

EXPLANATORY MEMORANDUM TO

THE REDRESS FOR SURVIVORS (HISTORICAL CHILD ABUSE IN CARE) (SCOTLAND) ACT 2021 (CONSEQUENTIAL PROVISIONS) ORDER 2021

2021 No. 1310

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Office of the Secretary of State for Scotland and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This Order makes provisions in consequence of the Redress for Survivors (Historic Child Abuse in Care) (Scotland) Act 2021 (“the 2021 Act”), which acknowledges and provides tangible recognition of the harm suffered as a result of historical child abuse in relevant care settings in Scotland.¹

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Section 113(7) of the Scotland Act 1998 (“the 1998 Act”) has been exercised in the making of this Order as a result of the delegation of functions in articles 4 to 6 which enable or require the Scottish Ministers to issue notices.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom, except for Articles 2 and 3, which extend to England and Wales only.
- 4.2 The territorial application of this instrument mirrors its territorial extent.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 This Order is made in exercise of the powers conferred by sections 104, 112(1), 113(4) and 113(7) of the 1998 Act. Section 104 of the 1998 Act provides for subordinate legislation to be made in the UK Parliament which contains provisions that are necessary or expedient in consequence of any provision made by or under any Act of the Scottish Parliament.
- 6.2 The Order is made in consequence of the 2021 Act, which establishes a scheme of financial redress and related support for and in respect of survivors of historical child abuse in relevant care settings in Scotland. The Redress Scheme (“the scheme”) will provide acknowledgement and financial and non-financial redress for those who wish to access it. The Order is required to make equivalent cross-border provisions to those

¹ Under the 2021 Act, a ‘relevant care setting’ means a residential institution in which the day to day care of children was provided by or on behalf of a person other than a parent or guardian of the children resident there, or a place in which a child resided while being boarded out or fostered.

in the 2021 Act, insofar as they relate to: amendments to charity law, the disclosure of information by applicants about previous payments, the provision of information and evidence in respect of scheme applications and offences in respect of failing to provide evidence and tampering with evidence.

- 6.3 Section 14 of the 2021 Act makes provision to enable the making of financial contributions towards the funding of redress payments under the scheme by organisations responsible for the care of children at the time they were abused. Many of those organisations are constituted as charities. Section 17 of the 2021 Act provides that where Scottish charities make financial contributions to the scheme, these are treated as being in furtherance of the charity's charitable purposes, consistent with the charity's constitution or trusts and providing public benefit. In addition, the making of a financial contribution to the scheme will be treated for all purposes as not being contrary to the interest of the charity, and as being within the power exercisable by the charity trustees. Article 2 of this Order will make equivalent provision in relation to charities registered in England and Wales.
- 6.4 Section 42 of the 2021 Act makes provision for the deduction of relevant payments² from any redress payment made under the scheme. This is to respect the principle that a person should not be compensated twice for the same abuse. Section 44 of the 2021 Act sets out that an application for a redress payment must provide the Scottish Ministers with information about relevant payments which the applicant (or the person to whom the application relates) has received or becomes entitled to before their application is determined. Article 3 of the Order makes provision in consequence of section 44 of the 2021 Act, to provide 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. This makes equivalent provision to section 45 of the 2021 Act in respect of settlements or other agreements which are governed by the law of Scotland.
- 6.5 The 2021 Act recognises that applicants may need support from the Scottish Ministers (as part of their duty to provide support to applicants and administering the scheme) in obtaining information and evidence from a variety of sources in connection with applications under the scheme. Whilst it is anticipated that in most cases this information and evidence should be made available without recourse to formal powers, sections 79 and 80 of the 2021 Act provide a formal power to compel the provision of information or evidence from individuals or organisations that may be required in particular cases, including information about previous payments which a person has received in relation to relevant abuse.³ Under section 81 of the 2021 Act, Redress Scotland⁴ can also require the Scottish Ministers to provide information or evidence or issue a notice under sections 79 and 80. These provisions are underpinned by criminal offences as set out in section 84 of the 2021 Act. This means that individuals or organisations who fail without reasonable excuse to comply with a notice under sections 79 and 80, or who take action to conceal, destroy, alter, or distort evidence or information which either they know is required, or they have

² 'Relevant Payment' is defined in section 42 of the 2021 Act and relates to payments in respect of abuse of the person in question which is covered under the scheme.

³ This is for the purpose of section 42 of the 2021 Act, as discussed in paragraph 6.4 of this Explanatory Memorandum.

⁴ Redress Scotland is the non-departmental public body established under section 3 of the 2021 Act to independently assess and make decision on applications for redress payments under the scheme.

reasonable grounds for believing might be required, by virtue of those provisions, are committing a criminal offence.

- 6.6 Some of the individuals or organisations which hold relevant information and evidence might be based in England, Wales or Northern Ireland. Moreover, there may be other circumstances where it would be outside the devolved competence of the Scottish Ministers to obtain information from individuals or organisations. Articles 4 and 5 therefore make provision, similar to sections 79 and 80 of the 2021 Act, to enable the Scottish Ministers to obtain information or evidence in such circumstances that might be relevant to an application for a redress payment or in respect of previous relevant payments. The Crown does not fall within the scope of those who may be subject to a requirement to provide information under Articles 4 and 5. Article 6 of the Order makes provision, equivalent to section 81 of the 2021 Act, requiring the Scottish Ministers to issue notices under Articles 4 or 5 of the Order. Article 7 of the Order makes provision equivalent to section 84 of the 2021 Act, to provide that failures without reasonable excuse to comply with notices under Articles 4 or 5 or to tamper with evidence which may be required by virtue of notices under articles 4 or 5 of the Order or, as the case may be, section 79 or 80 of the 2021 Act, constitute criminal offences. A person who commits an offence under this provision is liable on summary conviction to imprisonment for a term not exceeding three months⁵, a fine not exceeding level 3⁶ on the standard scale, or both.

7. Policy background

What is being done and why?

- 7.1 As described at paragraph 6.2 above, the 2021 Act established a scheme of financial redress and related support for survivors of historical child abuse in relevant care settings in Scotland. This section 104 Order is necessary to make appropriate cross-border provisions: to enable charities in England and Wales to contribute to the scheme; to require applicants to the scheme to disclose information about previous relevant payments where subject to a settlement or other agreement otherwise prohibiting the disclosure of the information under the law of England and Wales; and to give Scottish Ministers, including at the request of Redress Scotland, the power to obtain relevant information and evidence in relation to applications under the scheme (non-compliance with which would constitute criminal offences).
- 7.2 With the Scottish Government seeking financial contributions to the scheme from those organisations connected to the care of children at the time of abuse, Article 2 will enable charities based in England and Wales to make financial contributions to the scheme, should they wish to do so. This will also ensure that financial contributions from charities based in England and Wales are treated as being in furtherance of the charity's charitable purposes, providing public benefit, not being contrary to the interests of the charity, and being within the powers exercisable by the charity trustees.
- 7.3 By making provisions to oversee the disclosure of information about previous relevant payments to applicants, Article 3 ensures that applicants to the scheme can disclose

⁵ Whilst the equivalent offence under section 84 of the 2021 Act may result in imprisonment for a term not exceeding six months, section 113(10)(a) of the Scotland Act 1998 provides that the maximum penalty for offences tied summarily in relation to England, Wales and Northern Ireland, includes imprisonment for a term not exceeding three months.

⁶ Currently £1,000.

relevant information without fear of breaching any previous agreements. This means applicants can provide information about previous settlements or payments they may have agreed, even if they signed a non-disclosure agreement.

- 7.4 Articles 4 to 7 have been drafted in support of the Scottish Government's desire to ensure access to the scheme is straightforward for survivors. The provisions mean that if required, the Scottish Ministers (including at the request of Redress Scotland) can compel the facilitation of information and evidence in support of redress applications or about previous payments, and can request this information from individuals and organisations in other parts of the United Kingdom or in circumstances where the exercise of the equivalent powers under sections 79 and 80 of the 2021 Act would be out with devolved competence. Articles 4(8) and 5(5) ensure that there will be no overlap between notices issued under the 2021 Act and those issued under this Order. It is likely that these powers would only be used where all other attempts by a survivor, or someone working with a mandate from a survivor, to obtain the information have failed. Having a robust and adequate framework to facilitate the provision of records, where co-operation is not forthcoming, is essential to support survivors to apply for redress payment and to facilitate the assessment of applications. Through the Order, non-compliance with these provisions will also be considered an offence under the relevant United Kingdom jurisdiction. The penalty outlined in Article 7 which sets out the offence provisions, has been adjusted in line with section 113(10)(a) of the Scotland Act 1998.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 This Order does not amend primary legislation and therefore consolidation is not required.

10. Consultation outcome

- 10.1 As amendments in this Order are consequential, a formal consultation on the draft Order was not considered necessary.
- 10.2 A pre-legislative public consultation on the detailed design of a redress scheme was undertaken by the Scottish Government between 2 September and 25 November 2019 in advance of the 2021 Act. This consultation received 280 responses, the majority of which were from survivors of historical abuse in care (82%). Independent analysis of the responses was conducted and published online in March 2020.⁷
- 10.3 During the consultation exercise, questions were asked about the key barriers to financial contributions being made to the scheme and whether legal restrictions on charitable spending was one such barrier to securing contributions from charities. Respondents were in agreement that charitable organisations should be able to make a financial contribution if they wished to do so. Therefore, this Order seeks to build on the provision in the 2021 Act to ensure that contributing to the scheme is not contrary to the charitable purposes of any organisation registered in England and Wales.

⁷ <https://www.gov.scot/publications/financial-redress-historical-child-abuse-care-analysis-consultation-responses/>

- 10.4 The consultation also sought views on whether previous payments should be taken into account in assessing the amount of redress payment received. Views were mixed on this issue, including within the survivor community itself. Taking on board the views provided, the approach adopted recognises that relevant payments should be taken into account and in the interest of fairness, information on any previous payments made anywhere in the UK should be disclosed to allow them to be deducted from a redress payment.
- 10.5 Additionally, the overwhelming majority of respondents were in agreement when asked about whether the scheme should provide assistance to survivors in obtaining documentary records required for an application. The approach taken in the Order recognises the cross-border nature of organisations involved in the provision of care in Scotland such that the evidence required to support a survivor’s application for redress may be held by an individual or organisation based in England, Wales or Northern Ireland. It also ensures that there are meaningful enforcement consequences for non-compliance with a request for information.

11. Guidance

- 11.1 Supporting guidance will be issued by the Scottish Government to scheme contributors which will provide further reassurances to charities on their right to contribute to the scheme and further details on the support available to applicants, including support accessing records.

12. Impact

- 12.1 A full Impact Assessment has not been prepared for this instrument because the legislative impact assessments for the 2021 Act have been updated to reflect the impact of this Order.
- 12.2 For those charities that choose to participate in the scheme, the impact will be mainly financial. The Order addresses the legal restrictions on the proper use of charitable funds to make it possible for charities registered in England and Wales to contribute to the scheme. Charity trustees must still abide by their general trustee duties and take all the relevant considerations into account before deciding whether or not it would be in the best interest of the charity to contribute to the scheme.
- 12.3 The impact on the public sector is limited, however there may be a possible increase in workload for departments which come into contact with applicants to the scheme. This is due to the need to fulfil subject access requests where applicants are seeking evidence to support an application for redress.
- 12.4 An Impact Assessment was also not considered necessary however a Justice Impact Test has been carried out for this Order. The impact on the justice system in England and Wales is expected to be very low, but nonetheless the Scottish Government will provide any funding if necessary.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The Order is consequential upon the 2021 Act. No formal monitoring or review is considered necessary.

14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 the Secretary of State for Scotland has made the following statement: “There is no need for review or monitoring as the Order does not regulate businesses.”

15. Contact

15.1 Arthur Halfhide at the Office of the Secretary of State for Scotland (telephone: 07557896644 or email: Arthur.Halfhide@ukgovscotland.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Rachel Irvine, Deputy Director for Constitutional Policy, at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Secretary of State for Scotland at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.