

HOUSING

Sustainability in a changing
built environment

RISK MANAGEMENT

Waste management
Enterprise risk

LEGAL UPDATE

The *Redress for
Survivors Act 2021*

SMART GUIDE

Local government
re-organisation

stronger

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The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021

The legal context and update on the redress in Scotland for historical abuse, the *Australian National Redress Scheme* and the direction of travel.

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On 13 August 2020 the *Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill* (the *Bill*) was published. Scottish Parliament voted unanimously to pass the *Bill* on 11 March 2021.

The Redress Scheme is available for survivors of historical child abuse which took place before 1 December 2004 in relevant care settings in Scotland. This includes sexual, physical and emotional abuse or abuse which takes the form of neglect.

The Scottish scheme and a similar Australian redress scheme illustrate how organisations (including charities) are under pressure by governments, policymakers and society to take responsibility and accountability for historic child abuse. As redress schemes develop and expand, failing to 'opt-in' may

result in reputational damage, naming and shaming by governments for non-compliance, and financial sanctions for failing to engage.

Introducing redress schemes

There have been global attempts to establish redress schemes relating to historic child abuse in other jurisdictions, including Northern Ireland, Jersey, Sweden and Australia. These offer alternative redress schemes to commencing civil litigation for abuse survivors.

Although the above schemes vary, their general aim is to offer survivors a non-adversarial process that is faster, cheaper, and more certain than civil litigation. Importantly, the schemes also offer victims compensation without cross-examination in court. ▶

The Act

Once the Presiding Officer has submitted the *Bill* for Royal Assent, it will be known as the *Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021* (the *Act*), and will be followed by subsequent ministerial regulations.

The objective is for the Scheme to be open by December 2021 at the latest, subject to the agreement of Redress Scotland, a new organisation which will independently assess and make decisions on applications. The Scheme will be open for a period of five years, or two years following the publication by Scottish Child Abuse Inquiry of its final report, whichever is longer.

In terms of payment structure, the Scheme provides the option of applying for a fixed rate redress payment set at £10,000 or an individually assessed payment that can range from £20,000 to £100,000.

There is also a non-financial aspect of the redress which offers access to an acknowledgement, apology, therapeutic support and

access to a survivor forum.

The Scheme will require 'fair and meaningful' financial contributions from organisations which were involved in the care of children at the time of the abuse or involved in the decision-making processes and arrangements by which the child came into care. What is considered 'fair and meaningful' will be published separately by the Scottish Government. The *Act* does, however, require Scottish ministers to take into account reasons of 'affordability' and 'sustainability'.

Redress payment will be conditional on the applicant signing and returning a waiver to abandon any civil proceedings and giving up their right to continue to raise civil legal action in respect of abuse, against the Scottish Government and the organisations that made the 'fair and reasonable financial contributions'.

The waiver only will apply to the organisations that have made 'fair and meaningful financial

contributions'. The *Act* provides a published list of organisations who have financially contributed to the Scheme. A post-implementation report will review the impact and effectiveness of the waiver.

The legal costs for applicants will, subject to appropriate limits, be paid for part of the Scheme. The *Act* requires Scottish minister to make provision for 'requiring the reimbursement by them, on request, of the costs and expenses reasonably incurred by an applicant in connection with an application for a redress payment'. However, if there are concerns in terms of the reasonableness of the legal work undertaken, it will be for Redress Scotland to decide.

Survivors who have received a payment in respect of the abuse from another source, such as court awarded damages, who would be eligible for redress, can still apply to the Scheme. However, any payment provided under the Scheme will take into account the amount already received.

Australian National Redress Scheme

The *Australian National Redress Scheme (ANRS)* was established in July 2018. The *ANRS*'s objectives include holding institutions accountable for institutional child sexual abuse.

Australian institutions have been encouraged to join the *ANRS*, with those identified by the Royal Commission into Institutional Responses to Child Sexual Abuse, or named in an application to the *ANRS*, asked to join the *ANRS* by 30 June 2020. That deadline was

extended until 31 December 2020 as a result of the COVID-19 pandemic.

The Australian Government announced in November 2020 its intention to introduce sanctions

for charities that fail to join the *ANRS*, taking a firm stance towards those who have avoided accountability. Those registered charities failing to fulfil their obligation to join or take reasonable steps to join the *ANRS*, will be subject to the Australian Charities and Not-for-profits Commission's

We anticipate further and extended redress schemes will be introduced, placing organisations, councils and charities under a brighter spotlight.



BACKGROUND

There has been a UK compensation scheme for victims of violent crime (the *Criminal Injuries Compensation Scheme*) since 1996.

In 2017 the Scottish Parliament introduced the *Limitation (Childhood Abuse) (Scotland) Act 2017*, considered to be a progressive step for other legal systems to follow. Before the introduction of the *Act*, Scottish victims who attempted to bring civil legal claims were often time-barred as a result of the expiry of the limitation date.

The *Act* removes the usual three-year limitation period for claims by anyone who was under 18 when the abuse took place. Instead, such claims can be brought at any time. Two 'safeguards' were implanted by the *Act* for defenders; the first is that the court will not allow a case to proceed where a fair hearing is not possible, and the second is if the defender would be 'substantially prejudiced' were the action to proceed.

compliance powers. These include changes to an organisation's charitable status and associated loss of a range of commonwealth benefits, and tax and other concessions. Charities and organisations also risk having their names published on the ANRS website and identified as non-compliant organisations.

The future of redress schemes

There is no doubt that redress schemes are an important alternative option for survivors of abuse in care who want to access redress and do not wish to start legal proceedings.

Recent extensive media coverage involving institutional sexual abuse, the #MeToo movement and the broader context of social media activism, indicate a clear direction towards ensuring those who suffer harm are encouraged to come forward, safe in the knowledge they will be listened to. We anticipate further and extended redress schemes will be introduced, placing organisations, councils and charities under a brighter spotlight. Organisations should ensure they are up-to-date with any relevant scheme and seek legal advice to understand their obligations and associated risks.

Over the coming years signing up to a redress scheme may be a condition of contracts with governments. Also, funding for future grants may be used as leverage to ensure compliance. Ultimately, the reputational damage for failing to engage with contemporary legal requirements could be extensive. ●

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