

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

[As Amended at Stage 2]

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## Supplementary Delegated Powers Memorandum

### Purpose

1. This supplementary memorandum has been prepared by the Scottish Government in accordance with rule 9.7.10 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill, amended or removed at Stage 2.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament. This supplementary memorandum should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.

### Provisions conferring power to make Subordinate Legislation introduced or amended at Stage 2

3. The amended or new delegated powers in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

## **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**

**Revised or new power: revised (the power itself has not changed, but a new condition upon its exercise has been added)**

## **Provision**

4. The power at section 18(4) to modify the meaning of “residential institution” has not changed but there is now a condition at section 18(5) which has to be met in order for the Scottish Ministers to be able to exercise this power.

5. Section 18 sets out the meaning of “relevant care setting” for the purpose of eligibility to apply for redress payments under the Bill. This includes a “residential institution”. The types of establishment that fall within that term are set out in subsection (3), with each of these types of establishment then being further defined in section 19.

6. 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 the descriptions of each type of establishment in section 19(1) as they consider appropriate, whether that is in consequence of a modification to subsection (3) or not.

7. Section 18 was amended at Stage 2 to add subsection (5), which provides that the Scottish Ministers may make regulations under subsection (4) only if satisfied, so far as reasonably practicable, that doing so will not have the effect that persons who would otherwise be eligible to apply for redress payments cease to be so eligible.

## **Reason for taking power**

8. The reason for taking the power has not changed and remains as set out in the Delegated Powers Memorandum published to accompany the Bill on introduction.

## **Choice of procedure**

9. The affirmative procedure continues to be considered appropriate for this power for the reasons set out in the Delegated Powers Memorandum published to accompany the Bill on introduction.

10. It is considered appropriate to add the new condition at subsection (5) because it provides reassurance as to the intended use of the power. While it may be necessary to adjust the definition in light of experience gained during the lifetime of the scheme (given the complexity of the care settings landscape over the period in question), the policy intention is that this should not result in a person's eligibility for redress under the scheme being adversely affected.

## **Section 46 – Form and content of waiver**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: affirmative**

**Revised or new power: revised (the power itself has not changed, although the procedure to which it is subject has)**

## **Provision**

11. 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**

12. The reason for taking the power has not changed and remains as set out in the Delegated Powers Memorandum published to accompany the Bill on introduction.

## **Choice of procedure**

13. At Stage 2 the Bill was amended to change the procedure to which these regulations are subject from negative to affirmative. It was considered that the greater level of parliamentary scrutiny that will now be given would

be appropriate, given the subject matter and the potential implications for applicants of signing a waiver.

### **Section 88C(3) - power to make further provision about fee payment requests**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: negative except where they add to, replace or omit any part of the text of an Act, in which case affirmative**

**Revised or new power: new**

### **Provision**

14. At Stage 2 the Bill was amended to leave out sections 88 to 90 and replace them with sections 88A to 88E. These new provisions place a duty on the Scottish Ministers to pay a prescribed sum (i.e. a fixed fee) for legal work reasonably carried out in the making of an application for redress, rather than Redress Scotland carrying out a more detailed assessment of the legal fees actually incurred in each case, subject to a capped maximum, and basing payment on that (which is what the Bill provided for at introduction). However, there is still the ability for a solicitor to apply for a bespoke assessment to be carried out in cases where there are exceptional or unexpected circumstances which may justify the payment of an additional sum. Although the move to a predominantly fixed fee system has been dealt with by the insertion of new sections, many elements of sections 88A to 88D are very similar to the Bill as introduced (subject to some restructuring and other minor adjustments).

15. Section 88C(3) allows the Scottish Ministers to make further provision about “fee payment requests” (being requests made by solicitors acting for applicants or potential applicants, and submitted to the Scottish Ministers for payment in respect of legal work). This replaces the power formerly set out in section 88(7). However, the Bill now expressly provides that the provision which may be made about fee payment requests under the generality of this power includes the ability to prescribe any steps that must be taken prior to the making of a fee payment request. It also allows the regulations to make provision about which types of work are (or are not) to be regarded as reasonably undertaken for the purposes of assessing whether a sum is to be

paid (which was previously covered by section 89(6) as read with section 89(7)(b) of the Bill). Section 88C(5) provides that regulations under section 88C(3) may modify any enactment (including the Bill once it is enacted).

## **Reason for taking power**

16. This power has been taken to allow the Scottish Ministers to set out further details in relation to fee payment requests in secondary legislation. As was the case with the power under section 88(7), it is considered that a delegated power is more appropriate for this 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.

17. The express mention of the ability to require the taking of prior steps has been added so as to ensure that provision similar to section 89(5)(a) of the Bill as introduced (which required a prior step where extra costs were to be incurred) may be made under the regulations. Moving any prior authorisation requirement to regulations will allow greater flexibility to respond to any lessons learned about how such a requirement functions in practice.

18. The power to modify enactments has been taken because section 88A(4) is predicated on the fact that the listed elements are all part of the work of making an application. If provision is made under regulations to say that something else is also work that is undertaken in making an application, it would be appropriate for the regulations to expand the list in section 88A(4) to reflect that.

## **Choice of procedure**

19. As was the case with the previous powers which this power replaces, the negative procedure is considered to be generally appropriate in view of the procedural and administrative nature of the provision to be made under this power. However, by virtue of section 88C(5), regulations under this provision may now modify enactments, and where they add to, replace or omit any part of the text of an Act, they will be subject to the affirmative procedure. It is considered appropriate that any change to primary legislation should be subject to a greater level of scrutiny.

## **Section 88C(4) - power to prescribe sum to be paid in respect of legal work undertaken in connection with an application, or potential application, for redress**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: negative**

**Revised or new power: new**

### **Provision**

20. Section 88C(4) provides the Scottish Ministers with a power to prescribe the sum (i.e. the fixed fee) payable under sections 88A(1) and 88B(1). This replaces the previous power to set maximum fees in section 89(6), which was left out of the Bill following amendment at Stage 2. The power in section 88C(4) can, by virtue of section 88C(6), be exercised to prescribe scales of fixed fees and the conditions under which they are payable. Under section 98(1), it also continues to be the case that different provision may be made for different purposes. As such, just as was the case in relation to the previous power in section 89(6) to set maximum fees, a different fixed fee could, for example, be set in relation to applications for different types of redress payment or based on whether or not the work included a review too.

### **Reason for taking power**

21. This power has been taken to allow the Scottish Ministers to set out the sum payable in response to fee payment requests. This will allow the Scottish Ministers to alter this sum in future if needed, to take account of inflation and in light of knowledge and experience gained from the practical operation of the scheme, without the need for further primary legislation.

### **Choice of procedure**

22. As was the case with the previous power under section 89(6) which this power replaces, 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 88D(5) - further provision on reviews of assessments of fee payment requests**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: negative**

**Revised or new power: new**

### **Provision**

23. Section 88D(5) provides the Scottish Ministers with a power to make further provision about reviews by Redress Scotland of assessments of fee payment requests. This replaces and expands upon the power which previously appeared at section 90(3) of the Bill as introduced, with the additional aspects of the provision (paragraphs (d) and (f)) being included simply to put beyond doubt that the regulations may cover these things.

### **Reason for taking power**

24. This power has been taken to allow the Scottish Ministers to make further, detailed provision about reviews of assessments of fee payment requests. 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**

25. As was the case with the previous power under section 90(3) which this power replaces, 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 90B(1) - power to make further provision about payments, other than redress payments, made in error**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: affirmative**

**Revised or new power: new**

### **Provision**

26. Sections 90A and 90B make provision as regards liability for payments (other than redress payments) which have been paid in error. In accordance with section 90A(2), this includes payments under a variety of Bill provisions, such as those made in respect of reports commissioned under section 79(1), or under sections 88A or 88B in respect of fees for legal work. Section 90B(1) provides the Scottish Ministers with a power to make further provision about or in connection with their consideration as to whether decisions to make such payments were materially affected by error. Subsection (2) of section 90B sets out some of the matters that the regulations may cover, and subsection (3) provides that the regulations may modify any enactment, including the Bill.

### **Reason for taking power**

27. This power will allow the Scottish Ministers to make more detailed provision as regards their consideration as to whether decisions to which section 90A applies were materially affected by error. It is considered that this level of detail is appropriate to be delegated to secondary legislation, and will also provide flexibility if the regulations need to be adjusted in due course in the light of experience. In addition, some of the payments to which this power relates will be subject to processes which are themselves subject to some flexibility (for example, payments in respect of support under section 85 or 86, or reimbursement of costs or expenses by virtue of regulations under section 87). As such, it would not be possible to set out what procedure should be applied to reconsideration of a decision until the details of the original decision-making process are known in full. The provision made in section 90B is very similar to the regulation-making power in section 75 of the Bill which relates to errors made in relation to redress payments.



## **Choice of procedure**

28. Affirmative procedure is considered to be appropriate in much the same way as it is considered appropriate in relation to the broadly comparable power in section 75. Although the payments to which section 90B relates are likely to be lower amounts than those covered by section 75, and although section 90B does not allow for the recovery of a payment from a survivor, the affirmative procedure is nonetheless considered appropriate given that the provision made may still have a significant impact on those to whom such payments are made. It is also appropriate to the extent that the power may be exercised to amend primary legislation.

## **Section 93A - The Survivors Forum**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: affirmative**

**Revised or new power: new**

## **Provision**

29. Section 93A(1) requires the Scottish Ministers to establish a forum for survivors of historical child abuse in care, and subsection (3) sets out the current functions of this forum (though some adjustments are likely to be proposed at Stage 3 in that regard). Subsection (4) provides the Scottish Ministers with a regulation-making power to make further provision in relation to the forum. Subsection (5) sets out that these regulations may in particular make provision in relation to the reimbursement of expenses incurred by members of the forum, and may also make such modifications to enactments as the Scottish Ministers may consider necessary or expedient in consequence of the establishment of the forum.

## **Reason for taking power**

30. This provision was inserted at Stage 2 by way of non-government amendment. The Policy Memorandum for the Bill had stated that the Scottish Government intended to establish such a forum but that, to maximise flexibility, this had not been provided for in the Bill.

31. The forum is now provided for on the face of the Bill. However, survivors will need to be consulted on the details of how the forum should operate. If more detailed provision were to be made about the forum now, that might need to change over time to respond to the views of those the forum is designed to serve, as well as changing circumstances. Taking a power to allow further detail to be dealt with in regulations later, as necessary, is therefore one method of allowing the forum to be established in the Bill while recognising that it would not be possible to make suitable provision in full just now.

### **Choice of procedure**

32. The affirmative procedure currently applies to these regulations, and it is considered that this would be appropriate in cases where the regulations were modifying an Act. However, in light of the fact that things of a much more minor and administrative nature could also be done under this power, the Scottish Government is exploring the scope for a more flexible approach which would enable the power to be exercised in other cases subject to the negative procedure. The Scottish Government may therefore bring forward amendments at Stage 3 to address this.

### **Provisions conferring power to make Subordinate Legislation removed at Stage 2**

#### **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**

33. This regulation-making power has been removed following amendment of the Bill at Stage 2. The power would have allowed 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. 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.

34. At Stage 1 the Committee heard evidence from some care providers and stakeholders that attempting to use restricted funds for any other purpose than a donor's wishes would potentially undermine confidence in charitable giving. Whilst the original policy intention was to empower charities and remove potential barriers to participation, it was considered that, on reflection, for the purposes of maintaining confidence in charitable giving, section 15 should be removed from the Bill. The effect of this is that the process by which charities may access their restricted funds is entirely unaffected by the Bill and remains subject to existing legislation (the Charities and Trustee Investment (Scotland) Act 2005).

### **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**

35. This regulation-making power was removed at Stage 2 and replaced by the power at section 88C(3). This was part of the substitution of sections 88A to 88E (which provide for a system of predominantly fixed fee payments for legal work) in place of sections 88 to 90 (which provided for an assessment of legal fees in each case, subject to a capped maximum).

### **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**

36. Much like the regulation-making power at section 88(7), this power was removed at Stage 2 and replaced by the power at section 88C(4). This was part of the substitution of sections 88A to 88E (which provide for a system of predominantly fixed fee payments for legal work) in place of

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sections 88 to 90 (which provided for an assessment of legal fees in each case, subject to a capped maximum).

### **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**

37. Much like the regulation-making powers at sections 88(7) and 89(6), this power was removed at Stage 2 and replaced by the power at section 88D(5). This was part of the substitution of sections 88A to 88E (which provide for a system of predominantly fixed fee payments for legal work) in place of sections 88 to 90 (which provided for an assessment of legal fees in each case, subject to a capped maximum).



This document relates to the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill (SP Bill 79A) as amended at Stage 2

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