

*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**

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## **EXPLANATORY NOTES**

### **DETAILED PROVISIONS**

#### **Part 1: Overview and meaning of “redress scheme”**

##### *Section 1: Overview of Act*

4. This section sets out how the Act is arranged.
  - Part 1 contains an overview of all the redress-related activity the Act provides for and defines the “redress scheme”;
  - Part 2 establishes Redress Scotland and sets out its functions and the support it will receive from the Scottish Ministers. It also requires that a list of contributors to the redress scheme be established and maintained, and facilitates charities becoming scheme contributors to the scheme where they wish to do so;
  - Part 3 sets out eligibility criteria for all applicants to the redress scheme, including for applications by next of kin;
  - Part 4 sets out how the application process will function, and makes provision about the requirements that will apply to applications, how they will be determined, types of redress payments, treatment of previous payments in respect of abuse, waiver, the time period during which offers are to remain valid, payment, review mechanisms, determination of applications where the applicant or person in respect of whom the payment is sought has a serious criminal conviction, the process if an applicant dies, recovery of redress payments made in error and the reconsideration process, and information sharing and confidentiality;
  - Part 5 makes provision with respect to the support available to applicants during the application process, including general support with the application, wider support for applicants and certain others in particular circumstances, reimbursement of costs incurred during the application process, payment of fees for legal work in connection with applications, and recovery of payments, other than redress payments, made in error;
  - Part 6 creates a requirement for contributors to the redress scheme to report on their wider activity in connection with redress;
  - Part 7 provides for the establishment of the Survivor Forum, the dissolution of the National Confidential Forum, the eventual dissolution of Redress Scotland, the interpretation of this Act, the issuing of guidance and making of regulations, and the commencement of this Act and its short title.

## ***Section 2: Meaning of “redress scheme”***

5. This section defines the “redress scheme” for the purposes of the Act. This includes not just the redress payments but also all other support provided for by the Act by way of redress.

## **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

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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 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

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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 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

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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 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.

## **Part 3: Eligibility and key concepts**

### **Eligibility to apply for redress payments**

#### ***Section 18: Eligibility to apply for a redress payment***

37. This section sets out who may apply for a payment under Part 4 of this Act (a "redress payment"). Subject to section 23 (power to create exceptions to eligibility), it provides that, to apply, the person to whom the application relates must have been abused whilst a child and resident in a relevant care setting in Scotland, and that the abuse must have occurred before 1 December 2004. A "child" in this context means a person under the age of 18. "Relevant care setting" is defined in section 20.
38. Subsection (4) clarifies that the definition of a "child" as meaning a person under the age of 18 does not apply to references to "a child of a deceased person" in relation to applications for next of kin payments.
39. Under section 106 of the Act, the Scottish Ministers may issue and publish guidance, including in relation to the eligibility criteria under this Part of the Act. This would include, for example, interpretative guidance in relation to the definition of "abuse" or in relation to "relevant care setting".
40. It should be noted that there is nothing in the Act to prevent an application being made by a person who has already sought or received redress for their abuse other than through the redress scheme established by the Act (whether successful or not, and whether concluded or not). For example, a person who has previously raised a civil court action in respect of abuse which is eligible for redress under the Act may still apply for a redress payment regardless of the outcome of that civil action. The relevance (to the extent that there is any) of a previous attempt to seek redress through other means is only as follows—
- In a case where the person was successful in obtaining financial redress through other means, section 42 of the Act will apply. This provides that where a person has received or become entitled to a "relevant payment" (as defined in section 42(2)) (for example, where the person has been awarded damages or compensation by the court in a successful civil action, or accepted a settlement from an organisation), that relevant payment, adjusted for inflation where appropriate, will be deducted from any redress payment offered under the Act.
  - In a case where the person's attempt to obtain financial redress through other means is ongoing, they may nonetheless apply to the scheme. If they are offered a redress payment which they wish to accept, they will have to abandon any "relevant civil proceedings" (as defined in section 46(6)) at that point, in accordance with section 50(2).
  - In a case where the person was not successful in obtaining financial redress through other means, this does not mean that an application for redress will necessarily

be similarly unsuccessful: the process of obtaining information and reaching a determination under the redress scheme is different.

## **Meaning of “abuse”**

### ***Section 19: Meaning of “abuse”***

41. This section defines what constitutes “abuse” for the purpose of the redress scheme provided for under this Act. Subsection (1) provides that “abuse” includes sexual, physical and emotional abuse and abuse which takes the form of neglect. As read with section 18, this would include abuse by peers within a relevant care setting. This definition mirrors the definition of “abuse” as used in section 17A of the Prescription and Limitation (Scotland) Act 1973 (as inserted by section 1 of the Limitation (Childhood Abuse) (Scotland) Act 2017).
42. Subsection (2) provides that corporal punishment will constitute “physical abuse” for the purpose of potential eligibility for redress where, at the time it was administered, it was not permitted under or by virtue of any enactment or rule of law. That would be because of the fact that it was excessive, arbitrary or cruel, because it was administered for an improper motive, or because it was not permitted for another reason.

## **Meanings of “relevant care setting” and “resident”**

### ***Section 20: Meaning of “relevant care setting”***

43. Section 20 defines “relevant care setting” for the purposes of the redress scheme under this Act. Relevant care settings are either residential institutions 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, or places other than residential institutions where children lived while being boarded-out or fostered. But the latter does not include where a child was boarded-out or fostered with a relative or guardian of the child, or under arrangements between a parent or guardian and another person unless that person was a public authority or a voluntary organisation exercising functions in relation to the safeguarding or promotion of the welfare of the child or furthering of the child’s interests.
44. “Residential institution” is defined 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 21.
45. Subsection (4) enables the Scottish Ministers by regulations (subject to the affirmative procedure) to modify the meaning of “residential institution” by adding to or varying the above categories of institution or the definitions which relate to them. However, subsection (5) provides that the Scottish Ministers are permitted to make such regulations only where they are satisfied, so far as reasonably practicable, that no-one who would have been eligible for the scheme will cease to be so eligible as a result of the regulations. Therefore, any exercise of this power should effectively result in a widening of eligibility under the scheme, or in there being no change to eligibility (for example, where the change was merely clarifying something).

### ***Section 21: Meaning of “residential institution”: further provision***

46. Section 21 defines each of the categories of residential institution as well as “voluntary organisation” for the purpose of section 20. It also provides that a residential institution may form part of another establishment.

### ***Section 22: Meaning of “resident”***

47. Subsection (1) defines “resident” in relation to a relevant care setting. This could include, for example, circumstances where a child was absent from the care setting

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while still under the care of the relevant care provider (or someone authorised by them), such as during a day excursion.

48. Subsection (2) provides that it does not matter whether the child was within or outside Scotland during any period of absence from a relevant care setting which is covered by subsection (1). The child will still be deemed to have been resident in that setting whilst under the care of the provider of that setting or a person authorised by that provider (for example, this may cover periods outside Scotland on excursions or holidays).

## **Exceptions to eligibility**

### ***Section 23: Power to create exceptions to eligibility***

49. This section provides a power for the Scottish Ministers by regulations (subject to the affirmative procedure) to make provision about specific circumstances in which an applicant would not be eligible to apply to the redress scheme. This could, for example, be in relation to certain types of abuse (such as certain types of peer abuse – e.g. a one-off fight between peers which was not known about by the residential institution) or in relation to the circumstances in which a person abused came to be resident in a relevant care setting (such as short-term private respite care in a children’s home).

## **Eligibility to apply for next of kin payments**

### ***Section 24: Eligibility to apply for a next of kin payment***

50. This section sets out the circumstances in which an application for a next of kin payment may be made: this will normally be where the criteria for a next of kin application are met, but an application can also be made where permission is granted due to exceptional circumstances (see section 25).
51. The criteria for a next of kin application require that the applicant must be the next of kin of a person who would have been eligible to apply for a redress payment, and who died on or after 1 December 2004 (section 24(2)(a) and (b)). Whether someone is the next of kin of a deceased person is determined in accordance with section 28.
52. In addition, the deceased person must either not have applied for a fixed rate or individually assessed redress payment by the date of their death, or have applied but died while the application was ongoing with certain other conditions being met. It should be noted for this purpose that, under section 33(5), if the deceased person made an application but then withdrew it, that is to be treated as though no application had been made.
53. Where such an application was made, the conditions which must be met are set out in subsection (3)(b); broadly speaking, these amount to the person dying while the application was ongoing and without any redress payment being paid out. Accordingly, where the application was for an individually assessed payment, the deceased person must have died without a fixed rate payment having already been paid – whether under a previous application for a fixed rate payment or, in the case of a second application for an individually assessed payment due to new evidence, by virtue of having received the fixed rate payment as an element of the individually assessed payment paid under that first application. In addition, where a nominated beneficiary was named in relation to the application, this would preclude a next of kin application from being made unless the nominated beneficiary either did not take over the application or, if they did, they themselves then died while the application was still ongoing and without having accepted a redress payment. As such, if the nominated beneficiary took over the application and either no offer was made under it or they opted to reject the offer, that would prevent a next of kin application from being made.
54. Section 24(4) clarifies that an application is considered to be ongoing from the time it is made until whichever is applicable of the following occurs: the application is



withdrawn; a determination is made that the applicant is not eligible for a redress payment and either the period for seeking a review expires without one being sought or the review is unsuccessful or is withdrawn; or an offer made under the application is either accepted or allowed to expire.

55. Where an application has been brought to an end but a person has made efforts to restart it again, it will once again be considered to be an ongoing application. Accordingly, an application is also ongoing from the time that a request to revive it is made or it is revived under section 49(4) or 58(4) without a request being made, or where a late request for a review is made in relation to it. Such an application is ongoing until the point that the attempt to restart it is made until either that attempt fails or, if the attempt is successful, the application is brought to an end in a way described in paragraph 54.

***Section 25: Eligibility to apply for a next of kin payment: exceptional circumstances***

56. This section provides that a person may apply for permission to apply for a next of kin payment due to exceptional circumstances.
57. This type of permission can only be sought where the person making the application is the specified next of kin of the deceased person (see section 28). In addition, it must be the case that the deceased person had applied for and been offered a redress payment (either a fixed rate or individually assessed payment) but the offer had not been accepted during the time it was valid and the person then died. Further, where the application was for an individually assessed payment, the deceased person must have died without a fixed rate payment having already been paid (whether under a previous application for one or, in the case of a second application for an individually assessed payment due to new evidence, by virtue of having received the fixed rate payment as an element of the individually assessed payment paid under that first application).
58. In these circumstances, section 25 provides that an application can be made to the Scottish Ministers, in such form as the Scottish Ministers may require, setting out the exceptional circumstances as a result of which permission is being sought and including any relevant information. The Scottish Ministers must then pass on the application and any accompanying information to Redress Scotland for a determination.
59. Any application submitted under subsection (1) must be determined by a panel of at least two members of Redress Scotland. The procedure for this will be determined by Redress Scotland. The panel may grant the applicant permission to apply for a next of kin payment only where it considers there are exceptional circumstances which merit it. For example, this might be because the deceased person allowed the offer to expire because they were in hospital and then died shortly thereafter. Once the panel has determined the application, the Scottish Ministers must notify the applicant of the outcome and the panel's reasons for the decision.
60. In accordance with the definition of "notify" in section 105, this notification – as with other determination processes in the Act – must be given in writing. However, in accordance with schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 (in these Notes, "ILRA"), that requirement could be satisfied using electronic communication such as email.

***Section 26: Review of determination made under section 25***

61. This section provides that an applicant who has received notice of a determination under section 25 that permission to apply for a next of kin payment due to exceptional circumstances is not being granted may request a review of that determination.
62. In accordance with subsection (2), such a request must be made to the Scottish Ministers before the end of the period of eight weeks beginning with the date on which notice of the determination was received and be made in such form as the Scottish Ministers may require (and, under subsection (5), the Scottish Ministers must publicise any

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requirements for the form of applications). Section 26(5) and (6) of ILRA provides for when an applicant is to be assumed to have received notice of the determination. The request must also specify why a review is being sought, and should contain or be accompanied by any other information the applicant considers relevant.

63. Subsection (3) states that the Scottish Ministers must provide the request and any accompanying information to Redress Scotland as soon as practicable. Subsection (4) permits Redress Scotland to conduct a review despite it not being requested within the timescale specified in subsection (2)(b), if it is satisfied that the applicant has a good reason for not requesting it sooner.
64. Subsection (6) applies sections 55 (review panels), 56 (procedure for reviews) and 59(1) to (5) (withdrawal of review request) to reviews under this section. However, any withdrawal of a request for a review can only happen before the review is determined under section 27.

***Section 27: Outcome of a section 26 review***

65. Subsection (1) sets out that a panel conducting a review under section 26 must consider whether the panel that made the original determination ought to have reached a different determination, and, where additional evidence is provided to or obtained by the panel conducting the review, whether as a result the application should now be determined differently. In either case, the review panel may uphold or reverse the original determination.
66. Subsection (2) requires Redress Scotland to inform the Scottish Ministers, who must then notify the applicant of the review panel's determination as soon as reasonably practicable, and provide the applicant with a summary of the panel's reasons for reaching that determination. Paragraph 60 of these Notes applies equally to the form of notice of the outcome of a review under this section.
67. In accordance with subsection (3), the determination of a review panel under this section is final. This means that there is no further right of review or appeal in respect of this decision.

***Section 28: Meaning of "specified next of kin"***

68. This section sets out who is to be considered the 'specified next of kin' in relation to a deceased person for the purpose of a next of kin application.
69. Subsection (1) provides that specified next of kin is the person who immediately before the death of the deceased person was the spouse, civil partner or cohabitant of the deceased person. "Cohabitant of the deceased person" is defined in subsection (4) to mean a person who was neither married to nor in a civil partnership with the deceased person but who was living with the deceased person as if they were married to each other and had been doing so for a period of at least six months.
70. Subsection (2) deals with circumstances where the deceased person has both a spouse or civil partner, and a different person who they lived with immediately before their death (for example, because they had separated from their spouse and were in a new relationship). Where that is the case, the specified next of kin will be the cohabitant of the deceased person (which, in accordance with subsection (4), means a person who had lived with the survivor as if they were married for at least six months immediately before the survivor's death). If they had not lived together for those six months, subsection (2) does not apply because there is no "cohabitant" in terms of the definition used in the Act; as such, under subsection (1) the specified next of kin will be the spouse or civil partner of the deceased person. In any situation where subsection (2) applies, the decision in favour of the cohabitant is not revisited on the subsequent death of the cohabitant (meaning that the spouse or civil partner cannot later take over the right to apply).

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71. If the deceased person had neither a spouse, civil partner nor cohabitant, or where any such partner has themselves since died without having accepted an offer under the redress scheme for a next of kin payment, the specified next of kin will be the child or children of the deceased person (subsection (3), as read with subsection (1)(b)). The term “child” includes a stepchild, or a person treated as a child of the deceased person by them (subsection (4)), and the right to apply for a next of kin payment will pass to them.
72. Therefore, for example, if a person who would have been eligible to apply for a redress payment under the scheme, but had not done so, dies and they were married but separated from their spouse and had been living with another person for at least six months immediately before they died, it is the person they had been living with who could apply for a next of kin payment under the redress scheme. If that person decides not to do so and then dies, the right to make the application passes to the child or children of the abuse survivor who died.
73. In assessing for the purposes of these provisions whether a person was a “cohabitant” of the deceased person, Redress Scotland would be able to take into account relevant case law in relation to other legislation such as, for example, under the Family Law (Scotland) Act 2006. For example, there is case law which provides that a person does not cease being someone’s cohabitant simply because they were hospitalised for a period immediately before death.

## **Part 4: Financial redress: redress payments**

### **Chapter 1: Determination of applications for redress payments**

#### **Applications**

##### ***Section 29: Application for a redress payment***

74. Subsection (1) sets out the three types of redress payment for which an application can be made to the Scottish Ministers during the time that the redress scheme is open for applications. These payments are: a fixed rate payment, an individually assessed payment and a next of kin payment. The Scottish Ministers must set out the requirements in relation to the form in which the application must be made as well as the evidential requirements. These requirements must be publicised by the Scottish Ministers (subsection (6)).
75. Subsection (3) provides that, as a general rule (subject to section 30), only one application may be made for a redress payment in respect of a person who was abused. However, applications can relate to one or more relevant care settings (subsection (2)). This means that a person applying for a redress payment can normally only make one application, but that the application can relate to all of their time spent in care (where eligible for the redress scheme). As the rule about the number of applications is tied to the person who was abused, this would allow someone who had been abused in care and whose now deceased spouse had also been abused in care to make both an application in respect of their own abuse and a next of kin application in respect of their deceased spouse (subject to the rest of the eligibility criteria).
76. Subsection (4) places a duty on the Scottish Ministers to provide the summary of options (prepared under section 9) to an applicant at the point at which an application to the redress scheme is received.
77. The Scottish Ministers must provide any application received, and the accompanying information, to Redress Scotland (subsection (5)).

##### ***Section 30: Cases where more than one application permitted***

78. This section explains that in certain circumstances more than one application to the redress scheme is permitted.

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79. Subsection (2) allows for an individually assessed application to be submitted where the person previously successfully applied for a fixed rate payment. This is, however, subject to the rule in section 39(3)(a) which ensures that any fixed rate payment which was previously paid is taken into account in determining the subsequent application for an individually assessed payment.
80. Subsection (3) allows a person to make a further application to Redress Scotland for an individually assessed payment. This is allowed where a previous application for such a payment resulted in the person accepting a payment below the maximum level of payment available under the scheme (level 5, £100,000), and where Redress Scotland is satisfied that a further application is justified on particular grounds (although existence of a ground alone does not guarantee that Redress Scotland will be satisfied that a further application is justified; Redress Scotland might not be so satisfied if it is clear that the level of redress payment would nonetheless remain the same under section 39(4)). The grounds on which a further application may be justified are that either:
- there is new evidence which the person had a reasonable excuse for not providing at the time of the previous application (for example, because new records have come to light since the initial determination was made), or
  - regulations under section 20(4) of the Act have changed the eligibility criteria of the redress scheme (for example, where a residential institution at which an applicant had been abused and which was not covered by the scheme at the point of the initial determination then comes within the scope of the scheme as a consequence of regulations being made under section 20(4) to expand the definition of “residential institution”).
81. The further application will be determined by Redress Scotland under the provisions of the Act for determining applications, taking into account the new evidence or change in eligibility criteria reflected in the further application. This may result in an offer of a redress payment being made at a higher level than under the previous determination, although that will depend on the individual circumstances. Any redress payment which was previously paid under the first application is taken into account in determining the subsequent application and is deducted from any new offer (see section 39(3)(b)).
82. Subsection (4) states that a next of kin application may be made by a person where a deceased person previously applied for a fixed rate payment or an individually assessed redress payment and the circumstances allow the person to apply for a next of kin payment under section 24(1). The circumstances are set out in more detail in paragraphs 50 to 57 of these Notes but such an application is only permitted where the deceased person’s application did not result in a redress payment being made.
83. Subsection (5) allows a further next of kin application to be made by another child of the deceased for a proportion of the next of kin payment in order to ensure that separate applications by children can be accommodated.
84. Subsection (6) allows for an application to be made where an application has been withdrawn under section 33 and the application is for a type of redress payment that the person would have been able to apply for had the withdrawn application not been made. For example, someone who withdrew an application for an individually assessed payment could submit another application of that type. However, whether they could apply for a fixed rate payment would depend upon whether they had already previously made and persisted with an application for that. It would also not allow them to make an application for a next of kin payment in respect of someone else unless that was something they would always have been eligible to apply for.
85. Subsection (7) allows for a redress payment to be made where an application for a payment has previously resulted in a determination under section 60 that the person was precluded from being offered a redress payment and where an appeal in respect of a conviction or sentence means that section 60 no longer applies to the application.

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86. Subsection (8) allows for an application to be made where an application previously ended without a person receiving a redress payment, but Redress Scotland is satisfied that special circumstances exist which justify allowing the application to be made. This provision would, for example, be capable of covering a case where someone was previously determined to be ineligible for a redress payment or precluded from being offered such a payment, or where they simply chose not to accept the redress payment which was previously offered to them. It would also cover where they had applied for an individually assessed payment but received nothing because they had already previously received a fixed rate payment under an application for one and the determination was that the payment of a further sum was not appropriate.
87. Subsection (9) states that special circumstances may include the person's individual circumstances or the availability of new evidence (provided there was a good reason why that evidence was not provided in the original application), or regulations under section 20(4) having altered eligibility to apply for a redress payment.

### ***Section 31: Application period***

88. This section provides that the scheme will be open to applicants until whichever is the later of the end of the period of five years from the day this section comes into force (i.e. the date the financial redress scheme opens for applications) and the day falling two years after the Scottish Child Abuse Inquiry publishes its final report. Subsection (2) provides that the Scottish Ministers have the power to extend the application period beyond that period by regulations subject to the affirmative procedure.
89. Subsection (3) as read with subsection (4) provides that if, at the point 15 months before the scheme is due to end, regulations under subsection (2) have not already been made or are not at that point lying before the Parliament for it to approve the extension of the scheme, the Scottish Ministers will be under a duty to carry out a review of whether the scheme should be extended for a further period (by making such regulations). Subsection (5) requires that the Scottish Ministers publish the findings of any review and lay them before the Scottish Parliament.

### ***Section 32: Pausing of application***

90. A redress application may be paused, or resumed after being paused, at the request of the applicant (made in writing to the Scottish Ministers), at any time before a determination has been made. In relation to "writing", see paragraph 60 of these Notes.
91. The Scottish Ministers must notify Redress Scotland of a request once it is received by the Scottish Ministers. Once Redress Scotland receives this request, the determination of the application must be stopped until the application is resumed by the applicant requesting this, or until it is withdrawn (as provided for under section 33).
92. Subsection (5) states that where an application is paused under this section, it is to be treated as being withdrawn on the final day of the application period unless the applicant requests that their application should be resumed or withdrawn on or before the final day. This provides a longstop date in the event that there is no further engagement by the applicant with the paused application.

### ***Section 33: Withdrawal of application***

93. A redress application may be withdrawn by a request in writing from the applicant to the Scottish Ministers at any time before a determination is made under section 36. In relation to "writing", see paragraph 60 of these Notes.
94. The Scottish Ministers must notify Redress Scotland of this request as soon as is practicable. Where Redress Scotland is notified of such a request, Redress Scotland must bring any further determinations which relate to the application to an end.

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95. Where an application is withdrawn, it is to be treated for the purpose of section 24(3) (a) as though the application had never been made. The relevance of this is discussed further at paragraph 52 of these Notes.

## **Determination of applications**

### ***Section 34: Prioritisation of applications***

96. This section states that the chairing member of Redress Scotland must decide an order of priority for processing all applications, paying particular attention to the age and health of the applicant (to the extent that this is disclosed either in the application or otherwise). For example, the processing of applications from applicants who are terminally ill could be prioritised.

### ***Section 35: Decision-making panels***

97. This section lays out the minimum number of Redress Scotland panel members required to assess a fixed rate application (two members), a next of kin application (two members), and an individually assessed application (three members). Panels are to be appointed by the chairing member of Redress Scotland.

### ***Section 36: Determination of applications***

98. This section explains that, upon receipt of an application, the Redress Scotland panel appointed to consider it will determine the eligibility of the applicant for the type of redress payment applied for. The standard of proof against which an applicant's eligibility for a redress payment will be determined is the civil standard of "on the balance of probabilities".
99. This means that the eligibility criteria will be met if it is determined that the applicant has demonstrated that it was "more likely than not" that abuse of the survivor took place, prior to 1 December 2004, in the eligible care setting where the survivor was resident as a child.
100. Where the applicant is a next of kin applicant, the same standard of proof would also apply to any questions as to their eligibility to apply as next of kin (for example any question as to whether they had cohabitated with the survivor, in a relationship that was akin to that of spouses/civil partners, for at least 6 months immediately prior to the survivor's death).
101. If satisfied about eligibility, the panel must then determine the amount to be awarded. The panel will assess the application based on the information provided in the application, any further information requested by and provided to the panel, and anything else the panel deems relevant.
102. Subsection (3) ensures that the starting point for the panel when considering an application is that the information provided by the applicant is to be presumed to be true and accurate to the best of the applicant's knowledge and belief. While this presumption is the starting point, it can be overturned. The effect is that the applicant will submit the application in the knowledge that, as a starting point, there will be a presumption of credibility in favour of their account.
103. Subsection (4) provides that Redress Scotland has no power to rule on or determine any person's civil or criminal liability when considering applications (which would be the role of a court).
104. The process for determining an application is to be determined by Redress Scotland (having regard to any guidance which may be issued about the matter under section 106). Subsection (6) states that once the application has been determined by Redress Scotland, it must inform the Scottish Ministers, who will then notify the applicant of the outcome of the determination and the reasons for the determination,

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and provide the applicant with the summary of options (prepared under section 9). Where a payment is offered, the Scottish Ministers must also inform the applicant of the timings and options available to them in relation to the potential acceptance (or not) of a payment. Paragraph 60 of these Notes applies equally to the form of notice of a determination under this section.

105. Subsection (7) provides that neither the offer of redress, nor the failure to make such an offer, can be relied on in other proceedings as evidence that the acts complained of occurred or did not occur.

### ***Section 37: Assessment of amount of redress payment***

106. This section lays out the information to be considered when deciding on the amount (if any) to be offered to an applicant. In order for any payment to be offered, the panel must be satisfied of the following matters:
- that the applicant meets the eligibility criteria to apply for a redress payment under section 18;
  - where the application is for a next of kin payment, that the applicant meets the additional eligibility requirements relating to that (as set out in section 24);
  - that the application meets the requirements provided for under section 29 to the extent that they apply (for example, any requirements as to the information or evidence that must be included with an application for a next of kin payment),
  - and that the applicant is not precluded from being offered a redress payment under section 60 (which relates to serious unspent criminal convictions).
107. Subsection (3) sets out how the payment should be calculated, taking into account any relevant deductions that must be applied (see section 42). The payments are then made based on the category of applicant and whether the payment is of a fixed rate payment, an individually assessed payment, or a next of kin payment. Subsection (3)(b) acknowledges that someone who has previously applied for and received a fixed rate payment might not be awarded anything more upon making a subsequent application for an individually assessed payment. It also acknowledges that this could equally apply to someone who has previously applied for and received an individually assessed payment and who is permitted to make a second application for that in light of new evidence.
108. Subsection (4) provides that where the application relates to more than one relevant care setting it is only one determination of a redress payment that can be made to cover all establishments in which the person resided.

## **Payment levels**

### ***Section 38: Fixed rate payment***

109. This section sets out the amount of the fixed rate payment, which is £10,000.

### ***Section 39: Individually assessed payment***

110. This section sets out the amounts of individually assessed payments that can be offered by the panel depending on the nature, severity, frequency and duration of the abuse suffered and any other factor that is considered relevant. An individually assessed payment is a payment of £10,000 (a fixed rate payment), together with such further sum (if any) as the panel considers appropriate. As such, the total amount received (subject to any deductions) will be £20,000 for a level 1 payment, £40,000 for a level 2 payment, £60,000 for a level 3 payment, £80,000 for a level 4 payment or £100,000 for a level 5 payment. However, there may be cases where the panel determines that no payment is appropriate beyond the fixed rate payment.

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111. Subsection (3)(a) sets out that if a fixed rate payment has previously been made to a person, no further fixed rate payment will be made when deciding upon the individually assessed payment. Accordingly, someone who was assessed as being due a level 2 payment would be offered £30,000 (subject to any deductions) to reflect the fact that the £10,000 fixed rate payment had already been received.
112. Similarly, subsection (3)(b) sets out that if an additional application is being made by virtue of section 30(3) (where Redress Scotland is satisfied that there is new evidence which the applicant had a reasonable excuse for not providing at the time of the previous application and which justifies a further application) any previous redress payment paid to the applicant will be deducted from any payment that falls due to them as a result of the determination of the further application and the new evidence.

#### ***Section 40: Next of kin payment***

113. This section states that the next of kin payment is the equivalent of the relevant share of the fixed rate payment (£10,000). The next of kin payment which can be made under the redress scheme will either be made to one person, or shared. Where the person eligible to receive the next of kin payment is the spouse, civil partner or cohabitant of the deceased person to whom the application relates, the full fixed rate payment will be made to them.
114. In circumstances where the next of kin payment is to be made to a child of the deceased person, the payment will be divided by the number of surviving children of the deceased person at the date of the first child's application (section 40(2)(b)). A surviving child in this context includes a stepchild or a person treated as their child by the person who died.
115. Therefore, if the person eligible to receive the next of kin payment is the spouse, civil partner or cohabitant of the deceased person, they will be eligible to receive £10,000. If the person who died had three surviving children, and the right to apply for and receive the next of kin payment applies to them, each child will be eligible to receive one third of the fixed rate payment (i.e. £3,333).

#### ***Section 41: Power to adjust redress payment amounts for inflation***

116. This section provides that the Scottish Ministers may modify sections 38 and 39 where it is considered appropriate due to material changes in the value of money. However, the figures may only be adjusted upwards. This power may be exercised by regulations subject to the negative procedure. For details of the negative procedure, see section 28 of ILRA.

#### **Deduction of previous payments**

##### ***Section 42: Deduction of previous payments from redress payment***

117. Sections 42 and 43 apply where the panel has determined that an applicant is eligible for a redress payment and, before the determination is made, the applicant or the person in respect of whom the application has been made received or became entitled to a "relevant payment". This applies whether the payment was made (or the right to it arose) before the date of the application being made or after it.
118. Subsection (2) defines what is meant by a "relevant payment". A relevant payment is a payment which relates to any abuse of the person to whom the application relates which is covered by the redress scheme. The payment may have taken the form of damages or an out of court settlement. Other payments are also covered. For example, a payment under the advance payment scheme is covered in order to avoid double-counting. As such, those who received a payment under the advance payment scheme can apply for an enhanced sum, but the previous payment is deducted from any offer. Subsection (3) states that legal fees and costs incurred in obtaining the relevant payment are not included in this. A redress payment is also not included given that any double-counting



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in relation to a person who applies for a fixed rate payment, and then later applies for an individually assessed payment, or a person who submits a further application by virtue of section 30(3) after having already received a redress payment, is addressed instead by section 39(3).

119. Subsection (4) sets out that, subject to section 43 (which deals with a number of less common cases), relevant payments or, where there has been more than one, the total of those relevant payments, or the adjusted figures (as the case may be) are to be deducted from a redress payment. Subsection (5) outlines the steps involved in making the required adjustment to a relevant payment. This is to be done in relation to a payment which was received before the date section 42 comes into force. The Gross Domestic Product deflator ratio (“the GDP deflator”) will be used to establish the present day value of the payment previously paid to the person. This is done by applying the GDP deflator to the relevant payment by reference to the period beginning on the date it was made and ending with the date section 42 comes into force. However, in accordance with section 43(6), a payment under the advance payment scheme is not to be adjusted for inflation.
120. Subsection (6) states that the Scottish Ministers may, by regulations subject to the affirmative procedure, modify the meaning of “relevant payment” and make any modifications to definitions in subsection (7) which may be required.
121. Although this section also applies to a review panel, this only covers the situation where a review panel is the first panel to make a finding of eligibility. In a case where the original panel found the applicant to be eligible but a review was sought in relation to the amount of the offer, section 57(2)(c) prevents the review panel from increasing the deductions to which the offer is to be subject.

***Section 43: Deduction of previous payments: further provision***

122. This section sets out further matters relating to the deduction of previous payments from redress payments.
123. Subsections (2) and (3) set out that where a child of a deceased person has made an application for a next of kin redress payment and where a relevant payment has previously been made in respect of the deceased person, the amount deducted from the redress payment will be divided by the number of surviving children of the deceased person at the date that the first child’s next of kin application is made. The payment offered to each child will therefore be subject to an equal share of the deductions.
124. Subsection (4) sets out that as much of a relevant payment that has already been deducted from a redress payment will not be deducted again from an individually assessed payment – it will only be the balance of the relevant payment which will be deducted. This avoids double-deductions and covers both earlier applications specifically for a fixed rate payment and a payment of a previous redress payment where the application under consideration is a further application made by virtue of section 30(3).
125. Subsection (5) sets out that the panel does not need to deduct a relevant payment to which the applicant has only an entitlement. This would include, for example, where the applicant is entitled to a payment but is unlikely in practice to be able to recover this (because of the financial situation of the debtor).
126. Subsection (6) states that a relevant payment received from the advance payment scheme is not to be adjusted using the GDP deflator.

***Section 44: Information about previous payments from applicant***

127. Section 44 sets out that applicants must provide the Scottish Ministers with information about relevant payments they (or the person to whom the application relates) received or are entitled to before their application is determined. The term “relevant payment”

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is defined in section 42 and relates to payments in respect of abuse of the person in question which is covered under the redress scheme. Subsection (2) sets out the information to be provided about relevant payments. Subsection (2)(e) states that the Scottish Ministers may make regulations about other information which must be provided in relation to relevant payments. Any such regulations are subject to the negative procedure. The Scottish Ministers must pass information about relevant payments to Redress Scotland (subsection (3)). Information about relevant payments can also be obtained directly from third parties under section 80.

#### ***Section 45: Information about previous payments: further provision***

128. This section sets out that, where the applicant has entered into a settlement or other agreement relating to a relevant payment that forbids them from disclosing information about relevant payments, the disclosure of that information will not be regarded as a breach of the settlement or other agreement.

### **Waiver**

#### ***Section 46: Waiver***

129. Section 46(1) provides that, in order to receive a redress payment under the scheme, an applicant must agree to abandon any relevant civil proceedings, and to waive their right to raise such proceedings in the future. The redress scheme is intended to provide applicants with an alternative to civil litigation, and applicants essentially have a choice as to whether to accept a redress payment or to continue or raise relevant civil proceedings. This choice is exercised by the applicant signing a waiver where they wish to accept a redress payment. Relevant civil proceedings covers a wide range of legal actions where an applicant seeks compensation or any other remedy in relation to abuse eligible under the scheme. This would include, for example, actions for damages for personal injury as well as actions for declarator, and cases before the European Court of Human Rights. However, proceedings are only required to be abandoned to the extent that they are relevant civil proceedings. Accordingly, a case could be continued against a non-scheme contributor provided that it was dropped against other parties who were scheme contributors at the relevant time.
130. While a waiver must be signed in order to receive a redress payment, there will be cases where an applicant for an individually assessed payment has already signed a waiver in relation to an earlier redress payment. That earlier payment might have been under a separate application for a fixed rate payment or, where the application under consideration is one made by virtue of section 30(3), it might have been a previous individually assessed redress payment. In such a case, it is possible that, if those against whom proceedings would constitute “relevant civil proceedings” have not changed in the interim, the signature of a waiver would not add anything to the rights which have already been waived. Subsections (2) to (4) therefore deal with this situation and provide that a second waiver need not be signed in such a case, as the original waiver is sufficient. In contrast, where the contributor list has expanded to include new scheme contributors in the intervening period, the person would be required to sign an additional waiver in order to receive the further redress payment.
131. The effect of subsection (5)(b) is that, where the applicant signs and returns a waiver (and thereby abandons any ongoing relevant civil proceedings and waives their right to raise new proceedings), there will be no right of recovery under section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (in so far as it would have entitled any person to recover from the Scottish Ministers or a relevant scheme contributor any contribution towards the payment of any damages or expenses in respect of relevant abuse). Any other rights of recovery or relief, or indemnity against Ministers or other contributors in relation to abuse of that person which is covered under the scheme, also cease to have effect (subsection (5)(c)).

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132. Subsection (6) defines “relevant civil proceedings” as those against the Scottish Ministers or any relevant scheme contributor for abuse of the person in question which is covered by the scheme. “Relevant scheme contributor” is defined to mean those contributors included in the published list of scheme contributors on the date the panel determines that the applicant is eligible for the redress payment (under section 35 or 55).
133. Subsection (7) provides that if a contributor is removed from the list with retrospective effect in accordance with section 16, that organisation will not benefit from any waivers from that date. This has the effect of revoking any waivers that were previously granted by applicants to the extent that they would otherwise prevent the bringing of a civil claim against an organisation which has not in the end contributed the agreed amount to that applicant’s redress payment.

#### ***Section 47: Form and content of waiver***

134. Section 47 provides that the Scottish Ministers may make regulations, subject to the affirmative procedure, to make further provision about the granting of a waiver under section 46 in order to provide for the form and content of the waiver and in order to specify information about the waiver which must be provided to applicants.

#### ***Section 48: Report on effect of waiver on participation in redress scheme***

135. This section requires the Scottish Ministers to lay a report before the Scottish Parliament within 18 months of section 46 coming into force, setting out the Scottish Ministers’ assessment of any impact the waiver has on applications for a redress payment, and its effectiveness in encouraging public authorities, voluntary organisations and other persons to become scheme contributors. The report must also set out any steps they intend to take as a result of that assessment, and where they do not intend to take any such steps, their reasons for that.

### **Payment of redress payment**

#### ***Section 49: Period for which offer valid***

136. In accordance with subsection (1), once a redress application has been determined and an offer is made under section 36, the applicant can accept the offer by signing and returning a waiver, or the applicant may request a review of the offer in the terms permitted by section 54.
137. If the applicant does neither of these things within the time period during which the offer remains valid, it will be treated as having been rejected (subsection (2)) unless the reason for the inaction is the applicant’s death and a nominated beneficiary then takes over the application.
138. The offer remains valid for a period of six months from the date it is received by the applicant (or such longer period as the panel determining the application may specify) (subsection (3)). As with other timescales which run from the date of receipt of something by the applicant, section 26(5) and (6) of ILRA provides for when an applicant is to be assumed to have received the thing. It should be noted that a review cannot necessarily be sought during the entirety of the period for which the offer is valid: the period for seeking a review is eight weeks, although late requests can be allowed if there is a good reason for any delay.
139. Subsections (4) and (5) make provision as regards the revival of an application in exceptional circumstances where the time period for acceptance has elapsed. Revival of an application would not revive any review rights in relation to it. In such a case, the appropriate course of action would be to seek a late review under section 54(5). However, revival may be appropriate where the applicant wishes to accept the offer but, for example, was unable to do so in time due to a period of hospitalisation.

***Section 50: Acceptance of offer and making of payments***

140. This section provides that an applicant becomes entitled to a redress payment once the offer of a redress payment is accepted and once the Scottish Ministers are satisfied that any relevant civil proceedings have been or will be abandoned. An offer is accepted by the applicant signing and returning a waiver or, where a waiver has previously been granted and a second waiver is not required because of the operation of section 46(2), by written notice (see paragraph 130 of these Notes). The payment will be made as a single payment, or in agreed instalments.

***Section 51: Payments to children***

141. This section applies to applicants who have been offered a redress payment and who are under the age of 18 years.
142. Subsection (2) allows a panel determining an application or a review to give directions relating to the payment and management of the redress payment for the benefit of the applicant, where considered appropriate.
143. Subsection (3) provides examples of the options Redress Scotland can consider when making a direction in relation to the payment or management of a redress payment for applicants under the age of 18. The options available to Redress Scotland include making the payment in instalments or retaining the payment until the applicant turns 18.
144. Subsection (4) makes further provision which applies where a direction has postponed the payment of the whole or part of the redress payment (for example, by directing that it should be paid in instalments). Where that is the case, applicants can ask for earlier payment of the whole or part of the redress payment. This means that the redress payment awarded to the applicant can be accessed earlier than provided for in the direction where appropriate. Further details on how this process will work in practice will be included in guidance.
145. Once the applicant reaches the age of 18, the whole of any remaining balance of the redress payment must be paid to the applicant, and paid in accordance with the provision for payment set out in section 50(3).

***Section 52: Review of direction made under section 51***

146. Section 52 allows an applicant to request a review of the panel's decision in relation to any directions given under section 51(2).
147. In accordance with subsection (2), such a request must be made to the Scottish Ministers before the end of the period of eight weeks beginning with the date on which notice of the direction was received and be made in such form as the Scottish Ministers may require (and under subsection (5), the Scottish Ministers must publicise any requirements for the form the request is to take). The request must also specify why a review is being sought, and should contain or be accompanied by any other information the applicant considers relevant.
148. Subsection (3) states that the Scottish Ministers must provide the request and any accompanying information to Redress Scotland as soon as practicable. Subsection (4) permits Redress Scotland to conduct a review despite it not being requested within the timescale specified in subsection (2)(b), if it is satisfied that the applicant has a good reason for not requesting it sooner.
149. Subsection (6) applies sections 55 (review panels), 56 (procedure for reviews) and 59(1) to (5) (withdrawal of review request) to reviews under this section. However, any withdrawal of a request for a review can only happen before the review is determined under section 53.

### ***Section 53: Outcome of a section 52 review***

150. Subsection (1) sets out that a panel conducting a review under section 52 must consider whether the panel which gave the direction ought to have done so, and, where additional evidence is provided to or obtained by the panel conducting the review, whether the question of the direction to be given (if any) ought to be determined differently as a result. In either case, the review panel may uphold or reverse the original direction.
151. Subsection (2) requires the Scottish Ministers to notify the applicant of the review panel's determination, and to provide the applicant with a summary of the panel's reasons for reaching that determination.
152. In accordance with subsection (3), the determination of a review panel under this section is final. This means that there is no further right of appeal in respect of this decision.

## ***Chapter 2: Review of redress payment determinations***

### ***Section 54: Right to a review***

153. This section provides applicants with the right to request a review of certain decisions in relation to their application, where they have not already accepted the offer that has been made (subsection (1)).
154. Subsection (2) sets out that the decisions which may be reviewed are: that the applicant is not eligible for a redress payment, that the applicant is to be offered a particular level of individually assessed payment, or that a particular amount is to be deducted from the redress payment that has been offered.
155. In accordance with subsection (3), such a request must be made to the Scottish Ministers within eight weeks of the date on which notice of the determination was received. Where the Scottish Ministers set requirements in relation to the form for a request for a review, the request must be in that form (any such requirements being publicised in accordance with subsection (6)). The request must also specify why a review is being sought, and must contain or be accompanied by any other information the applicant considers relevant. The Scottish Ministers must, as soon as reasonably practicable, pass the request and accompanying information to Redress Scotland.
156. Subsection (5) permits Redress Scotland to conduct a review despite it not being requested within the timescale specified in subsection (3), if it is satisfied that the applicant has a good reason for not requesting it sooner. In a case where an offer had been made and was allowed to expire, there is no requirement to apply first to revive the application under section 49(4); the applicant can simply go straight to requesting a late review.

### ***Section 55: Review panels***

157. This section provides that requests for a review will be determined by Redress Scotland, by a panel consisting of at least three members (none of whom made the determination which is under review). The panel is to be appointed by the chair of Redress Scotland.

### ***Section 56: Procedure for a review***

158. Where a panel is established under section 55 to conduct a review, it may invite oral representations to be made if it considers this necessary. Otherwise, the review will be determined on the basis of the evidence available to the original decision-makers and any additional evidence provided to or obtained by the review panel, including that contained in the request for the review or in any written representations it has received. In accordance with subsection (2), any additional procedural requirements will be determined by Redress Scotland.

***Section 57: Outcome of a review***

159. Subsection (1) sets out that a panel conducting a review under section 55 must consider whether the panel that made the original determination ought to have reached a different determination and, where additional evidence is provided to or obtained by the panel conducting the review, whether the application should now be determined differently as a result of that additional evidence.
160. Once a review is under consideration, the review panel is not restricted to the matters raised in the application for review and may change any part of the decision taken in respect of the redress application (subsection (3)). However, subsection (2) provides that the review panel may not reverse a decision that the applicant is eligible for a redress payment, nor may the panel decide that a lower amount should be offered to the applicant than was offered initially or that any deduction made in accordance with section 42 should be increased. In other words, the applicant cannot be placed in a worse position following a review.
161. Subsection (4) provides that the review panel has no power to rule on or determine any person's civil or criminal liability, nor can its determinations be relied on in other proceedings as evidence that the acts complained of occurred or did not occur.
162. Subsection (5) requires the Scottish Ministers to notify the applicant of the review panel's determination, and to provide the applicant with a summary of the panel's reasons for reaching that determination. Where an offer is made, comparable information must be given in relation to it as would have been given under section 36. Paragraph 60 of these Notes applies equally to the form of notice of the outcome of a review under this section.
163. In accordance with subsection (6), the determination of a review panel under this section is final. This means that there is no further right of appeal in respect of this decision.

***Section 58: Period for which offer valid following a review***

164. Following review, if an offer of a redress payment is made it will be valid for a period of six months (or for such longer period as the review panel specifies). The applicant can choose to accept the offer in accordance with section 50(1), and it will be considered to have been rejected if there is no such acceptance within the period during which it is valid.
165. Subsections (4) and (5) make provision as regards the revival of the application in exceptional circumstances where the time period for acceptance has elapsed.

***Section 59: Withdrawal of review request***

166. In accordance with this section, an applicant who has requested a review of a decision can withdraw that request in writing at any time before the review is determined. In relation to "writing", see paragraph 60 of these Notes. While no further request for review can be made on the same basis as the original application for review, the applicant may submit another application for review in respect of a different aspect of the original decision (subsection (5)). For example, if a decision is made to offer a particular level of individually assessed redress payment, with a particular level of deduction for a relevant payment taken into account, that decision can be subject to review. If a review of the level of deduction is made and then withdrawn, it cannot be resubmitted. However, a subsequent request may be made in respect of the level of individually assessed redress payment offered.
167. If a request for review is withdrawn, the original decision remains in place, including the original offer of a redress payment (if one was made). The period that the offer is open, originally valid for the six month period (or such other period as the panel specified), will be extended by the number of days from the request of the review to

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its withdrawal (subsection (7)). In addition, it would be open to the original panel to extend the period further under section 49(3)(b) if there were a good reason to do so.

### ***Chapter 3: Applications affected by convictions for serious offences***

#### ***Sections 60 and 61: Applicants etc. with convictions for serious offences***

168. Section 60 provides that where an applicant (including a next of kin applicant) or a nominated beneficiary has been convicted of certain serious offences, whether in the United Kingdom or elsewhere in the world, before a panel can determine their application, the panel must first determine whether it would be contrary to the public interest to make a redress payment to that person and, in consequence, whether that person should be precluded from being offered a redress payment. This applies whether the conviction occurred before the date of the application or after it. This also applies where the person to whom the application relates (where not the applicant) has been convicted of such an offence.
169. For the purpose of these provisions, a relevant offence is murder, rape, or another sexual or violent offence which resulted in a person being sentenced to a period of imprisonment of five years or more. Section 61 contains definitions for the purpose of this section. It also contains a regulation-making power (subject to the affirmative procedure) to add, vary or remove offences. In light of the Rehabilitation of Offenders Act 1974 (sections 1 and 4), for the purpose of these provisions account will only be taken of unspent convictions.
170. Subsection (6) provides for the matters to which the panel must have regard in reaching its decision as to whether a person should be precluded from being eligible for a redress payment as a result of a serious criminal conviction. In addition, in exercise of the power in section 106, the Scottish Ministers may issue guidance which Redress Scotland would have to have regard to when making an assessment for the purpose of this provision.
171. Where a determination is made to preclude a person from being offered a redress payment, subsection (7) allows the panel to determine whether the person would otherwise have been eligible for such a payment. This is of importance to survivors of abuse who would, notwithstanding that they are precluded from being offered a redress payment, qualify for elements of non-financial redress offered by the scheme including access to emotional and psychological support. Subsection (8) states that the Scottish Ministers must notify the applicant of the determination and provide reasons for the panel's determination. Paragraph 60 of these Notes applies equally to the form of notice of a determination under this section.

#### ***Section 62: Review of determination made under section 60***

172. This section provides that a person who has been notified of a determination under section 60 may request a review of it. The review may relate to the decision that the person should be precluded from being offered a redress payment, or it may relate to the determination as to whether or not the person would, but for the previous conviction, have been eligible for a redress payment.
173. In accordance with subsection (2), such a request must be made to the Scottish Ministers within eight weeks of the date on which notice of the determination was received. Where the Scottish Ministers set requirements in relation to the form for a request for a review, the request must be in that form (any such requirements being publicised under subsection (5)). The request must also specify why a review is being sought, and must contain or be accompanied by any other information the applicant considers relevant.
174. The Scottish Ministers must, as soon as reasonably practicable, pass the request and accompanying information to Redress Scotland for it to determine.

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175. Subsection (4) permits Redress Scotland to conduct a review despite the request not being made within the timescale specified in subsection (2), if it is satisfied that the applicant has a good reason for not requesting it sooner.
176. Subsection (6) applies sections 55 (review panels), 56 (procedure for reviews) and 59(1) to (5) (withdrawal of review request) to reviews under this section. However, any withdrawal of a request for a review can only happen before the review is determined under section 63.

### ***Section 63: Outcome of a section 62 review***

177. Subsection (1) sets out that a panel conducting a review under section 62 must consider whether the panel that made the original determination ought to have reached a different determination and, where additional evidence is provided to, or obtained by, the panel conducting the review, whether the application should now be determined differently as a result of that additional evidence. In either case, the review panel may uphold or reverse the original determination.
178. Subsection (2) requires the Scottish Ministers to notify the applicant of the review panel's determination, and to provide the applicant with a summary of the panel's reasons for reaching that determination. Paragraph 60 of these Notes applies equally to the form of notice of the outcome of a review under this section.
179. In accordance with subsection (4), the determination of a review panel under this section is final. This means that there is no further right of appeal in respect of this decision.

### ***Section 64: Information about convictions for serious offences***

180. Subsection (1) states that an applicant or (as applicable) the applicant's nominated beneficiary must provide the Scottish Ministers with the information mentioned in subsection (2) in relation to any conviction which is or may be relevant under section 60.
181. Subsection (2) lists the information to be provided in relation to a conviction. Where this information is provided in relation to a conviction under subsection (1), the Scottish Ministers must provide this information to Redress Scotland (subsection (3)).

## ***Chapter 4: Death of applicant***

### ***Section 65: Nomination of a beneficiary***

182. Subsection (1) provides that an applicant for a fixed rate payment or an individually assessed payment may nominate a person (a "nominated beneficiary") to take over the application when permitted by section 66 in the event that the applicant dies while the application is ongoing. Under schedule 1 of ILRA, "person" is defined as including "*a body of persons corporate or unincorporated and a partnership constituted under the law of Scotland*". This therefore would allow organisations such as charities to be nominated as nominated beneficiaries. A nomination can be part of the application, or can be made by way of other notice in writing to Redress Scotland.
183. In accordance with subsection (2), the nomination remains in force until it is withdrawn by the applicant by notice in writing to the Scottish Ministers, or alternatively the person who is nominated dies or, in the case of a person other than an individual, ceases to exist.
184. Subsection (3) sets out that a reference to an "application" also includes a request for a review of the determination of that application, so a nominated beneficiary who takes over an application can also take over any review of it.

### ***Section 66: Applicant's death while application ongoing***

185. Subsection (1) provides that the death of an applicant during the application process will bring an application to an end, unless there is a nomination in force in relation to



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it under section 65 (nomination of beneficiary) and the nominated beneficiary is to be invited to take over the application by virtue of subsection (2) or (3) of this section.

186. Subsection (2) sets out that where an applicant has died after the panel has all of the information required to determine the application, but while it is still ongoing, the nominated beneficiary is to be invited to take over the application.
187. Subsection (3) provides that, where an applicant has died after making an application, but before the panel has all of the information required to determine the application, the panel must make a determination in accordance with subsection (4) whether or not the nominated beneficiary should be invited to take over the application. In accordance with subsection (4), the nominated beneficiary will only be invited to take over the application where there are exceptional circumstances which merit it - for example, where the remaining paperwork required in respect of the application is minimal, and not fundamental to the determination of eligibility of the applicant.
188. Once a determination has been reached, subsection (5) requires Redress Scotland to inform the Scottish Ministers, who must, in turn, notify the nominated beneficiary of the determination, and provide the beneficiary with a summary of the panel's reasons for it.
189. Subsections (6) and (7) set out what is meant by an application being "ongoing" for the purposes of this section. This is explained in paragraphs 54 and 55 of these Notes.

### ***Section 67: Access to information and evidence by nominated beneficiary***

190. This section provides that access to information and evidence held by Redress Scotland or the Scottish Ministers can be provided, subject to certain restrictions, to a nominated beneficiary (that is, a person nominated by an applicant under section 65 to take over their application in the event of their death while the application is ongoing).
191. The section provides for a nominated beneficiary to be able to access any relevant information or evidence when considering whether to accept an invitation to take over the application under section 66(2) or (3) of the Act, or, having not been invited to take over the application (because too much of the information needed in relation to the application is still outstanding), for the purposes of a review of that decision under section 68. Once a nominated beneficiary takes over an application, their right to access is provided under section 82 instead.
192. Subsection (3) makes clear that the right of access to information and evidence applies so far as that can be provided in a way which is compliant with applicable data protection legislation (including the Data Protection Act 2018 and the General Data Protection Regulation as now enshrined in UK law), and without releasing information or evidence that would identify any person other than the applicant or nominated beneficiary.

### ***Section 68: Review of determination made under section 66(3)***

193. This section provides for a review of a determination made under section 66(3) that a nominated beneficiary is not going to be invited to take over an application following an applicant's death.
194. In accordance with subsection (2), any request for a review must be made to the Scottish Ministers within eight weeks of the date on which notice of the determination was received by the nominated beneficiary, be in the required form as set out by the Scottish Ministers, and specify why the review is being requested. Any accompanying documents and information considered relevant by the nominated beneficiary must also be produced as part of this process. As soon as reasonably practicable after receiving a request for a review, the Scottish Ministers will pass it, and any accompanying information, to Redress Scotland.

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195. Subsection (4) permits a review to be conducted despite the request for it not being made within the timescale specified in subsection (2), if Redress Scotland is satisfied that the applicant has a good reason for not requesting it sooner.
196. Subsection (6) applies sections 55 (review panels), 56 (procedure for reviews) and 59(1) to (5) (withdrawal of review request) to reviews under this section. However, any withdrawal of a request for a review can only happen before the review is determined under section 69.

### ***Section 69: Outcome of a section 68 review***

197. Subsection (1) sets out what a panel conducting a review under section 68 (review of determination made under section 66(3)) must consider; namely, whether the panel that made the original determination ought to have reached a different determination and, where additional evidence is provided to or obtained by the panel conducting the review, whether the application should now be determined differently on the basis of that additional evidence. In either case, the review panel may uphold or reverse the original determination.
198. Subsection (2) requires Redress Scotland to inform the Scottish Ministers of the outcome following the review. The Scottish Ministers must then, as soon as reasonably practicable, notify the nominated beneficiary of the review panel's determination, and provide the nominated beneficiary with a summary of the panel's reasons for reaching that determination. Paragraph 60 of these Notes applies equally to the form of notice of a determination under this section. Subsection (3) provides that where the review panel reverses the original determination, the Scottish Ministers must invite the nominated beneficiary to take over the application. Subsection (4) provides that, where the review panel determines that the nominated beneficiary is to take over the application, it is to be treated as having been continued by section 66(3), so section 71 would apply to those who are invited to take over an application following a review just as it would apply to those who were invited to take over an application from the outset.
199. In accordance with subsection (5), the determination of a review panel under this section is final. This means that there is no further right of appeal in respect of this decision.

### ***Section 70: Applicant's death after offer accepted***

200. This section provides that, where an applicant to the redress scheme dies after accepting the payment and signing the waiver but before the payment is made, the payment will pass to the applicant's estate.

### ***Section 71: Invitation to nominated beneficiary to take over application***

201. This section provides for what is to happen where an applicant for a redress payment dies in the course of their application and a nominated beneficiary is to be invited to take over the application under section 66.
202. Once a nominated beneficiary is to be invited to take over the application, the Scottish Ministers must notify them of the invitation and provide them information about the effect of doing so. Paragraph 60 of these Notes applies equally to the form of notice of an invitation under this section.
203. Subsection (3) provides the nominated beneficiary with a period of eight weeks to accept the invitation by giving notice in writing to the Scottish Ministers (and in relation to "writing", see paragraph 60 of these Notes). Where the application is incomplete and further information is required before the application can be determined (see section 66(3)), the nominated beneficiary must provide any remaining information which is required from them within eight weeks. If the nominated beneficiary does these things within the eight week period, they take over the application.

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204. Once the nominated beneficiary has (within the permitted timescale) accepted the invitation to take over the application, the Scottish Ministers must inform Redress Scotland of that as soon as reasonably practicable. In addition, in a case where the nominated beneficiary also has to provide any remaining information required from them within the permitted timescale, the Scottish Ministers must also pass on any information that has been provided, as soon as it is reasonably practicable to do so.
205. Subsection (5) provides that, should the nominated beneficiary not take all of the actions set out in subsection (3) (where applicable) within the period specified, the application will be treated as being brought to an end.
206. A nominated beneficiary must provide the Scottish Ministers with evidence in relation to the death of the applicant and the nominated beneficiary's identity should it be requested (subsection (7)).

### ***Section 72: Application taken over by nominated beneficiary***

207. This section sets out what happens where an applicant for a redress payment dies in the course of their application and the application is then taken over by a nominated beneficiary.
208. Where a nominated beneficiary takes over the application, the application and any review thereof will continue to be determined. It will be determined on the basis of the eligibility of the applicant. Consideration of any relevant payments to be deducted and the question of whether a fixed rate payment was previously paid or, in the case of an application made by virtue of section 30(3), an individually assessed payment was previously paid, will be based on whether it has been paid to the applicant or their estate. However, the nominated beneficiary is otherwise to step into the applicant's shoes in relation to the application.
209. Subject to certain exceptions, the nominated beneficiary is therefore to be offered any redress payment which the applicant would have been offered if alive (subject to the nominated beneficiary not having any serious criminal convictions which preclude such a payment). The nominated beneficiary may also do anything in respect of determination of the application that the applicant would have been able to do. Requirements placed on applicants in relation to applications are also imposed on the beneficiary.
210. The exceptions to this general approach are set out in subsection (3) of this section—
  - the nominated beneficiary is not to be treated as having applied for a redress payment for the purpose of Part 3 (Eligibility and key concepts), meaning that if the nominated beneficiary dies having been offered a payment, their next of kin cannot seek permission to apply for a next of kin payment under section 25;
  - where a waiver was previously signed by the applicant in respect of a fixed rate payment or, in the case of an application made by virtue of section 30(3), an individually assessed payment, a new waiver in respect of any further payment will need to be signed by the nominated beneficiary even if the contributor list has not changed in the meantime, as the applicant's previous waiver does not waive the nominated beneficiary's rights;
  - the nominated beneficiary may neither nominate a further beneficiary, nor apply for emotional or psychological support (see section 90).
211. Where a nominated beneficiary takes over an application following the determination of the application (or following a determination of a review of the application), subsection (4) ensures that any serious unspent criminal convictions of the nominated beneficiary are considered. Section 60 applies such that a panel must, as soon as reasonably practicable after the nominated beneficiary takes over the application, consider the effect of any serious previous conviction as set out in that section and make

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a determination as to whether the nominated beneficiary is precluded from receiving the redress payment as a result.

212. Where the nominated beneficiary takes over an application before the application (or a review of it) has been determined, section 60 will operate without any modifications in order to take account of any serious unspent criminal convictions of the nominated beneficiary (in addition to those of the now deceased applicant).

### ***Section 73: Nominated beneficiary's death etc.***

213. This section provides for what happens where a nominated beneficiary who has taken over a redress application subsequently dies themselves. Under subsection (2), if the nominated beneficiary dies during the course of the application (or ceases to exist if an organisation), the application comes to an end. Under subsection (3), if the nominated beneficiary was an individual and had accepted an offer of redress payment by signing a waiver before their death, the redress payment will be paid to their estate.

## ***Chapter 5: Redress payments or determinations made in error***

### ***Section 74: Liability for redress payments made in error***

214. This section provides that a person is liable to pay the Scottish Ministers the value of any redress payment that has been paid to that person due to a "relevant error", although only to the extent that it is attributable to the relevant error.
215. Subsection (2) sets out that the liability is the difference in value between the redress payments that were paid to that person, and those that would have been paid had the relevant error not occurred. Subsection (3) provides that any sum in respect of which the Scottish Ministers seek repayment may be paid in instalments if agreed with the person, or otherwise as a single payment.
216. "Relevant error" is defined in subsection (4) to mean either an error when making a redress payment, or an error which Redress Scotland determines under section 75 or 76 to have led to a determination being made incorrectly or on the basis of incorrect or misleading information (where this materially affected the determination).
217. Accordingly, any redress payment which was paid in error to the wrong account holder or where the wrong amount was entered in a bank transfer by mistake would be repayable, as that would constitute a relevant error under subsection (4)(a). Redress Scotland would not need to be involved in the recovery of such a payment. However, under subsection (4)(b), payments which are paid in accordance with a determination of Redress Scotland may only be recovered where Redress Scotland carries out a further determination process and is satisfied that an error materially affected the determination. The error may be one of, for example, having incorrectly calculated previous payments to be deducted despite having accurate information to work from, or it may be one of, for example, having been supplied (accidentally or otherwise) with evidence which misstated the details of the abuse.

### ***Section 75: Reconsideration of determination where possible material error***

218. This section provides that, where Redress Scotland or the Scottish Ministers have cause to believe that an error may have materially affected a determination under Part 4 of the Act, they must make a referral to a panel of at least three members of Redress Scotland appointed to consider the matter. A reconsideration can occur either once a payment has already been made or in advance of a payment being made (if the error is known about in time).
219. Where Redress Scotland refers a determination for reconsideration, subsection (3) provides that Redress Scotland must inform the Scottish Ministers as soon as reasonably practicable. Where either Redress Scotland or the Scottish Ministers refer

a determination for reconsideration, subsection (4) provides that the Scottish Ministers must then, again as soon as reasonably practicable, notify the relevant person that the determination is to be reconsidered and of the reasons for that, as well as providing information about the implications of the reconsideration. A period of at least eight weeks must be provided for the person to make written representations in relation to the reconsideration. Paragraph 60 of these Notes applies equally to the giving of notice to a person under subsection (4) that a determination is to be reconsidered. It is also relevant to the meaning of “writing” in relation to the making of representations under this section.

220. Subsection (5) provides that, once the period allowed for written representations has ended, the panel appointed to consider the matter must consider whether the determination was materially affected by an error. If the panel considers that the determination was so affected, it must redetermine it as it would have been determined had the error not occurred. In accordance with subsection (6), for the purposes of other proceedings (civil or criminal), nothing done under a reconsideration can be taken as a finding that any person mentioned in the original application acted or failed to act in a way set out in that application. This rule also applies to original determinations and reviews of them (see sections 36 and 57(4)).
221. Subsection (7) provides for notification requirements which apply once the reconsideration has taken place, and requires Redress Scotland to inform the Scottish Ministers, who must then notify the person affected of the outcome of the panel’s reconsideration, including providing a summary of the reasons for the panel’s decision. Paragraph 60 of these Notes applies equally to the form of notice of a determination under this section.
222. Subsection (8) provides that, where a redetermination relates to a redress payment that has not yet been made, the reconsidered determination takes the place of the original determination, but any review is to be under section 76 rather than section 54, so that there are not two different review rights applying simultaneously in respect of the same matter. Subsection (9) sets out the meanings of “error” and “relevant person” for the purposes of this section. The person who is notified of a reconsideration will usually be the applicant (or their nominated beneficiary) but there may be times where that person died after accepting a payment but before receiving it, and the payment was therefore redirected elsewhere.

### ***Section 76: Review of reconsidered determination***

223. This section provides for a review of a determination under section 75 (reconsideration of determination where possible material error).
224. In accordance with subsection (2), any request for a review must be made to the Scottish Ministers within eight weeks of the date on which notice of the determination was received by the person requesting the review (that is, the person who was notified of the determination under section 75). The Scottish Ministers must then provide the request and accompanying information to Redress Scotland as soon as reasonably practicable. Where the Scottish Ministers set requirements in relation to the form for a request for a review, the request must be in that form (any such requirements being publicised under subsection (5)). The request must also specify why a review is being sought, and contain or be accompanied by any other information the applicant considers relevant.
225. Subsection (4) permits a review to be conducted despite the request for it not being made within the timescale specified in subsection (2), if Redress Scotland is satisfied that the applicant has a good reason for not requesting it sooner.
226. Subsection (6) applies sections 55 (review panels), 56 (procedure for reviews) and 59(1) to (5) (withdrawal of review request) to reviews under this section. However, any withdrawal of a request for a review can only happen before the review is determined under section 77.

***Section 77: Outcome of a section 76 review***

227. Subsection (1) sets out what a review panel conducting a review under section 76 of a reconsidered determination must consider: namely, whether the reconsideration panel ought to have reached a different determination and, where additional evidence is provided to or obtained by the panel conducting the review, whether the application should now be determined differently on the basis of that additional evidence.
228. Subsection (2) provides that the review panel may not reverse or vary a determination under section 75 that a person remains eligible for a redress payment, nor determine that a person is to be entitled to or offered a lower amount of individually assessed payment than that person was entitled to or offered under section 75. The review panel also may not determine that more is to be deducted by way of relevant payment in accordance with section 42 from the person's redress payment than was determined under section 75. Subsection (3) goes on to provide that the review panel may otherwise uphold or reverse any part of the determination, irrespective of whether the request for a review relates to that part of it or not.
229. Subsection (4) provides that subsections (4) and (7) of section 36 apply to a determination as upheld, reversed or varied as they apply to a determination made under section 36 (determination of applications). This is subject to the modification that references to the panel appointed under section 35 (decision-making panels) to determine the application are to be read as references to the review panel.
230. Subsection (5) requires Redress Scotland to inform the Scottish Ministers of the review panel's determination, and they must then notify the person who requested the review of the outcome, and provide that person with a summary of reasons provided by Redress Scotland for reaching that determination.
231. In accordance with subsection (6), the determination of a review panel under this section is final. This means that there is no further right of appeal in respect of this decision. An exception to this is provided in subsection (7), whereby a further referral for review can be made if that referral relates to a different error.

***Section 78: Power to make further provision about reconsiderations***

232. This section provides that regulations (subject to the affirmative procedure) may be made in respect of reconsideration of determinations under section 75 and reviews of reconsidered determinations under section 76.
233. Subsection (2) sets out a non-exhaustive list of some examples of provision that may be made by these regulations. For example, it might be appropriate for provision to be made setting aside a waiver in the event that the redress payment to which it relates is reduced to nil by a reconsideration; or it may be appropriate for provision to be made for the recovery of fees for legal work or other costs and expenses relating to a reconsideration which are paid due to an error. It might also be appropriate for the rule in section 75(5)(b) to be modified slightly. While in most cases a reconsideration panel ought to be considering what determination would have been reached had the error not been made, that may not always be appropriate. If the error in the original determination was a result of fraud and the applicant has since been convicted of a serious criminal conviction to which section 60 applies, it might be appropriate for the panel to be allowed to take account of that conviction. Although the examples in this subsection relate to the initial determination of the reconsideration panel, the power could also be exercised in relation to any reviews of a reconsideration panel's determination, as subsection (1) expressly covers both aspects.

## **Chapter 6: Provision of information and evidence**

### **Section 79: Power of the Scottish Ministers to require the provision of evidence**

234. This section provides that the Scottish Ministers may by notice in writing compel individuals or organisations, other than the applicant, to provide evidence relevant to an application for a redress payment. It is not anticipated that this power will need to be used very often as the Scottish Government’s experience in administering the advance payment scheme has been that evidence requested is provided willingly in the vast majority of cases. However, where a formal power to compel is required, this section would allow for that. In relation to the requirement that any notice be in “writing”, see paragraph 60 of these Notes.
235. Subsection (1) allows the Scottish Ministers to compel the production of information, documents, objects, other items of evidence or evidence in the form of a written statement. The deadline for any such request would be specified in the notice. Subsection (2) provides that information may be obtained for the purposes of any determination to be made by a panel appointed under section 35 or any determination to be made by a review panel or a reconsideration panel. The determination of a matter by a review panel includes a review panel appointed under section 55 by virtue of another section – for example, a review panel appointed in accordance with section 62(6) to consider a review of a decision that an individual should be precluded from being offered a redress payment due to serious criminal convictions.
236. Subsection (3) lays out the conditions on which an individual or organisation may challenge the requirement to provide evidence. These are that the person is unable to comply with the notice, or it is not reasonable in all the circumstances to require them to comply with it. Subsection (4) requires the Scottish Ministers to pass any challenge to Redress Scotland for it to determine. Subsection (5) explains the actions Redress Scotland may then take in response to such a challenge: they may confirm, vary or revoke the notice.
237. Subsections (6), (7), and (8) explain considerations individuals or organisations compelled to provide evidence must take into account in relation to redaction and data protection when considering how to respond to a notice to provide evidence.

### **Section 80: Power to obtain information about previous payments**

238. This section provides the Scottish Ministers with a power to obtain information from third parties for the purposes of section 42 (which relates to the deduction of relevant payments from redress payments). The Scottish Ministers may by notice, in writing, require a person other than the applicant to provide information to the panel with details of relevant payments. In relation to the requirement that any notice be in “writing”, see paragraph 60 of these Notes.
239. Subsection (2) provides that a notice under subsection (1) may in particular require information on the following matters: the date on which payment was made or (where applicable) an entitlement to it arose; the amount of the payment; and the matter to which it related. In accordance with subsection (3), it must also specify the name and date of birth of the person to whom the payment relates (which will normally be the applicant but, for example, in the case of a next of kin payment may be the abuse survivor).
240. Subsection (4) states that a notice under subsection (1) does not have effect to the extent that complying with it would involve disclosure of information which would breach data protection legislation, or where the person would be permitted to refuse to comply with it in connection with court proceedings in Scotland. Subsection (5) sets out the meaning of “data protection legislation”.

***Section 81: Redress Scotland's power in relation to information and evidence***

241. This section provides that Redress Scotland may ask the Scottish Ministers to issue a notice to provide evidence or issue a notice to provide details regarding previous payments which a person has received in relation to relevant abuse. Furthermore, Redress Scotland may ask the Scottish Ministers themselves to provide evidence they hold which is relevant to an application for a redress payment. The Scottish Ministers must comply with such requests within the specified period: in the case of issuing a notice to a third party, that period is four weeks; in the case of providing evidence themselves, that period is such period as Redress Scotland specifies (which must be at least four weeks).

***Section 82: Applicant access to information and evidence***

242. This section provides that Redress Scotland and the Scottish Ministers must, on request, provide a person with access to any information or evidence obtained by or provided to it or them in connection with the person's application for a redress payment.
243. Subsection (2) addresses the situation where a nominated beneficiary seeks access to information or evidence relating to the deceased survivor and provides that this includes a right of access to any information and evidence held in connection with the application prior to it being taken over by the nominated beneficiary. Any information or evidence provided or obtained after the nominated beneficiary had taken over the application would be covered by subsection (1), by reason of the nominated beneficiary being treated under section 72 as having stepped into the original applicant's shoes.
244. The right of access to information and evidence applies so far as that can be provided in a way which is compliant with applicable data protection legislation (including the Data Protection Act 2018 and the General Data Protection Regulation as now enshrined in UK law), and without releasing information that would identify any person other than the person making the request or the original applicant.

***Section 83: Power to commission reports***

245. This section provides the Scottish Ministers with the power to commission reports in connection with applications for fixed rate or individually assessed payments for the purpose of progressing the application, its determination, or the conducting of a review or reconsideration – provided the applicant has given their agreement for this. The determination of a matter by a review panel includes a review panel appointed under section 55 by virtue of another section (see also paragraph 235 of these Notes).

***Section 84: Offences of failure to provide, and of tampering with, information or evidence***

246. This section states that any individual who, or organisation which, fails to comply with a notice from the Scottish Ministers to provide evidence (as laid out in sections 79 and 80), without reasonable excuse, commits a criminal offence. This also applies where the Scottish Ministers fail, without reasonable excuse, to comply with a request from Redress Scotland under section 81(1)(c) to provide information which Ministers hold themselves.
247. An individual or organisation also commits a criminal offence if, without reasonable excuse, they take action to conceal, destroy, alter, or distort evidence which either they know is required, or they have reasonable grounds for believing might be required, under a notice given by the Scottish Ministers or under a request for information made of Ministers by Redress Scotland. This applies in any case where there are reasonable grounds for believing that a notice might be issued or a request made, regardless of whether or not that subsequently happens.



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248. An individual or organisation committing either of the aforementioned offences may be imprisoned for up to six months or issued with a fine up to the value of level 3 on the standard scale, or both. The value of level 3 on the standard scale is currently £1,000 (at the time of preparation of these Notes).

***Section 85: Individual culpability where an organisation commits an offence under section 84***

249. This section provides that where a criminal offence is committed in relation to a notice or request to provide information (as laid out in sections 79, 80 and 81(1)(c)) by an organisation and where a responsible individual within that organisation or someone acting as such has facilitated the offence – either actively or via neglect – both the organisation and the responsible individual (or the person acting as such) commit the offence. Subsection (3) defines “relevant organisation”. Subsection (4) specifies the meaning of “responsible individual” in relation to different types of organisation.

***Section 86: Crown application in relation to offences under section 84***

250. Subsection (1) states that the Crown cannot be held criminally liable for any offence committed in relation to a notice or request to provide evidence. However, the Court of Session may, on an application by the Lord Advocate, declare unlawful any act or omission for which the Crown would be criminally liable if it were not for subsection (1). Subsection (1) does not affect the criminal liability of individual persons in the service of the Crown such as civil servants or other officials engaged by Crown bodies who may be held criminally liable as individuals for any offence committed under section 84.

***Section 87: Confidentiality of information***

251. This section sets out the responsibility of Redress Scotland, the Scottish Ministers, their respective staff, and certain other parties to ensure confidentiality when handling information related to the redress scheme which is not otherwise in the public domain. Other than sharing of information and evidence that is done in accordance with section 82, persons listed in section 87 are prohibited from disclosing information given to them which relates to the scheme and has not been freely circulated to the public unless an exception applies.
252. Subsections (3), (4) and (5) describe the circumstances under which information can or must be shared. Specifically, sharing is permitted or, in some cases, required—
- within certain limits for the purpose of carrying out any of the functions outlined in the Act or under any regulations made under it, or where it is expressly provided for in either of those places (for example, to provide information to a scheme contributor);
  - where the person who supplied the information has given their consent;
  - to enable the police to carry out the investigation of a criminal offence against a child and where it is in the public’s interest to share this information with a constable; or
  - under a court order in relation to civil or criminal proceedings.
253. Subsection (6) defines the information subject to these provisions.

***Section 88: Power to share information with third parties***

254. This section lays out the conditions under which the Scottish Ministers or Redress Scotland may share information with third parties. There are four purposes for which information can be shared—

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- The first is to ask a third party to verify or authenticate evidence provided in connection with an application;
  - The second is to ask a third party to provide evidence relevant to a redress application;
  - The third is to ask a third party to provide details of any relevant payments made to a person or payments to which a person is entitled;
  - The fourth is to enable a scheme contributor to assess whether an individual in receipt of a redress payment has commenced legal proceedings against the scheme contributor in violation of section 46.
255. The third party to which information is disclosed may only use the information or disclose it to a further party for reasons consistent with the four purposes above and the further party may only use the information for the relevant purpose for which it was disclosed to them. For example, an organisation might inform their legal representative that an individual pursuing civil proceedings against the organisation has signed a waiver and therefore has no legal right to pursue the case. The legal representative may only use that information to provide advice to the organisation in question or take appropriate steps to protect the organisation's legal interests.
256. Subsection (4) provides that the information which may be shared with a third party for the purposes discussed is only such information as the person sharing it considers is reasonably necessary for the purpose for which it is being shared, and a non-exhaustive list of what this might include is given. Subsections (5) and (6) clarify that this provision does not permit any party to share information in such a way as to contravene data protection law.

## **Part 5: Other support for survivors of abuse**

### **Provision of support**

#### ***Section 89: Provision of support to persons in connection with an application***

257. This section provides that the Scottish Ministers may arrange to provide support to applicants to the redress scheme and to those who are in the process of preparing or considering an application to the redress scheme. Support in this section means emotional, psychological or practical support which the Scottish Ministers consider necessary for a person in connection with deciding to apply or making an application.

#### ***Section 90: Provision of support to certain persons eligible for a payment etc.***

258. This section provides that the Scottish Ministers may arrange to provide support to persons who meet the conditions set out in subsection (2), subsection (3), or subsection (4).
259. A person meets the conditions set out in subsection (2) if their application is not for a next of kin payment, they have been assessed as being eligible for a redress payment, and they have either accepted an offer of payment and signed a waiver, or are not receiving a payment only because of the deduction of previous relevant payments.
260. A person meets the conditions set out in subsection (3) if their application is not for a next of kin payment, they have been precluded from being offered a payment under section 60 (which relates to serious unspent criminal convictions), and Redress Scotland determines that they would have been eligible for a redress payment had it not been for the conviction.
261. A person meets the conditions set out in subsection (4) if they have previously received a payment under the advance payment scheme.

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262. Subsection (5) defines support under this section as emotional or psychological support in connection with the abuse to which the application relates as the Scottish Ministers consider necessary given the person's needs, and for such period as they consider appropriate.

## **Payment of costs and expenses**

### ***Section 91: Reimbursement of costs incurred in connection with applications***

263. This section sets out that the Scottish Ministers must by regulations, subject to the negative procedure, make provision for the reimbursement by them, on request, of the costs and expenses incurred by a person applying to the scheme provided that those costs were reasonably incurred. The regulations must provide for reimbursement of reasonably incurred costs regardless of whether or not the application was successful, and regardless of whether or not it was later withdrawn. Costs in this context would not include legal fees, as specific provision is made in relation to legal fees at sections 92 to 96.
264. The regulations must also make provision to permit the reimbursement by the Scottish Ministers, on request, of the costs and expenses reasonably incurred in connection with a proposed application by a person who did not subsequently apply where there are exceptional or unexpected circumstances which justify reimbursement. Such circumstances may include, for example, where the person died before being able to submit their application. It is for the Scottish Ministers to assess in the first instance whether such circumstances exist.
265. Subsection (2) ensures that the regulations will require the Scottish Ministers to notify the person who made the request of the outcome of their request and provide them with a summary of reasons.
266. Subsection (3) sets out examples of matters which may be provided for in regulations under subsection (1). These include the types of and limits on costs and expenses which may be reimbursed, any process by which pre-approval of anticipated costs and expenses can be obtained, when and how any request must be made, the factors to be considered by the Scottish Ministers in assessing the reasonableness of any costs and expenses, and reviews by Redress Scotland of the Scottish Ministers' assessment of the amount to be reimbursed and whether exceptional or unexpected circumstances exist which justify reimbursement in the case of non-applicants.

## **Payment of fees for legal work**

### ***Section 92: Duty on the Scottish Ministers to pay fee for legal work in making an application***

267. This section places a duty on the Scottish Ministers to pay, to a solicitor, a prescribed sum (i.e. a fixed fee) for legal work reasonably carried out in the making of an application for redress. Payment will be made whether or not the application was successful and whether or not the application was subsequently withdrawn (although in both these circumstances, separate payment amounts may be specified by virtue of section 94(4) as read with section 107(1)(a)).
268. Subsection (2) provides that where it is believed by the Scottish Ministers that work might not have been reasonably carried out, the matter will be referred for Redress Scotland to make a decision on payment. Otherwise, the request will be processed and the fixed fee paid by the Scottish Ministers without any referral to Redress Scotland being required.
269. What constitutes legal work carried out in making an application for redress (or in connection with a proposed application under section 93) is informed by both subsection (4) and by any provision that is made under section 94(3)(b). As such, it

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includes advice and assistance relating to: eligibility; the type of redress payment to apply for; the application process; whether to accept an offer of redress and sign a waiver; advice on whether to request a review; and the review process. However, the question of whether work is undertaken reasonably will relate not just to the type of work undertaken but also to the circumstances in which it was undertaken. For example, work involved in making an application in respect of a patently ineligible person (such as one whose abuse was not historical and which occurred in 2019) would likely not be covered.

270. Under subsections (3) and (4), legal advice given in relation to pursuing litigation as an alternative to redress will not be funded unless and to the extent that it forms part of legal work reasonably undertaken in connection with the making of an application to the scheme. For these purposes, legal work carried out in connection with making an application for redress includes advice and assistance relating to: eligibility; the type of redress payment to apply for; the application process; whether to accept an offer of redress and sign a waiver; advice on whether to request a review; and the review process.

### ***Section 93: Duty on the Scottish Ministers to pay certain fees for legal work in exceptional cases***

271. Subsections (1) and (2) place a duty on the Scottish Ministers to pay, to a solicitor, a prescribed sum (fixed fee) for legal work reasonably carried out in connection with a proposed application by a person who sought legal advice on eligibility but did not subsequently apply to the scheme where, in Redress Scotland's assessment, there are exceptional or unexpected circumstances which justify the payment of the fixed fee. For example, this may cover situations in which the prospective applicant died before the application could be submitted.
272. Subsection (3) places a duty on the Scottish Ministers to pay, to a solicitor, an additional sum as specified by Redress Scotland in respect of legal work reasonably carried out in relation to an application or proposed application where there are exceptional or unexpected circumstances which justify a payment over and above the fixed fee.
273. It is for Redress Scotland to decide whether anything is payable and, in the case of a request for an additional payment, the amount of that.

### ***Section 94: Sections 92 and 93: further provision***

274. This section makes further provision about the duty placed on Scottish Ministers to pay fees for legal work carried out in making an application and to pay certain fees for legal work in exceptional cases. It relates to the rules surrounding a 'fee payment request' (as defined in subsection (1)) and the amount of fixed fees. Subsection (2) provides that only a solicitor may make a fee payment request.
275. Subsection (3) allows the Scottish Ministers to make regulations about fee payment requests, including providing for time limits for making a fee payment request, any steps that must be taken prior to making such a request (which could, for example, require prior authorisation to be sought before incurring additional costs which might lead to a fee payment request under section 93(3)), the form and content of the request, and the information and evidence to be provided in or with the request.
276. The regulations can also make provision about legal work which is or is not to be regarded as reasonably undertaken (see also paragraph 269 of these Notes). This could, for example, involve specifying that certain types of work will be regarded as being undertaken in making an application or in connection with a proposed application, while still leaving the assessment of reasonableness to Redress Scotland. The power could also be used to specify types of work, or circumstances in which work is undertaken, which will lead to a conclusion that the work is not reasonably undertaken. There

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is a power to modify enactments when making such provision, as a consequential modification to section 92(4) may be appropriate.

277. Regulations under subsection (3) are subject to the negative procedure, except where they modify an Act and are therefore subject to the affirmative procedure (see section 107(4)).
278. Subsection (4) allows for regulations to prescribe the level of the fixed fees or scales of fees for legal fees and the conditions under which these will be payable. By virtue of section 107(1)(a), different provision may also be made for different purposes, so different fees could be set for different things. For example, this could be based on (among other things) the type of redress payment sought, on whether the application involves a review, on whether there has been a previous application to the redress scheme in respect of the person, or the amount that is offered to the applicant. Regulations under this subsection are subject to the negative procedure.

### ***Section 95: Assessment, notification and review of certain fee payment requests***

279. This section sets out the process for the assessment, notification and review of certain fee payment requests.
280. Subsections (1) and (2) provide that the Scottish Ministers must refer to Redress Scotland, for assessment, any fee payment requests for—
- legal work that may not have been reasonably carried out,
  - any legal work reasonably carried out in connection with a proposed application by a person who sought legal advice on eligibility but did not subsequently apply, or
  - any legal work reasonably carried out in relation to an application or proposed application where there may be exceptional or unexpected circumstances which justify a payment over and above the fixed fee.
281. Subsection (3) requires the Scottish Ministers to, as soon as reasonably practicable after they have been informed by Redress Scotland of the outcome of Redress Scotland's assessment, notify the solicitor of the outcome and provide the solicitor with a summary of reasons for it (which will have been provided to the Scottish Ministers by Redress Scotland).
282. Subsection (4) sets out the rules surrounding the rights of a solicitor to request a review of the assessment made by Redress Scotland. Namely, a solicitor may ask for a review where it has been determined that legal work was not reasonably carried out and that no sum is to be paid, where legal work was carried out in cases where no application was subsequently made and Redress Scotland decide that no sum is to be paid, and where in cases of exceptional circumstances an amount is sought above the fixed fee and it is decided that either no additional sum will be paid, or that the additional sum to be paid is lower than requested.
283. Subsection (5) allows the Scottish Ministers to make regulations making further provision about reviews of fee payment requests, including about time limits for requesting a review, the form and content of the request for a review, the outcome of the review and powers of the review panel, the notification of the outcome of the review, the suspension of payment for the work until the review is determined, and the payment for the work where the outcome of the review is that the sum is to be paid. Regulations under this subsection are subject to the negative procedure.

### ***Section 96: Restriction on additional legal fees***

284. This section provides that solicitors who obtain payments for legal work under the scheme in relation to a redress application may not also charge their clients separately for work carried out in relation to the same application. The effect of this is that solicitors

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will not be able to top up the fee they receive from the redress scheme and recoup fees over and above that which is paid by scheme. Applicants who access legal advice funded by the redress scheme will be able to keep the entirety of their redress payment, without further legal fees being deducted or requested separately by their solicitor in relation to work that is already covered by the redress scheme's legal fees provisions.

285. Subsection (3) provides that although applicants and potential applicants may get some advice on civil litigation in the context of whether they should sign a waiver or instead pursue litigation, the solicitor is not prevented from having separate funding arrangements for legal fees with their client in relation to that advice on civil litigation, to the extent that the advice and assistance instructed went beyond that required or appropriate as part of the legal work undertaken in making, or proposing to make, an application to the redress scheme.

## **Liability for certain payments made in error**

### ***Section 97: Liability for payments, other than redress payments, made in error***

286. This section allows for the recovery of payments made in connection with redress applications, other than the redress payments themselves (which are covered by section 74), where these payments were made due to an error. Under subsection (2), the payments recoverable are payments made in respect of expert reports, payments made in relation to the provision of support, payments made by way of reimbursement of costs and expenses by virtue of section 91, and payments of fees for legal work in making a redress application or in connection with a proposed application.
287. Subsection (3) provides that a person who has been paid for any of this work or reimbursed for these costs, either directly or indirectly, is liable to pay that money back to Ministers to the extent that there has been an error in relation to the making of the payment. However, subsection (6) provides that payments made due to error that fall under any of these categories cannot be recovered from the applicant to whose redress application they relate (who will not have been the real beneficiary of the payment).
288. Subsection (4) sets out that the liability is the difference in value between the payments made or received and those that would have been made or received had the relevant error not occurred. As such, if for example £530 is paid in error instead of £350, an obligation to repay only arises in respect of the overpaid amount (i.e. £180). Subsection (5) provides that any sum in respect of which the Scottish Ministers seek repayment may be paid in instalments if agreed with the person, or otherwise as a single payment.
289. Subsection (7) provides that a payment made because of a relevant error means one in which there was an error in the making of the payment (e.g. the incorrect amount was paid) and one in which there was an error in the decision to make the payment, including where the decision was based on incorrect or misleading information (e.g. a fraudulent invoice where services were not actually provided).
290. However, subsection (8) makes it clear that the error must relate to the payment made and not simply to any redress payment with which it is connected. For example, if a redress payment was initially made on the basis of misleading information, these provisions would not allow for the recovery of the legal fees in connection with that application where the solicitor was unaware of their client's behaviour.

### ***Section 98: Power to make further provision about payments, other than redress payments, made in error***

291. This section allows the Scottish Ministers to make regulations, subject to the affirmative procedure, to set out further provision about or relating to their consideration as to whether decisions to make payments (other than redress payments) were materially affected by error and therefore a right of recovery arises in respect of them. Among other things, such regulations may cover the procedure they will adopt, the review of their

decisions, and provision about legal fees for work in relation to any such procedures or reviews.

## **Part 6: Reporting on wider redress actions**

### ***Section 99: Annual report on wider redress actions***

292. This section requires a “relevant person” to produce a report on the activity they have undertaken to redress the historical abuse of children within each reporting period for which they qualify as a relevant person. A “relevant person” is someone who is a scheme contributor at any time during the first nine months of the reporting period under consideration. The first 12 month reporting period will begin when this section comes into force, and thereafter each successive 12 month period will be a reporting period (see subsection (7)). In accordance with subsection (1), redress reports must be sent to the Scottish Ministers within two months of the end of each reporting period.
293. Subsection (2) sets out the types of support which a redress report must include information about. Where no such support has been provided by the relevant person, they must provide the reasons why this is the case. Subsection (3) provides that a redress report must not include the name of any individual, or any other information which could be used to identify an individual, unless (under subsection (4)) the individual has, following consultation, given the person preparing the report written notice of their agreement to being identified in the report.
294. Under subsection (5), the Scottish Ministers must collate the information received in redress reports for each 12 month period into a combined report and publish this report. Where a person who is not otherwise under a duty to report prepares a report and submits it to the Scottish Ministers, the Scottish Ministers may opt to collate this information into the combined report mentioned in subsection (5) if they so wish.
295. Under subsection (7), the Scottish Ministers may make regulations (subject to the negative procedure) to bring the cycle of reporting periods to an end.

### ***Section 100: Power of the Scottish Ministers to require production of report***

296. Where an organisation has failed to fulfil the reporting requirements set out in section 99 by the relevant deadline, the Scottish Ministers are able to direct that organisation to report. The Scottish Ministers may also direct an organisation to report where an application for a redress payment involving that organisation results in an offer of a redress payment, and that organisation is not otherwise under a duty to report.
297. In either case, the Scottish Ministers may require the person to prepare a redress report and send it to the Scottish Ministers before the end of the period of three months beginning with the date the direction was given, or within such longer period as is specified in the direction by the Scottish Ministers.
298. The Scottish Ministers may revise or revoke a reporting direction. If the Scottish Ministers consider that an organisation has failed to comply with a reporting direction, they may publish the fact of the organisation’s failure to comply.

### ***Section 101: Power to make provision about additional redress reporting***

299. The Scottish Ministers may by regulations (subject to the negative procedure) require a relevant person under section 99 to include an additional statement in their annual report or equivalent document on the support described in paragraphs (a) and (b) of section 99(2) or, where no such support has been given, that fact and the reason for it.

## **Part 7: General and miscellaneous**

### ***Section 102: The Survivor Forum***

300. This section requires the Scottish Ministers to establish the Survivor Forum, a forum consisting of survivors of historical child abuse in care in Scotland and such other persons as the Scottish Ministers consider appropriate. For example, this could allow next of kin or persons representing survivors to take part in the Forum.
301. The purpose of the Forum is to provide feedback to the Scottish Ministers and Redress Scotland on the exercise of their functions under or by virtue of the Act. Subsection (3) clarifies that the Forum may not provide feedback on determinations made in relation to individual cases. Section 87 of the Act (on confidentiality of information) already ensures that Forum members will not have sight of details of individual applications or information that may allow individual applicants to be identified (unless an applicant were specifically to request that this should happen or were to provide the information to the Forum themselves directly).
302. Forum members may be paid such allowances or expenses as the Scottish Ministers consider appropriate (subsection (4)). Subsection (5) provides for a general regulation-making power to make further provision in relation to the Forum (for example, to provide for the existence of the Forum to be signposted to applicants) and for the dissolution of the Forum in connection with or following the dissolution of Redress Scotland. Whilst under subsection (6) regulations can modify any enactment, including this Act, that power could only be used to make provision about or in connection with the Forum itself, and could not be used to make unrelated alterations to the redress scheme.

### ***Section 103: Dissolution of the National Confidential Forum***

303. This section dissolves the National Confidential Forum. Further provision in relation to the dissolution is included in Schedule 2.

### ***Section 104: Dissolution of Redress Scotland***

304. This section gives the Scottish Ministers the power to make regulations (which are subject to the affirmative procedure by virtue of section 107(2)) providing for the dissolution of Redress Scotland. However, this may only be done at such point as the redress scheme has closed for new applications, there are no ongoing applications or ongoing requests for fee payments from solicitors, and Redress Scotland no longer has (or as a result of these regulations will no longer have) the functions detailed in section 7.
305. The regulations may modify or terminate any of Redress Scotland's functions, or transfer them to the Scottish Ministers or any other body. Before making the regulations, the Scottish Ministers have a duty to consult Redress Scotland and any other persons they consider appropriate. This would cover those whose interests are affected by the proposed regulations, such as survivors of historical abuse in care.

### ***Section 105: Interpretation***

306. This section sets out definitions of commonly used terms in the Act. It also clarifies that where a person receives a redress payment subject to the deduction of relevant payments, that is still to be considered as them having received, for example, a "fixed rate payment" despite the sum paid out being less than £10,000. This is relevant, for example, where the person subsequently applies for an individually assessed payment and the amount they receive depends on whether they have previously received a fixed rate payment. Similarly, where a payment is made in instalments or is in the process of being paid out, the payment is to be treated, for the purpose of certain provisions, as having been paid. This is the case where what is relevant is effectively whether the person has an entitlement to the money (again, such as where the amount received on



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an individually assessed payment is to be reduced because of the previous award of a fixed rate payment). This interpretative rule applies only when construing references in the Act to “previously received” or “previously paid” and does not affect any person’s right to receive the money to which they have an entitlement.

### ***Section 106: Guidance***

307. Subsection (1) provides a power for the Scottish Ministers to issue guidance about the operation of this Act. Under subsection (2), those to whom the guidance applies must have regard to it. Without prejudice to the generality of the power in subsection (1), subsection (3) provides some examples of the type of guidance which may be issued in relation to particular aspects of the redress scheme.
308. Subsection (4) requires the Scottish Ministers to have regard to recommendations made by Redress Scotland in its annual report, by virtue of paragraph 17(2) of schedule 1 of the Act, when updating scheme guidance.
309. Subsections (5) and (6) respectively provide that, as soon as possible after issuing guidance, the Scottish Ministers must lay a copy of the guidance before the Scottish Parliament and make the guidance publicly available. Subsection (7) provides that the power in subsection (1) includes the power to vary and revoke guidance issued under that subsection.
310. Under subsection (8), relevant guidance issued before the date this provision comes into force is to be regarded as guidance issued under subsection (1) for the purpose of this provision. Those to whom it applies will therefore be required to have regard to it, and it must be laid and published as provided for in this section.

### ***Section 107: Regulation-making powers***

311. This section makes further provision about the powers the Scottish Ministers are given under this Act to make regulations. It provides that a power to make regulations includes the power to make different rules for different purposes or make incidental, supplementary, consequential, transitional, transitory or saving provision when doing so. It also sets out the parliamentary procedure to which each regulation-making power is subject. Regulations made under section 94(3) (provision about fee payment requests and fees for legal work), 102(5)(a) (further provision about or in connection with the Survivor Forum) or 108 (ancillary provision) which amend any text contained within the Act or another Act are subject to the affirmative procedure, but are otherwise subject to the negative procedure.
312. The section does not apply to commencement regulations. Provision is made in relation to them in section 109 instead.

### ***Section 108: Ancillary provision***

313. This section sets out that the Scottish Ministers can make ancillary provision, by regulations, where appropriate. Regulations made under this section may modify any legislation, including this Act.

### ***Section 109: Commencement***

314. This section sets out when the provisions of the Act will come into force (i.e. begin to have an effect). For the most part, this will happen by regulations as determined by the Scottish Ministers. These regulations will be laid before the Scottish Parliament but will not otherwise be subject to any parliamentary procedure. However, some of the final sections of the Act, including this section, come into force automatically on the day after Royal Assent is granted.
315. In addition, this section provides that commencement regulations may include transitional, transitory or saving provision and may make different provision for

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different purposes. Further, it provides that commencement regulations which bring into force section 31 may amend subsection (1)(a) of that section so that it specifies the date upon which the section actually came into force.

### ***Section 110: Short title***

316. This section provides that the short title of the Act is the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021.

### ***Schedule 1 – Redress Scotland***

#### **Redress Scotland**

317. Schedule 1 makes further provision about Redress Scotland.
318. Paragraph 1 provides that Redress Scotland consists of a member appointed as chair and at least five other members, all appointed by the Scottish Ministers. The Scottish Ministers must only appoint persons having such skills, knowledge and expertise as they consider relevant to the carrying out of the body's functions. Following an open and transparent appointments process, it is intended to appoint persons with relevant expertise in the fields of emotional and psychological trauma, law, social work and health. Paragraph 1 also allows for a member to be appointed to deputise for the chair, to ensure that tasks such as the appointment of panels to carry out determinations can always be carried out.
319. Paragraph 2 deals with the terms and conditions of appointment for members of Redress Scotland. Members are to be appointed for between three and five years (subject to a regulation-making power – subject to the negative procedure – to amend those periods, which may be required in the event that the application period for the redress scheme is extended under section 31(2)). Members are appointed on such terms and conditions as the Scottish Ministers may determine, and may be reappointed. Paragraph 3 specifies that Ministers must encourage equal opportunities when appointing members. Paragraph 4 sets out certain categories of person who may not be appointed.
320. Paragraph 5 sets out the circumstances in which a person's membership will terminate before the person's period of appointment has come to an end, namely:
- where they resign,
  - if the person becomes disqualified from being appointed as a member (see paragraph 4),
  - if the person is removed as a member by the Scottish Ministers because the person has become insolvent, has been absent without permission or reasonable excuse from 3 consecutive meetings, or in the opinion of the Scottish Ministers is unable or unfit or unsuitable to continue as a member.
321. Paragraph 5 also gives the Scottish Ministers a power to suspend members where there is a need to investigate whether grounds for removal of the member exist.
322. Paragraph 6 requires the payment of remuneration and allowances (including expenses) to members, although the level of this payment is at the discretion of the Scottish Ministers.
323. Paragraph 7 provides that Redress Scotland must appoint a chief executive, subject to Ministerial approval of the person appointed. Other staff members may be appointed by Redress Scotland and these appointments do not require Ministerial approval. The Scottish Ministers are to set the terms and conditions of employment for the chief executive and other staff members. Provision is also made at paragraph 8 for the payment of staff pensions and allowances. The power to pay staff salaries is not

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mentioned as it is implicit in the power to appoint staff; their remuneration will form part of the terms and conditions referred to in paragraph 7 on which they are appointed.

324. Paragraph 9 allows Redress Scotland to set up and direct committees, the members of which need not be members of Redress Scotland itself, and provides powers to pay non-members remuneration and allowances (including expenses). However, the tasks which can be allocated to a committee which includes non-members is limited by paragraph 10.
325. Paragraph 10 permits Redress Scotland to delegate certain functions to members, committees or employees. This means that not everything that may, or must, be done by Redress Scotland need be done by the members as a collective body. The approval of its corporate plan, budgets, annual reports and accounts, or the exercise of Redress Scotland's functions in relation to the redress scheme under section 7, may not, however, be delegated under this provision.
326. Paragraph 11 states that the rules of procedure of Redress Scotland (and that of any of its committees) are to be prepared by Redress Scotland and approved by the Scottish Ministers.
327. Paragraph 12 provides that the validity of anything done by Redress Scotland or its committees is not affected by any vacancy in membership, defect in appointments of members or when a member's appointment is terminated early by virtue of paragraph 5.
328. Paragraph 13 provides for general powers for Redress Scotland to do anything necessary or expedient in connection with the performance of, or conducive to the exercise of, its functions. This, however, is subject to some limits – for example, in relation to borrowing or holding property. These general powers are intended to give the body a sufficiently wide range of powers to undertake any activity connected with its main functions.
329. Paragraph 14 enables the Scottish Ministers to give financial support, of various kinds, to Redress Scotland.
330. Paragraph 15 makes provision about the preparation and content of Redress Scotland's corporate plan. Following approval, the Scottish Ministers must publish the plan and lay a copy of it before the Scottish Parliament.
331. Paragraph 16 requires Redress Scotland to keep accounts, and to prepare a statement of account for each financial year and send a copy to the Scottish Ministers. The Scottish Ministers must then submit them to the Auditor General for Scotland for audit. The phrase "financial year" is defined in schedule 1 of ILRA as a year ending with 31 March.
332. As Redress Scotland's accounts are required, by statute, to be sent to the Auditor General for Scotland for auditing, sections 21 and 22 of the Public Finance and Accountability (Scotland) Act 2000 ("the 2000 Act") apply. Amongst other things, those sections provide for the accounts, and the auditor's report on them, to be laid before the Scottish Parliament and published (see section 22(5) of the 2000 Act). In addition, the principal accountable officer for the Scottish Administration can designate someone to be the body's accountable officer (see section 15(3) of the 2000 Act), and the Auditor General for Scotland can look into whether the body has been using its resources appropriately (see section 23 of the 2000 Act).
333. Paragraph 17 requires Redress Scotland to report after each financial year on its activities during that year. The report must include an audited statement of its accounts, a general description of its activities, an assessment of the achievement of its objectives, an assessment of whether applicants for redress appear to have had the opportunity to make informed choices, an assessment of the accessibility and suitability of guidance available to applicants on the sources and types of information and evidence needed for applications for redress payments (with reference to the information and evidence considered by Redress Scotland in determining applications), and any other information

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the Scottish Ministers require. Redress Scotland can also, by virtue of paragraph 17(2), include in its annual report specific recommendations on any matter, in particular in relation to its assessments of the opportunity applicants have to make informed choices, and in relation to the accessibility and suitability of guidance available to applicants about the sources and types of information and evidence. Redress Scotland must publish this report and send a copy of it to Ministers. The paragraph further requires that the Scottish Ministers lay the annual reports before the Scottish Parliament.

### **Application of public bodies legislation**

#### **Ethical Standards in Public Life etc. (Scotland) Act 2000**

334. Paragraph 18 of schedule 1 adds Redress Scotland to the list of devolved public bodies in schedule 3 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (“the Ethical Standards Act”). This means that Redress Scotland will need to:

- have a code of conduct for its members, whose compliance with the code will be policed by the Standards Commission for Scotland (see sections 3 and 9 of the Ethical Standards Act), and
- maintain a public register of its members’ interests (see section 7 of the Ethical Standards Act).

#### **Scottish Public Services Ombudsman Act 2002**

335. Paragraph 19 of schedule 1 adds Redress Scotland to the list of authorities in schedule 2 of the Scottish Public Services Ombudsman Act 2002 (“the 2002 Act”). The effect is to:

- make Redress Scotland amenable to investigation by the ombudsman (see section 5 of the 2002 Act),
- oblige it to have its own complaints handling procedure that complies with the statement of principles published by the ombudsman under section 16A of the 2002 Act,
- permit it to be made subject to the further requirement to have a complaints handling procedure that complies with a model complaints handling procedure prepared by the ombudsman (see sections 16B and 16C of the 2002 Act).

#### **Freedom of Information (Scotland) Act 2002**

336. Paragraph 20 of schedule 1 adds Redress Scotland to the list of Scottish public authorities in schedule 1 of the Freedom of Information (Scotland) Act 2002 (“FOISA”). This means that Redress Scotland will be subject to the requirements that Act places on public bodies, including requirements to provide certain information to the public on request and to have in place a scheme for the pro-active publication of information it holds.

337. Being a public authority within the meaning of FOISA also makes Redress Scotland a “Scottish public authority” to which the Environmental Information (Scotland) Regulations 2004 apply.

338. In addition, as a public authority within the meaning of FOISA, Redress Scotland is a “public authority” or “public body” for the purposes of the General Data Protection Regulation by virtue of section 7 of the Data Protection Act 2018 (subject to the Secretary of State not making regulations under that section to remove its “public authority” status). The General Data Protection Regulation (also commonly referred to by the acronym “GDPR”) is Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. There are particular rules applied to bodies classified as “public authorities” (over and above those applied to all data processors) in the GDPR and the Data Protection Act 2018. An analysis of those rules is beyond the scope of these Notes.

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339. Further, being a public authority within the meaning of FOISA makes Redress Scotland subject to the duties imposed by section 44 of the Climate Change (Scotland) Act 2009 and, as such, liable to monitoring and investigation under Part 4 of that Act.

#### Public Services Reform (Scotland) Act 2010

340. Paragraph 21(a) of schedule 2 adds Redress Scotland to the list of bodies in schedule 5 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”). This means that it is a body in relation to which an order can be made under section 14 of the 2010 Act. Such an order can (subject to restrictions, and only after the Scottish Parliament has approved a draft of the order):

- modify, confer, abolish, transfer or provide for the delegation of any function of a public body,
- amend the constitution of a public body.

341. Paragraph 21(b) adds Redress Scotland to the list of bodies in schedule 8 of the 2010 Act. This means that Redress Scotland will be subject to the duties to report after each financial year on:

- expenditure (see section 31 of the 2010 Act), and
- the steps it has taken to promote and increase sustainable growth and improve its efficiency, effectiveness and economy (see section 32 of the 2010 Act).

#### Public Records (Scotland) Act 2011

342. Paragraph 22 of schedule 1 adds Redress Scotland to the schedule of the Public Records (Scotland) Act 2011 and thereby makes it subject to the duties created by that Act to produce, implement and keep under review a records management plan.

#### Procurement Reform (Scotland) Act 2014

343. Paragraph 23 of schedule 1 makes Redress Scotland subject to the procurement rules applicable to contracting authorities in the Procurement Reform (Scotland) Act 2014.

#### Gender Representation on Public Boards (Scotland) Act 2018

344. Paragraph 24 of schedule 1 adds Redress Scotland to the list of bodies in schedule 1 of the Gender Representation on Public Boards (Scotland) Act 2018 (“the 2018 Act”). This means that in appointing members to Redress Scotland, the Scottish Ministers must give preference to a woman if there are equally qualified candidates of either gender and appointing a woman would result in, or be a step towards, 50% of the membership being women (see section 4 of the 2018 Act). In addition, the 2018 Act requires that such steps as Ministers consider appropriate be taken to encourage women to apply to be members of Redress Scotland (see section 5 of the 2018 Act), and further steps to be taken to promote gender balance in the membership if the 50% target has not been reached by a particular date (see section 6 of the 2018 Act).

### ***Schedule 2: The National Confidential Forum***

345. Section 103 of the Act dissolves the National Confidential Forum (“the Forum”), which is a committee of the Mental Welfare Commission. Schedule 2 makes provision in respect of connected matters. Part 1 provides for continuing matters following the repeal of the Forum, while Part 2 repeals relevant sections of the Victims and Witnesses (Scotland) Act 2014 which established the Forum and makes adjustments to other legislation to take account of that repeal.

#### **Part 1 - Continuing matters**

##### **Confidentiality and disclosure of information**

346. Paragraph 1 of the schedule makes provision in relation to confidentiality and disclosure of information which will apply following the closure of the Forum. This includes

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setting out the persons to whom the paragraph applies, imposing a general prohibition on the disclosure of certain information, setting out the information which is not to be disclosed by those persons, and setting out the circumstances in which disclosure may be permissible.

347. Section 15(2) of ILRA provides that the repeal by an Act of the Scottish Parliament (“ASP”) of another ASP does not affect an existing right or obligation accrued under the repealed ASP. So, any information which had been received prior to the dissolution of the Forum would remain subject to the confidentiality provisions in force whilst it was in operation. However, this would not apply to someone who accessed the information after the repeal has taken place, as that person will not be subject to any existing obligation to maintain confidentiality or any existing right or obligation to disclose information in certain situations. Records accumulated during the Forum’s existence will continue to be stored and may need to be accessed for particular purposes. Therefore, this has been dealt with by way of a repeal and a specific provision (which is tailored to the fact that the Forum will no longer exist) about the duty of confidentiality and the ability to disclose in certain circumstances.
348. The disclosure of relevant information is not prevented to the extent that it is a disclosure to another person referred to in paragraph 1(1) and is necessary for the purpose of enabling or assisting the carrying out of functions by the Mental Welfare Commission for Scotland, or it is necessary for the preparation of the Mental Welfare Commission’s annual report. Paragraph 1(4) sets out that a court may order disclosure of relevant information in, or for the purposes of, civil and criminal proceedings, including for the purposes of the investigation of any offence or suspected offence, where this is necessary and to the extent necessary in the interests of justice.

### **Public records**

349. Paragraph 2 ensures that the Mental Welfare Commission for Scotland must continue to have a separate records management plan for the records related to the Forum following its closure.

### **Part 2 - Consequential modifications**

350. Part 2 of the schedule makes consequential modifications to other pieces of legislation to take account of the Forum’s dissolution. References to the Forum are therefore removed from other enactments where they appear. The number of members of the Mental Welfare Commission is returned to between six and eight to take account of the fact that it is no longer necessary to have one person with skills relevant to the Forum’s functions (which was the reason for increasing the number to between seven and nine).