress payments, the meaning of any expression used in Part 3 of the Bill, and the sources and types of evidence that an application for redress must include or be accompanied by. Guidance issued under this section is to be laid before the Scottish Parliament, and is

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to be made publicly available. It may be varied or revoked by subsequent guidance issued under this section. It may also include guidance issued before this section comes into force.

Reason for Taking Power

67. It is considered appropriate for the Scottish Ministers to have the power to issue guidance from time to time about the operation of the redress scheme, to assist applicants, Redress Scotland and others who may require to interact with the redress scheme. Guidance is considered appropriate in these circumstances, where the content is operational, administrative and practical in nature. Some of this may need to be prepared in advance of implementation of the scheme. The level of detail that is required in the guidance is beyond that which would normally be contained in primary legislation.

Choice of Procedure

68. For transparency, copies of any guidance will be laid as soon as reasonably practicable before the Parliament. The guidance to be produced covers a range of matters concerning the operation of the scheme and can be expected to be updated from time to time in light of practical experience. The guidance will cover matters of administrative or technical detail, and will expand upon the core principles within the Bill that are already subject to parliamentary scrutiny. However, as guidance does not have the force of law, requiring the Parliament to scrutinise the guidance itself would not be the best use of parliamentary time.

Section 99(1) – Ancillary provision
Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative if amends primary legislation, otherwise negative

Provision

69. Section 99(1) provides that the Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, or in consequence of, or for giving full effect to, any provision of or made under

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the Bill. Subsection (2) allows such regulations to modify any enactment, including this Bill.

Reason for Taking Power

70. As with any new body of law, this Bill may give rise to a need for a range of ancillary provisions. For example, consequential provision may be required to make necessary changes to related legislation. Without the power to make ancillary provision, it might be necessary to return to the Parliament, through subsequent primary legislation, to deal with technical, operational or implementation matters clearly within the scope and policy intentions of the original Bill. That would not be an efficient use of resources by the Parliament or the Scottish Government. The power, whilst potentially wide, is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate to do so, for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision made by or under the Bill. It is considered that the power is necessary for the above reasons, and that it should extend to the modification of enactments. That also seems appropriate for flexibility given the intended relatively short lifespan of the redress scheme established under the Bill.

Choice of Procedure

71. Section 98 of the Bill provides that regulations made under this section which modify an Act will be subject to the affirmative procedure, which is considered appropriate as textual amendments would be made to primary legislation. It provides that, in all other cases, regulations made under this section are subject to the negative procedure. This dual approach is typical for ancillary powers.

Section 100(2) – Commencement
Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: laid, no procedure

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Provision

72. Subsection (1) of section 100 sets out the date upon which certain specified provisions of the Bill will come into force. Subsection (2) enables the Scottish Ministers to commence the remaining provisions of the Bill on such day as they may by regulations appoint. Subsection (3) provides that these regulations may include transitional, transitory or saving provision and make different provision for different purposes. Subsection (4) permits regulations made under this section which commence section 29 to amend section 29(1)(a) so that it specifies the date upon which the section actually came into force.

Reason for Taking Power

73. For some provisions an appropriate commencement date is already known, and this is set out in subsection (1) of this section. However, where this is not the case, it is standard practice for the Scottish Ministers to have the power to commence provisions at such time as they consider to be suitable. Subsection (3)(b) is necessary to ensure provisions can be commenced for different purposes. For example, it may be necessary to commence a provision initially only for the purpose of making regulations. In relation to subsection (4), the application period for the scheme is currently expressed in section 29 as beginning on the day that section “comes into force”. The regulations commencing that section will be able to amend it to make reference instead to the date upon which it does come into force, which will make the start and end dates of the application period clear on the face of the Bill.

Choice of Procedure

74. As is usual for commencement regulations, the power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010.

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Schedule 1 – Redress Scotland - Paragraph 2(5) - Period of appointment for members

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

75. Paragraph 2(1) of schedule 1 provides that the members of Redress Scotland will be appointed for such period (being not less than three years and not more than five years) as the Scottish Ministers may determine. Paragraph 2(5) provides the Scottish Ministers with a power to substitute a different number for either number mentioned in that sub-paragraph.

Reason for Taking Power

76. As set out in section 29(1) of the Bill, the application period for the redress scheme is 5 years. However, section 29(2) enables the period of application of the scheme to be extended by regulations. In light of any extension under that provision, it is appropriate for the Scottish Ministers to have the power to adjust the time period for which members may be appointed or re-appointed. This will provide flexibility and will allow Ministers to tailor any period of appointment or re-appointment to any extension of the period of application of the redress scheme.

Choice of Procedure

77. The negative procedure has been chosen as this is a small, technical amendment, which requires a flexible approach without using up parliamentary time unnecessarily.

Schedule 1 – Redress Scotland - Paragraph 16(2) – Accounts and audit

Power conferred on: the Scottish Ministers

Power exercisable by: directions

Parliamentary procedure: none

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Provision

78. Paragraph 16(1) of schedule 1 provides that Redress Scotland must keep proper accounts and accounting records, prepare an annual statement of accounts and send a copy of that statement to the Scottish Ministers. Paragraph 16(2) requires Redress Scotland to comply with any directions from the Scottish Ministers in relation to those requirements.

Reason for Taking Power

79. This enables the Scottish Ministers to issue directions to require Redress Scotland to report on the financial requirements in a format which is consistent with other public bodies.

Choice of Procedure

80. As the function is essentially administrative in nature, and to ensure the format of Redress Scotland's financial reporting aligns with similar obligations applicable to other public bodies, it is not considered necessary or appropriate for this to be subject to parliamentary procedure.

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

Delegated Powers Memorandum

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