

## **Analysis: The Scottish redress Bill's waiver conundrum**

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View more Scotland's redress Bill was passed by the Scottish parliament in March and sets out a fresh way for residential care abuse survivors to access compensation. But attempts to involve insurers and encourage organisations to contribute have left it with a problematic waiver requirement, according to some stakeholders.

The Scottish Redress For Survivors (Historical Child Abuse in Care) (Scotland) Bill was introduced as a scheme through which survivors of non-recent child abuse in residential care up to December 2004 can access financial payments.

The scheme provides a route for survivors of abuse that occurred before September 1964, for which legal action cannot be raised, to obtain financial redress. Survivors of abuse that occurred after September 1964 have a choice of going to court, with the Bill providing them with a faster and less adversarial route.

The Bill was passed by the Scottish Parliament on 11 March and will now proceed to Royal Assent to become an Act. Its implementation will follow subsequent ministerial regulations (see box below for 'main features of the Bill').

With redress also a key topic of the Independent Inquiry into Child Sexual Abuse in England and Wales' investigation into Accountability and Reparations, insurers that may not have exposure in Scotland will have been watching the scheme's construction closely.

The Scottish scheme is the latest in a series of bids to centralise payouts for survivors of non-recent abuse, with Irish schemes, as well as examples in Jersey and Australia.

Manchester City Football Club set up its own scheme in 2019 to compensate victims of Barry Bennell and John Broome. Scotland's scheme asks the organisations involved with residential care of children in the past to pay in a fair and meaningful contribution, with the government also set to pay in.

In return, survivors who accept a redress payment will have to agree not to take legal action against those organisations or the Scottish government by signing a waiver. This waiver proved particularly controversial as the Bill was debated. Main features of the bill: Redress Scotland will be established to assess the applications and administer payments to qualifying survivors or their next of kin.

The redress scheme applies to survivors who were children in care in relevant residential establishments prior to 1 December 2004. Successful applicants will receive £10,000, £20,000, £40,000, £60,000, £80,000 or £100,000 – with the £10,000 being a “fixed-rate payment”. This rate could be topped up with any of the higher levels by an “individually assessed payment which takes into account the nature, severity, frequency and duration of the abuse”.

Survivors accepting the redress payment will be required to sign a waiver, giving up their right to seek civil compensation in court, with the waiver applying to both the Scottish government and to any “relevant scheme contributor” listed by the Scottish government. Scottish ministers are empowered to remove organisations from the list of scheme contributors if they fail to make an agreed financial contribution, including removal with retrospective effect where considered appropriate.

A Survivors Forum is to be established to – among other things – contribute to “the continuous improvement of the delivery of the redress scheme” and “providing scrutiny of the assessment and awards process”.

All applicants and potential applicants must be treated “with dignity, respect and compassion” by all those involved with the redress scheme.

**Affordability** Throughout the debate preceding the Bill's approval there were questions over affordability for the organisations asked to contribute, many of which continue to provide vital and charitable services.

Insurers have not been expected to pay directly into the scheme. However, it had been hoped that the waiver would incentivise them to support insureds to contribute by offering an alternative route to costly and complex litigation.

**During the second meeting of the committee, Ron Culley, CEO of Scottish social care charity Quarriers, had cautioned that without insurer participation the sum that organisations are being asked to contribute is “a million miles away from being affordable”.**

However, the Association of British Insurers submitted on behalf of its members that while insurers would “indemnify the insured organisation including the payment of any compensation settlement and legal fees”, the redress scheme is “not compensation”.

The ABI added that it will be an “individual commercial decision for an insurer whether or not they provide a contribution to an organisation they have insured if that organisation decides to make a financial contribution to the proposed redress scheme”.

A source in a senior role at a care organisation, who spoke to Post on condition of anonymity, said that insurers are “picking up costs related to civil claims currently, and if people decide to go down a redress route, rather than a civil claim route, then it goes from a situation where the insurance pays for this to a situation where the insurance doesn't pay”.

They added: “It does feel like it's a cost avoidance option that insurers are taking. “I would have thought there's a solution that is sensible, pragmatic and works for the insurers, whereby if it's a claim that they would have paid under a civil claim, and the claimant decided to go down the redress route, the insurers should continue to be able to either fund or make a contribution towards that redress payment. But that doesn't seem to be a viable option at the moment.”

The source said they anticipate that while the total number of claims will increase as a result of the redress scheme, the number that go through the civil claims process will decrease.

They acknowledged that insurers can only support businesses contributing to the scheme on “a case-by-case basis” but if a provider agreed how much they are going to fund towards the redress scheme with the Scottish government, if insurers agreed to reimbursement on a claim-by-claim basis “it would be sensible and viable from insurers' point of view as well as having some financial benefit to the providers that have paid out the insurance premiums in the past”. They added that the organisation they are working for has had discussions with insurers about the support available to it, with insurers being sympathetic to the situation “but not able to do anything”.

Post contacted a number of commercial insurers to ask whether they will support policyholders paying into the scheme. RSA confirmed that support for businesses paying into the scheme will be “considered on its own individual merits”. Aviva, Allianz, AIG and QBE declined to comment on whether they had exposure to claims from relevant organisations or whether they would support insureds, while Axa and Ecclesiastical told Post they believe they are unaffected.

A spokesperson for Zurich said: “We understand the Scottish Redress Scheme will work with organisations in Scotland (where abuse occurred in certain residential care settings). These organisations have been invited to join and contribute (financially).

Zurich is not one of those involved and so we would not envisage paying into the scheme.

However, full details have not yet been finalised so we will continue to monitor its development.”

How the Bill changed from conception to approval Frank Hughes, partner in law firm BLM's abuse and neglect team, said: “There are a number of significant changes to the Bill since it was first introduced, with a clear and important principle that applicants are to be treated 'with dignity, respect and compassion' by all those involved.

“A significant amendment to the bill includes Scottish Ministers now being empowered to remove organisations from the list of scheme contributors if they fail to make a 'fair and meaningful' agreed financial contribution, including removal with retrospective effect where considered appropriate.

The names of contributors will be published. A very recently revised financial memorandum from the Scottish government predicted an estimated average payment of £35,500, with 85% of the payments expected to exceed the £10,000 fixed-rate payment.”

The standard period for which a redress offer is open for acceptance has been increased from 12 weeks to six months. Hughes said: “This is to allow sufficient time for applicants to take legal advice on the prospects of litigating rather than accepting the redress offer and signing the waiver.” Two new payment levels have also been introduced to the scheme: £60,000 and £100,000.

Hughes said: “The basic structure for all redress payments remains as it was first introduced, namely that the £10,000 is a fixed rate payment which may be increased to any of the higher levels by an 'individually assessed payment' taking account of the nature, severity, frequency and duration of abuse and any other relevant matter.

“Applicants are now to be given a right of access to relevant evidence obtained by the new body which will administer the scheme, Redress Scotland, excluding evidence that would be likely to identify any person other than the applicant.

“By amendment to the bill as introduced, Scottish Ministers are required to lay before the Scottish Parliament a post-implementation report within 18 months of implementation.

The report must set out Scottish Ministers' assessment of the impact of the waiver on applications for a redress payment; and the effectiveness of the waiver in encouraging public authorities, voluntary organisations and other persons to become scheme contributors.

” Waiver Before the Bill was passed, the Association of Personal Injury Lawyers had called for the Scottish government to remove the provisions related to the waiver, saying that because it will prevent those who accept payment from pursuing a legal claim against organisations that financially contribute to the scheme, it is “restricting their legal rights” and risks “leaving them under-compensated”.

Apil also criticised the waiver for benefiting “only those organisations where the abuse took place”. Speaking after the Bill was approved, Kim Leslie, Apil spokesperson, said: “We are very disappointed that the waiver has been retained. The waiver was always the most controversial element to the Bill.” The waiver poses a risk that “individuals will take their stake and massively under compensate themselves for a viable claim”, according to Leslie.

She added: “It’s critical that people do not assume that this is the only option. My concern is that there will be people that despite the best efforts are financially [strapped] and it's money that they can get access to quickly. That’s how it’s been built. It’s supposed to be a very straightforward process.”

**The waiver was also one of the “most serious concerns” to survivor representative group Former Boys and Girls Abused in Quarriers Homes, according to spokesperson David Whelan, as it is asking people “to sign their rights away”.**

**He said: “Our main concern is that the state [for example] the Scottish government, and local authorities will never be held accountable.**

**“We understand that a waiver was tested in Ireland where it was found to be unlawful in international law. We do believe that there will come a situation in an instance where the waiver will be tested in the future, to determine its illegality.”**

In January 2020, the United Nations Committee Against Torture found in *Elizabeth Coppin v Ireland* the waivers signed by a participant in the Residential Institutions Redress Board and the Magdalen Restorative Justice Ex-Gratia Scheme were unenforceable. Post understands that waiver would not affect any criminal proceedings or rights to report anyone for criminal acts, or prevent anyone from talking about their abuse.

**Whelan added that as the Scottish Bill progressed it was clear that insurer contributions weren't “going to happen”.**

**He said: “The committee recognised that, and that is why the waiver is such a contentious issue, because the government insisted that the waiver had to be brought in to ensure there were contributions made from the insurers. “We're aware that the insurers have not contributed and are not going to contribute to this scheme, and it begs the question, why does the waiver still remain in place? “Contributions need to be fair and meaningful, but we also have to recognise that in some institutions, it needs to be affordable. If they're delivering services today, then we don't want to damage the organisation and we don't want to damage those services that are being delivered today.”**

**Controversy The Association of Personal Injury Lawyers' Kim Leslie was quoted in the Scottish Sun on 2 November 2019 saying that the waiver is “just offering cash in exchange for silence”.**

Last August, MSPs urged Scottish ministers to reconsider the waiver, as reported by Press and Journal.

**Scottish Green MSP John Finnie was quoted as saying: “I’ve heard from upset and concerned survivors that the redress scheme as proposed by the Scottish government risks letting organisations where abuse took place off the hook. “The payments proposed as part of the redress scheme are substantially lower than survivors could receive if they pursued a civil claim in the courts, yet they would be barred from pursuing such a claim if they signed up to the scheme. “I don’t doubt the Scottish government’s good intentions in introducing the Bill, but it is vital that the payments do not simply act as a shield for organisations to avoid paying out larger sums of compensation.”**

**Last December Labour education spokesman Iain Grey argued that the “waiver compromises the integrity of the bill” and “it must go”, the Sunday Post reported. Civil Claims Speaking to Post, Frank Hughes, partner in BLM's abuse and neglect team, pointed out that during committee evidence sessions “very strong views” were voiced by some survivor organisations and their representation against the waiver “feeling that it restricts true access to justice”. He said: “Whether it discourages applications for redress and the extent to which it may encourage organisations to participate in the scheme both remain to be seen.**

These issues are likely to be scrutinised both from the outset by the Survivor Forum and also by the Scottish Parliament at the 18-month post-implementation review.” Hughes added that the number of legal action claims as a result will need to be monitored over time.

**Qualified one-way costs shifting is expected to be implemented in Scotland on 30 June 2021. According to Hughes: "This will greatly diminish the prospect of a personal injury claimant being found liable in costs even if their litigated claim fails.**

This may support or encourage potential applicants to the redress scheme to seek a litigated solution without a redress application."

Hughes continued: "The litigation waiver will only operate in favour of the Scottish government and any 'relevant scheme contributor' listed by the Scottish government as making a 'fair and meaningful' contribution to the scheme. The waiver need only be signed if and when an applicant is accepting a redress payment.

It is also worth noting that limitation has been retrospectively and prospectively abolished for Scottish personal injury claims arising from childhood abuse albeit that, still developing, defences of 'fair hearing' and 'substantial prejudice' remain.

Again, the Scottish Parliament is likely to scrutinise the numbers of litigated claims and the numbers of redress applications at the 18-month post-implementation review." Louise Gallagher, DAC Beachcroft insurance partner, said she expects there will still be a number of survivors who will seek redress through the scheme "who may not have contemplated taking legal actions" and there will be those who "feel their claims are worth more than the highest level offered by the scheme".

A spokesperson for the ABI said: "Historic abuse claims can be particularly complex and sensitive matters meaning insurers have bespoke processes for handling claims of this nature that are brought against the organisations they have insured. The role of insurers is to pay out on valid claims against liability policies which our members will continue to do. Financial redress is a matter for legacy care providers and the Scottish government."

**A Scottish government spokesperson said: “**

As we have previously stated, and as with many other redress schemes around the world, our scheme has been designed as an alternative to court – creating a route for some survivors to receive redress where none currently exists, and for others creating choice. The waiver can help ensure organisations who were responsible for the care of children at the time of historical abuse acknowledge that responsibility and contribute to the benefit of survivors who do not want to go to court, or who do not have the option of court action.

“Survivors will only be asked to sign a waiver in respect of organisations which make fair and meaningful financial contributions to the scheme and will not affect any criminal proceedings or rights to report anyone for criminal acts. The Scottish government will pay in full the cost of redress payments to survivors if the organisation that provided their care does not make a fair and meaningful contribution to the scheme.

If this is the case the survivor will retain the right to take civil action against the organisation. “We are grateful for the continued involvement of the many survivors, including Redress, in helping us address the wrongs of the past and provide meaningful redress and support.”

# Payment levels for Scottish redress scheme

*The payment levels for survivors are set out as follows:*

## Fixed rate redress payment

**£10,000**

## Individually assessed payment levels

**Level one- 20k**

**Level two-40K**

**Level three-60K**

**Level four-80K**

**Level five-100k**

## Examples of Redress Schemes

- Irish Residential Institution Redress Board set-up in 2002
- Jersey Redress Scheme set-up in 2012
- Magdalen Restorative Justice Ex-gracia Scheme set-up in 2013
- Lambeth Councils, Lambeth Children's Homes Redress Scheme set-up in 2013
- Jersey Redress scheme relaunched in July 2019
- Australia's National Redress Scheme set-up in 2019
- Manchester City Football club redress scheme to compensate victims of Barry Bennell and John Broome set-up in March 2019
- Church of England redress scheme for survivors of abuse to be confirmed

## Bill stages completion dates

Introduction 13<sup>th</sup> August 2020

Stage 1 -17<sup>th</sup> December 2020

Stage 2-11th February 2021

Stage 3- 17thMarch 2021

Bill becomes law – no date yet ??

## MSP votes

The bill was voted in by MSPs on 11 March

**For: 82 votes Against: 32 votes Abstentions: 4**