

These notes relate to the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 (asp 15) which received Royal Assent on 23 April 2021

REDRESS FOR SURVIVORS (HISTORICAL CHILD ABUSE IN CARE) (SCOTLAND) ACT 2021

EXPLANATORY NOTES

DETAILED PROVISIONS

Part 2: Operation of the redress scheme

Redress Scotland

Section 3: Establishment

6. Section 3(1) provides for the creation of a new body to be known as ‘Redress Scotland’. The Gaelic name Ceartaich Alba has equal legal status.
7. Subsection (2) states that it is a body corporate. This means that it has a legal personality separate from that of the people who comprise it.
8. Subsection (3) provides that Redress Scotland has the functions conferred on it under or by virtue of this Act and any other enactment.

Section 4: Status

9. Section 4(1) provides that Redress Scotland is not a servant or agent of the Crown. The Crown, which for this purpose broadly means the executive branch of government, enjoys certain privileges and immunities in law. Redress Scotland is not to be regarded as a government body and therefore none of the particular legal rules that apply to government bodies apply to it.
10. Subsection (2) states that Redress Scotland’s members and staff are not to be regarded as civil servants. This means that none of the statutes that make provision about the civil service (see, for example, Part 1 of the Constitutional Reform and Governance Act 2010) apply to the people who comprise, and work for, Redress Scotland.

Section 5: Membership, procedures and powers etc.

11. Section 5 introduces schedule 1 to the Act, which makes provision about the membership, staff, procedures, powers and duties of Redress Scotland. It also modifies some legislation which applies to public bodies so as to apply those rules to Redress Scotland. Further notes on schedule 1 are given in paragraphs 317 to 344 of these Notes.

Section 6: Independence

12. Section 6 provides that in performing its functions under the Act, Redress Scotland is not subject to the direction or control of any member of the Scottish Government (subject to any contrary statutory provision). This is to ensure its operational independence in relation to the exercise of those functions.

Functions in relation to the redress scheme

Section 7: Functions of Redress Scotland

13. Section 7 of the Act sets out the general function of Redress Scotland. The function is making decisions in connection with applications for redress payments under the scheme, including determining those applications and reviewing or reconsidering those determinations (for example, in the case of a possible material error).

Section 8: Functions of the Scottish Ministers

14. This section sets out the general functions that the Scottish Ministers have in relation to the redress scheme. They must make administrative arrangements for the establishment and operation of the scheme and provide information, guidance and support for applicants to the scheme in connection with their applications.

Section 9: Duty with respect to ensuring individuals can make informed choices

15. Subsection (1) of section 9 places a duty on the Scottish Ministers, when exercising their general functions under section 8(b) of the Act concerning the provision of information, guidance and support, to use their best endeavours to ensure that applicants and potential applicants to the redress scheme have the opportunity to make informed choices.
16. Subsection (2) requires the Scottish Ministers to prepare and publish a statement (the “summary of options”) setting out information about the options available to individuals in connection with applications, the support and other assistance available under the scheme, and alternatives to the scheme (which could, for example, include raising an action for damages).
17. Subsection (3) requires that the summary of options must contain or set out details of where to find information about: (a) options in relation to making, pausing and withdrawing applications, accepting redress payment offers (including the timescales and the effect of signing and returning a waiver), and requesting reviews of decisions; (b) the sources and types of information or evidence that may or must accompany an application for a redress payment; (c) how such information and evidence may be obtained and shared, including the assistance offered to applicants under the scheme with regard to obtaining it; (d) the importance of obtaining independent legal advice, in particular before accepting an offer of a redress payment and signing and returning a waiver (a key point at which the applicant should be obtaining advice on the legal effect of the waiver); (e) payment of fees for legal work under the scheme; and (f) other support available under the scheme. In addition, subsection (4) provides that the summary may include other appropriate information.
18. The summary will therefore provide applicants and potential applicants with a list of their options under the scheme as well as assurance that they can access support and legal advice through the scheme and will not have to pay for this separately, with a view to them being able to make informed decisions about accessing the redress provided by the scheme. Further provision about the summary of options is included elsewhere in the Act to require it to be provided to applicants at the point at which an application is submitted to the redress scheme (under section 29 of the Act) and at the point when an applicant is notified of a determination made by Redress Scotland (under section 36 of the Act).
19. Subsection (5) requires the Scottish Ministers to keep the summary of options under review and provides that they may make any adjustments required. This will ensure it remains up to date and reflects any developments in the operation of the scheme. Subsection (6) requires that the Scottish Ministers, in complying with their duty under subsection (5), must have regard to any recommendations made by Redress Scotland in its annual report, which, by virtue of paragraph 17(1)(d) of schedule 1 of the Act, must include an assessment of whether applicants for redress appear to have had

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the opportunity to make informed choices. By virtue of subsection (7), any modified version of the summary of options must also be published.

Section 10: Provision of administrative support to Redress Scotland

20. This section sets out that the Scottish Ministers must provide such administrative support as they consider necessary to Redress Scotland in order to allow Redress Scotland to perform its functions under the Act.

Section 11: Duty on the Scottish Ministers and Redress Scotland to co-operate

21. This section provides that the Scottish Ministers and Redress Scotland must co-operate with one another when exercising their respective functions under or by virtue of the Act. However, they may only share information with each other as provided for in section 12.

Section 12: Sharing of information between the Scottish Ministers and Redress Scotland

22. This section provides that the Scottish Ministers and Redress Scotland may share information with each other in certain circumstances, such as where it is necessary to allow either of them to exercise their functions, or where necessary to allow the scheme to operate effectively. This is subject to data protection law.

Section 13: Principle of dignity, respect and compassion

23. This section provides that when exercising functions under the Act, the Scottish Ministers, Redress Scotland, scheme contributors and others performing duties or exercising powers under the Act (or any subordinate legislation made under it) must have regard to the principle that anyone who has made, or has decided to make, an application to the scheme should be treated with dignity, respect and compassion. This duty is also owed to persons who are, or may be, considering making an application for redress, as well as those receiving or eligible for support under section 90, those seeking or considering seeking the reimbursement of costs and expenses under section 91, and nominated beneficiaries.
24. The duty applies not only to Ministers, Redress Scotland and scheme contributors, but also to other relevant persons as defined in subsection (2). The latter includes those on whom functions are conferred under or by virtue of the Act. This may be, for example, a person from whom information or evidence has been requested by the Scottish Ministers under section 79 of the Act. However, although an applicant can, for example, be subject to the requirement to provide information under section 44, the result of paragraph (b) of subsection (2) is that the duty is not imposed on those for whose benefit it is intended to operate.

Contributions to the redress scheme

Section 14: Scheme contributors

25. Section 14 relates to those making financial contributions towards the funding of redress payments under the redress scheme. This places a requirement on the Scottish Ministers to keep, maintain and publish a list of organisations who currently carry out, or have in the past carried out, functions in relation to the safeguarding, protection or care of children, who are making fair and meaningful financial contributions to the scheme, and who in making or agreeing to make such a contribution acknowledge the wrongfulness of, and the harm caused by, historical child abuse covered by the scheme (scheme contributors). The contributor list will contain information about: when a scheme contributor is included in the list; the financial contribution the scheme contributor is making or has agreed to make; where a scheme contributor is removed from the list, the date on which removal takes effect; and information on whether a contributor who

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is removed from the list has been removed with retrospective effect in accordance with section 16. The contributor list may include such other information as the Scottish Ministers consider appropriate, including, in so far as known, details of relevant care settings the scheme contributor was responsible for (section 14(4)).

26. Subsection (5) requires the Scottish Ministers to ensure that applicants to the redress scheme are made aware of the contributor list and of the effect of section 46. Section 46 makes provision for waiver, including that a waiver applies to scheme contributors included on the contributor list on the date Redress Scotland determines an individual's eligibility for a redress payment.
27. Subsection (6) sets out that the Scottish Ministers may revise the list by including an organisation on the list, varying descriptions of scheme contributors, removing a scheme contributor (either retrospectively or not), including information on payments actually made by a scheme contributor in respect of their agreed financial contribution (and subsequently updating it), or by varying other information on the list.
28. Subsection (7) requires the Scottish Ministers to publish the contributor list (including any revisions to it) at such intervals, and in such form, as they consider appropriate.
29. Subsection (8) clarifies that the removal of a scheme contributor from the list does not affect any waiver signed under section 46 unless and to the extent that the removal is to have retrospective effect. Where the removal has retrospective effect, the effect of section 46(7) is that the waiver continues to apply against an organisation only if the retrospective date of removal falls after the date that eligibility to a redress payment was determined.
30. Subsection (9) clarifies that becoming a scheme contributor or giving the acknowledgement required by subsection (1)(c) cannot, for the purposes of other proceedings, be taken as evidence of anything relevant to the determination of liability in connection with an allegation of abuse. The purpose of the redress scheme is not to determine liability for abuse in a way that a court would or in a way that would have legal consequences outside the redress scheme itself.

Section 15: Statement of principles in relation to contributor list

31. Section 15(1) requires the Scottish Ministers to prepare and publish a statement of principles on which they will determine whether a contributor should be included in, or removed from, the scheme contributor list. The principles relating to removal must cover both removal with retrospective effect in accordance with section 16 and non-retrospective removal.
32. Subsection (2) requires that those principles include the matters which are to be taken into account in determining whether a contribution is fair and meaningful. These matters must include the circumstances in which a contribution which is proposed to be made over time for reasons of affordability, or which takes into account the sustainability of services being provided by the prospective contributor, can be fair and meaningful. For example, the principles could set out appropriate parameters for timescales where contributions are proposed to be made by instalments.
33. Subsection (3) ensures that this obligation can be complied with by this being done in advance of the requirement coming into force.

Section 16: Retrospective removal of scheme contributor from contributor list

34. This section makes provision about the power (under section 14(6)(c)) of the Scottish Ministers to remove a scheme contributor from the contributor list with retrospective effect. Subsection (1) provides that this power applies only where the contributor has failed to make the agreed financial contribution under section 14(1)(b). Following such a removal from the contributor list, the contributor will no longer benefit from any waivers signed and returned under section 46 in respect of redress payments to which

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it has not contributed. The calculation of which redress payments it has contributed to is to be carried out in accordance with the remainder of section 16.

35. Subsections (2) and (3) require the Scottish Ministers to carry out an assessment of the contribution made by the scheme contributor and to appropriately allocate it (in accordance with the fair and meaningful statement of principles under section 15) against redress payments, and to determine a date on which the retrospective removal will take effect. Under subsection (4), this date is to be determined by reference to the point at which the sums paid by the contributor are exhausted and there is no longer funding to allocate against redress payments.

Section 17: Financial contributions by charities

36. This section applies where a charity makes a financial contribution to the redress scheme. Financial contributions made by charities will be treated as being in furtherance of the charity's charitable purposes and consistent with the charity's constitution, providing public benefit, not being contrary to the interests of the charity, and being within the powers exercisable by the charity trustees of the charity. However, this section does not authorise the use of restricted funds for this purpose. In addition, charity trustees will still have to comply with their duties under section 66 of the Charities and Trustee Investment (Scotland) Act 2005, although those duties must be considered in light of the modifications made by section 17(2) of the Act.