**Response to Pre-Legislative Public Consultation on Financial Redress for Historical Child Abuse in Care**

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the national human rights institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

# Summary of key points

The Scottish Human Rights Commission has played a key role in advocating for rights based solutions in relation to the issue of historic child abuse since our inception in 2008. In 2009, the Commission developed and published a ‘Framework on Justice and Remedies for Historic Abuse of Children in Care’, grounded in international human rights law. Following this, in 2010, the Commission and other key stakeholders developed an Interaction model to facilitate dialogue between survivors, the Scottish Government, social care organisations and institutions and others. Throughout this period, the Commission advocated for an Apologies law which was passed in 2016. In 2017 the Commission argued that the time bar in Section 17 of the Prescription and Limitations (Scotland) Act 1973 should no longer apply for personal injuries sustained in care as a result of abuse while the applicant was a child.

The Commission welcomes the opportunity to respond to the Scottish Government’s proposals on Financial Redress for survivors of Historic Child Abuse. Key elements of our submission include the following:

* The need for a more explicit acknowledgment that childhood abuse constitutes a human rights violation and that financial redress forms one aspect of a wider package of reparations.
* Financial redress should aim to provide reparations for both pecuniary and non-pecuniary damages which have resulted from the abuse and the impact of the abuse.
* The principles underpinning a system of financial redress should include adequacy, effectiveness, promptness, proportionality, accessibility and adaptability in addition to those proposed in the consultation paper.
* A careful assessment of the proposed restrictions on eligibility should be undertaken, since as currently construed, these have the potential to exclude specific groups, such as disabled people who were institutionalised in long stay hospital. The Commission notes that there should be no direct or indirect discrimination in the access to effective remedy.
* The Commission’s view is that the proposed ‘cut-off’ date for abuse to be considered as historical is too early given the lack of access to remedies between 2004 and 2017. Similarly, the Commission believes that the date after which a survivor must have died for their next of kin to be eligible to apply to the redress scheme limits access to justice for this group.
* Evidence requirements for both Stage 1 and Stage 2 payments should strike the right balance between establishing a robust process and recognising the risk of retraumatisation to survivors. They should also take into account that the redress scheme is not intended to be an adversarial process and that the standard of proof will be set lower than in a civil action.
* The Commission is not of the view that survivors should have to choose between redress and a civil action, since while both form part of a package of reparations, each has a different function within such a package.

# Questionnaire

Please refer to the full consultation paper or the summary version for further detail.

# PART 1 Design of the Redress Scheme

This part includes questions about the detailed design of the statutory financial redress scheme. It includes key issues from the 2017 consultation which were identified as requiring further detailed consideration.

# Part 1.1: Purpose and Principles of the Financial Redress Scheme

Q1. We are considering the following wording to describe the purpose of financial redress: “to acknowledge and respond to the harm that was done to children who were abused in care in the past in residential settings in Scotland where institutions and bodies had long-term responsibility for the care of the child in place of the parent”.

What are your thoughts on this? Do you agree?

Yes

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to comment on proposals in relation to a scheme of financial redress to survivors of historic abuse. As we have argued in our previous submissions in connection with this area, compensation is an essential part of a package of reparations, and has the advantage that it does not have to be linked to prosecution or adversarial legal procedures, meaning that it provides a separate avenue for remedy for survivors.

The Commission notes that the proposed purpose of the financial redress scheme within the consultation paper is ‘to acknowledge and respond to the harm done.’ While both of these are necessary elements in a financial redress scheme, the Commission is of the view that a more explicit acknowledgment of historic abuse as a breach of human rights, and the financial redress as one aspect of a package of reparation, are required in the purpose statement. The European Court of Human Rights (the Court) has found that its power to award damages under Article 41 ‘Just Satisfaction’ serves to ‘give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage’ .

With respect to the response to the harm done, both international human rights agreements and the case law of the European Court of Human Rights indicate that compensation should make reparation both for material harm, such as loss of earning and non-material harm, such as physical and mental distress. In 2005, the UN General Assembly agreed the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Van Boven Principles). The Van Boven Principles set out that the following in relation to the purpose of compensation:

“Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

(a) Physical or mental harm;

(b) Lost opportunities, including employment, education and social benefits;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Moral damage;

(e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.”

As such, the Van Boven principles indicate that compensation should be made available for both pecuniary and non-pecuniary damage, as well as costs and expenses.

The European Court of Human Rights (the Court), under Article 41, is empowered to afford just satisfaction to an applicant for both pecuniary and non-pecuniary losses, where a violation has been found. Under the Court’s practice directions, which are derived from the standards emerging from case law, there must be a clear causal link between any pecuniary damages claimed and the violation. The Court is clear that purpose of any award it makes under Article 41 is not to punish the perpetrators or the State concerned, but to compensate the applicant for the actual harmful consequences of a violation. The Court may make an award of pecuniary damage, in which the aim is to ‘place the applicant in the position in which he or she would have been had the violation found not taken place’ (restitutio in integrum), for both loss actually suffered and expected future loss. In the case of non-pecuniary damage, the Court may make an award for non-material harm.

The Commission has suggested an updated purpose which reflects these elements below.

If no, what are your thoughts on purpose?

The proposal is that the purpose of financial redress is “to acknowledge and respond to the harm that was done to children who were abused in care in the past in residential settings in Scotland where institutions and bodies had long-term responsibility for the care of the child in place of the parent.”

Taking the comments made in part 1, the Commission recommends that the purpose of financial redress should acknowledge that the abuse experiences was a breach of human rights and that the redress scheme provides compensation for both material and non-material harms.

In accordance with international human rights law, the purpose of the financial redress scheme is to:

a) recognise that the abuse committed against children in residential settings in Scotland where institutions and bodies had long-term responsibility for the care of the child in place of the parent constituted a breach of their rights to physical and mental integrity;

b) compensate victims and survivors for the impact this abuse had on their material and non-material well-being, as part of a package of reparations, which taken together are able to provide an effective remedy to survivors of historic abuse.

## Principles

## It is our intention that the financial redress scheme should be underpinned by guiding principles.

Q2. We are considering the following as guiding principles:

* To ensure that redress is delivered with honesty, decency, trust and integrity;
* To make the scheme as accessible as possible;
* To treat applicants with fairness and respect and to offer them choice wherever possible;
* To ensure that the assessment and award process is robust and credible;
* To make every effort to minimise the potential for further harm through the process of applying for redress.

Do you agree with these guiding principles?

No

Would you suggest any additions or amendments to the proposed principles?

International human rights law sets out a number of standards in relation to reparations processes. While some aspects of these are captured in the proposed guiding principles, it will be important to ensure that these are as comprehensive as possible. Additional standards can be found in the following:

* International Covenant on Civil and Political Rights
* Convention Against Torture
* European Convention on Human Rights/Human Rights Act 1998
* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Van Boven Principles)
* Recommendations of the UN Special Rapporteur on the Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms

The Commission would highlight the need for the adequacy and effectiveness of remedies for survivors, as indicated in the International Covenant on Civil and Political Rights. This means that any remedy should meet the needs of the victim and should be capable of being enforced, as is set out in Article 2 of the ICCPR:

2 (3). Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

In addition, the ICCPR sets out the requirement of adaptability. The Human Rights Committee, which has responsibility for overseeing the implementation of the International Covenant on Civil and Political Rights, has set out in General Comment 31 that States Parties, including the UK have a general obligation to ensure that individuals:

‘have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children.’

The accessibility of the process will be particularly important for older survivors, those who are in ill-health and those who might need support to apply for financial redress and as such the Commission supports the inclusion of this principle. This should be supplemented by information rights provided by the Van Boven principles which place a positive obligation upon States to provide survivors with relevant information on mechanisms for redress:

‘States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access.’

The Van Boven principles also note that remedies should be ‘adequate, effective and prompt’ (2c).

In summary, the guiding principles for the financial redress scheme should include the following elements not already included in the proposals:

a) Adequacy (Van Boven Principles, ICCPR)

b) Effectiveness (ICCPR, Article 2, paragraph 3; ECHR Article 13, Article 41)

c) Promptness (Van Boven Principles)

d) Adaptability, to support the applications of older survivors or survivors affected by ill-health and/or impairments (ICCPR, General Comment 31)

e) Proportionality, ensuring that decisions with respect to redress reflect the gravity of the violations and the resulting harm which these precipitated (Van Boven Principles, ECHR)

f) Respect for and responsiveness to the needs and wishes of survivors

g) Protection for the privacy and safety of survivors

The Commission suggests the below changes to the proposed principles:

* To ensure that redress is delivered with honesty, decency, trust and integrity;
* To ensure that the scheme respects the privacy and safety of applicants at all times;
* To make the scheme as accessible as possible ensuring that the scheme meets the needs of individual survivors;
* To ensure appropriate support is provided to applicants throughout the process;
* To treat applicants with fairness and respect and to offer them choice wherever possible;
* To ensure that the assessment and award process is robust and credible;
* To ensure that redress decisions reflect the gravity of the human rights violations that have occurred and the resulting harm suffered;
* To make every effort to minimise the potential for further harm through the process of applying for redress;
* To make every effort to ensure the process is prompt and efficient.

## Part 1.2: Eligibility for the Financial Redress Scheme

Defining ‘in care’

We intend that ‘in care’ for this redress scheme is based on two criteria. First, where an institution or body had long-term responsibility in place of the applicant’s parent, and secondly that the applicant was within an eligible residential setting.

Q3. Do you agree with the proposed approach in relation to institutions and bodies having long term responsibility for the child in place of the parent?

Unsure

Please explain your answer.

The Commission agrees that this approach may be appropriate for the great majority of children who experienced abuse, where there were clear processes through which the legal responsibility for parenting transferred from the biological or legal parents to e.g. the local authority social work services.

However, a careful assessment of whether this definition has the effect of ruling out specific groups of survivors of abuse is recommended, in particular where there was often no clear process of transferring legal responsibility from e.g. the biological parents to institutional care, but where the institution did effectively have complete control over the liberty, and the moral, physical, social and spiritual well-being of the child. This may be particularly relevant for disabled people, including people with learning disabilities, institutionalised as children where parents were often advised that an institutional setting would be the most appropriate place for the care and support of the child, but where parents did not or may not have formally ceded parental rights to the institution. Such circumstances may be worth additional consideration in the design and development of the scheme in order not to indirectly discriminate against specific groups whose pathways into residential care may have been less typical. Both international and domestic human rights standards prohibit discrimination in the realisation of rights, including in the access to effective remedy.

The Commission would also welcome a clear definition of the phrase “long-term”, as this implies a temporal cut-off point will be applied, and survivors should be aware of this from the outset.

Q4. Subject to the institution or body having long term responsibility for the child, do you agree that the list of residential settings should be the same as used in the Scottish Child Abuse Inquiry’s Terms of Reference?

Unsure

Please explain your answer.

The Commission is aware that some survivors of historic abuse have not been able to participate in the Scottish Child Abuse Inquiry due to the eligibility criteria applied. The Commission believes the redress scheme is an opportunity for those survivors excluded from the Inquiry to achieve some form of reparation if the scope were to be widened, and the Commission would encourage the Scottish Government to consider ways in which this could be achieved.

Q5. Where parents chose to send children to a fee paying boarding school for the primary purpose of education, the institution did not have long-term responsibility in place of the parent. Given the purpose of this redress scheme, applicants who were abused in such circumstances would not be eligible to apply to this scheme.

Do you agree?

Unsure

Please explain your answer.

The Commission notes that there are survivors who were in the care of the state who were sent to private boarding schools in order to fulfil the state’s obligation to provide an education to the child, and therefore these individuals can be considered to have been ‘in-care.’

The Commission recognises that children who had been sent to a fee paying boarding school by their parents cannot be considered to have been in the care of the state. However, under human rights law, the state still has obligations to ensure the physical and mental integrity and broader well-being of children in the care of a boarding school. It is not clear to the Commission that these children should be excluded from a scheme of financial redress which seeks to acknowledge and respond to harm.

Q6. Where children spent time in hospital primarily for the purpose of medical or surgical treatment, parents retained the long-term responsibility for them. Given the purpose of this redress scheme, applicants who were abused in such circumstances would not be eligible to apply to this scheme.

Do you agree?

No

Please explain your answer.

As the Commission set out in Q3 above, it will be important to undertake a careful assessment on the decision to exclude children who spent time in hospital primarily for the purpose of medical or surgical treatment. The proposal to exclude children who spent time in hospital primarily for the purpose of medical or surgical treatment could have the effect of excluding disabled children whose parents were advised that they would be best cared for in an institutional setting on a long-term basis, for example children who lived in long-stay hospitals such as Lennox Castle, Gogarburn or the Royal Scottish National Hospital. Many children who lived in these environments effectively had no other home and would have lived in hospital for many years, and often into adulthood, in spite of the fact that their parents may not have formally ceded parental responsibility to the institution in question. It should also be recognised that while ostensibly this institutionalisation was for medical or surgical treatment, it was in fact a national policy frequently justified with reference to regressive attitudes towards disabled people, with a consequence that many disabled people including people with learning disabilities, experienced all the types of abuse relevant to the financial redress scheme. In a similar vein, people with mental health issues often lived in these types of institutions on a long term basis.

The Convention on the Rights of Persons with Disabilities has since set out a number of important counterpoints to the historical policy of institutionalisation and includes a specific right to effective access to justice among others:

* Social model approach to disability (Article 1)
* Respect for inherent dignity of disabled people, freedom to make one’s own choices and full and effective participation in society (Article 3)
* Equality before the law (Article 5)
* Right to recognition as persons before the law (Article 12)
* Right to effective access to justice (Article 13)
* Right to live independently in the community (Article 19)
* Protections from violence, exploitation and abuse (Article 16)

Therefore, as set out in our response to Q3, a careful assessment of whether this definition has the effect of ruling out specific groups of survivors of abuse is recommended, in particular where there was often no clear process of transferring legal responsibility from e.g. the biological parents to institutional care, but where the institution did effectively have complete control over the liberty, and the moral, physical, social and spiritual well-being of the child. This may be particularly relevant for people with learning disabilities institutionalised as children where parents were often advised that an institutional setting would be the most appropriate place for the care and support of the child, but where parents did not formally cede parental rights to the institution. Such circumstances may be worth additional consideration in the design and development of the scheme in order not to indirectly discriminate against specific groups whose pathways into residential care may have been less typical. Both international and domestic human rights standards prohibit discrimination in the realisation of rights, including in the access to effective remedy.

## Defining ‘abuse’

Q7. We intend to use the same definition of abuse as the Limitation (Childhood Abuse) (Scotland) Act 2017 for the purpose of the financial redress scheme. This includes sexual abuse, physical abuse, emotional abuse and abuse that takes the form of neglect.

Do you agree?

Yes

Please explain your answer.

The Commission agrees with the proposal to use the same definition of abuse as the Limitation (Childhood Abuse) (Scotland) Act 2017 since this has the benefit of including abuse that takes the form of neglect.

It is well-established within the case law of the European Court of Human Rights that sexual abuse, physical abuse, emotional abuse and neglect can represent violations of rights to physical, psychological and mental integrity under both Articles 3 and 8 of the European Convention on Human Rights.

In addition, in its case law around its powers to award just satisfaction to applicants, the court has held that non-pecuniary damages may be awarded in circumstances including where the applicant has suffered ‘evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity.’ These may all be consequences of the different types of abuse named within the Limitation (Childhood Abuse) (Scotland) Act.

## Defining ‘historical’ abuse

Q8. In our view 1 December 2004 represents an appropriate date to define ‘historical’ abuse for this financial redress scheme.

Do you agree?

No

Please explain your answer.

The Commission acknowledges that the policy and legislative context with respect to the monitoring and regulation of care changed substantially after 1998 and that the First Minister’s apology in 2004 was a significant part of the package of reparations for survivors of abuse. However, it should be noted that this apology was only the first step among a number of wider measures of reparation and that there is a significant time period of more than 12 years between the apology and the implementation of the Limitation (Childhood Abuse Bill), which provided new opportunities for redress through the civil courts, where previously people’s claims were subject to a time bar.

To set the date at 1st December 2004 would therefore mean that almost a generation of children in care would have no right to claim financial redress for historical abuse, despite the potential for serious breaches of their rights to physical and mental integrity within this period, the improvements to regulation nothwithstanding.

It would therefore seem more reasonable to set the cut-off date at 3 years before Royal Assent was given to the Limitation (Childhood Abuse) (Scotland) Act, given that someone bringing a civil action within this timeframe would not have been outwith the limitation period in the 1972 act and their claim could therefore not reasonably be claimed to be historical.

## Child migrants

Q9. Do you have any comments you would like to make in relation to child migrants who also meet the eligibility requirements of this redress scheme?

The Commission agrees with the suggested approach that child migrants who meet the eligibility criteria should be able to apply.

## Those with a criminal conviction

Q10. Do you have any comments about the eligibility of those with a criminal conviction?

The Commission agrees that people with a criminal conviction should not be excluded from applying for redress if they meet the eligibility requirements of the scheme.

## Other

Q11. Do you have any other comments on eligibility for the financial redress scheme?

N/A

## Part 1.3: Payment Structure, Evidence and Assessment

In line with the views expressed in the 2017 survivor consultation, we intend to design a redress scheme with a combination payment approach which would have two possible stages (please see full consultation or the summary version for further details).

## Evidence Requirements

Q12. What options might be available for someone who has been unable to obtain a supporting document which shows they spent time in care in Scotland?

N/A

Q13. Do you think the redress scheme should have the power, subject to certain criteria, to require that bodies or organisations holding documentation which would support an application are required to make that available?

Yes

Please explain your answer.

The Commission agrees that the redress scheme should include a power to require that bodies or organisations holding documentation which would support an application are required to make that available.

The initial interaction work made clear that access to records was one of the key asks of survivors, whether to facilitate personal understanding of the past or to support civil claims. If organisations are able to provide survivors with records which can support their clam, then this represents an important part of the reparation process.

Jurisprudence of the European Court of Human Rights also indicates that the State must support individuals’ access to information about their childhood where the individual was in care, under the right to private and family life, home and correspondence. For example, prior to the introduction of the Data Protection Act 1998 and the associated right of access to care/personal files, a man who had been brought up in the charge of the local authority sought information and records on his childhood, but was refused access to his full file. The Court held that this was a breach of the UK’s obligations to his Article 8 rights. The Court has also set out that Article 8 will be engaged where individuals are seeking information and records in relation the long-term health effects of government activities. In *McGinley and Egan v UK*, a case in which former servicemen sought access to Ministry of Defence records in connection with the Christmas Island nuclear testing, while the Court found no violation of Article 8, it set out that:

‘respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enable such persons to seek all relevant and appropriate information.’

The Van Boven principles also indicate that victims are entitled to ‘seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.’

Q14. For Stage One, what evidence do you think should be required about the abuse suffered?

A signed declaration by the applicant that they suffered abuse, but no other supporting evidence

N/A

A short written description of the abuse and its impact

N/A

Any existing written statement from another source which details the abuse in care

N/A

Q15. Do you have any additional comments on evidence requirements for a Stage One payment?

The Commission is of the view that the requirements around evidence should strike the right balance between assuring survivors and the general public that the process is robust and not creating a system which has the potential to retraumatise and distress survivors. The evidence required for a stage one claim should be proportionate to the purpose of this stage, which, as the Commission understands it, is a flat rate claim to any survivor of historic abuse, and is not contingent on the nature, severity, length of time or impact of the abuse.

Survivors should be able to call upon other forms of supporting documentation or for example, the notes and documentation of a medical professional, psychologist or psychiatrist or counselling service.

Given that the redress scheme is not intended to be an adversarial process and that the standard of proof will presumably be set lower than a civil action ‘balance of probabilities’ test, it would be appropriate to provide survivors with the choice of submitting a short written statement or providing a short amount of oral evidence, depending on their particular needs. The Commission recalls that for many survivors, it is extremely difficult to access records and information to support their case and that to require this may be setting the evidence requirements too high.

Additionally the Commission notes that there is a distinction to be made between evidence which is required and evidence which could support the survivors’ case. While the Commission is not of the view that all of the above types of evidence are required, some of these types of evidence will be helpful to substantiate a survivor’s claim and should therefore be admissible in this process, but may not necessarily be required.

The Commission refers to the standard of proof applied above, and believes it is important to consider the appropriate standard at this stage. Experiences in other countries demonstrate a number of options in this regard. Some schemes have adopted legal terminology used in civil courts, such as ‘on the balance of probabilities’, whereas other schemes have proposed lower standards of additional proof. For example, Sweden uses ‘it may be suspected that the person has been exposed to severe abuse or neglect’. The Commission believes that a standard lower than that required in the civil courts is appropriate, given difficulties accessing information and the risk of re-traumatisation if survivors are required to provide the levels of evidence needed in court. That said, the standard set must retain the confidence of survivors and the wider public.

Q16. For Stage Two, what additional evidence of the abuse, and of its impact, should be required for the individual assessment?

Any existing written statement from another source which details the abuse

N/A

Oral testimony of abuse and its impact

N/A

Short written description of the abuse and its impact

Yes

Detailed written description of abuse suffered and its impact

No

Documentary evidence of impact of the abuse:

* Existing medical and/or psychological records

Yes

* New medical and/or psychological assessment

No

Supporting evidence of the abuse/impact from a third party

Yes

Q17. Do you have any comments on evidence requirements for a Stage Two payment?

The proposals with respect to Stage 2 indicate that this part of the payment relates to the individual’s experience of abuse and the impact that this had on their life. With this in mind, the evidence requirements will need to strike the right balance between providing the panel with sufficient information to assess both pecuniary and non-pecuniary damages, while at the same time minimising the potential for additional trauma on the individual applicant.

With respect to pecuniary damage, the case law of the European Court of Human Rights suggests that applicants should be able to demonstrate a clear causal link between the violation, in this case, the abuse, and the impact this has had on their educational and professional life and earnings potential. With respect to non-pecuniary damage, the case law of the European Court suggests that this may be awarded for ‘evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity.’

Therefore some evidence in connection to these aspects of the individual’s experience is needed but should not require such a level of detail that there is a risk of retraumatisation to the applicant. The Commission is not of the view that a new medical assessment is helpful in these circumstances.

Additionally the Commission notes that there is a distinction to be made between evidence which is required and evidence which could support the survivors’ case. While the Commission is not of the view that all of the above types of evidence are required, some of these types of evidence will be helpful to substantiate a survivor’s claim and should therefore be admissible in this process, but may not necessarily be required.

## Provision for oral testimony

Q18. Do you think applicants should be able to give oral evidence to support their application?

Yes

If yes, under what circumstances might it be available?

It may be the case that for some survivors, providing an oral testimony is the least traumatic and most accessible way for a person to articulate the abuse they experienced. This format may be particularly important as an accessibility issue, for example where a survivor would need a lot of support to provide a written statement.

The Commission notes that in its response to the ‘Historical Institutional Abuse Inquiry’s Redress Recommendations’, the survivor-led Northern Ireland Panel of Experts on Redress found that more than 90% of survivors thought that applicants to the Redress Board should have the choice to give oral evidence, although this should not be mandatory.

Where this option is available, it will be important for the person to be able to access appropriate support, for example information or counselling within a short timescale. The Commission also notes the importance of providing survivors with the option of making any oral statements in private, whether that is recorded or live through a video link. The option of providing a statement to one panel member as opposed to appearing before the whole panel should also be made available.

## Stage Two Assessment

Q19. Do you have any views on whether the length of time in care should be factored into the Stage Two assessment?

Yes

If so how?

The length of time in care may be a relevant factor in determining the payment to be made at Stage 2. First, the length of time in care may bear a relationship to the length of time for which the abuse was experienced. The European Court of Human Rights will take the duration of a breach of human rights into account when determining non-pecuniary payments. Second, where an applicant has experienced abuse and remains in the same care situation for a long period of time, this is likely to create intense stress and anxiety about the risk of further abuse, with consequences for the individual’s mental health and their ability to form relationships with others.

Q20. Do you have any views on the balance the assessment should give to different types of abuse (physical, emotional, sexual, neglect)?

All the types of abuse specified, whether physical, emotional, sexual or neglect go directly to the physical and mental integrity of the person who has experienced the abuse. These elements of human dignity are protected by the right to life, the right to be free from torture and cruel, inhuman and degrading treatment, and in some cases by the right to respect for private life. While there is no hierarchy of rights within the Convention, the respect for all rights being essential for human dignity, a study of the European Court of Human Rights’ jurisprudence has found that violations of these rights tend to attract the highest amounts in non-pecuniary damages.

In *Varnava and others v Russia*, the Court’s approach in awarding just satisfaction has:

‘distinguished situations where the applicant has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of and those situations where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is a powerful form of redress in itself. In many cases where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right. In some situations, however, the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further. Such elements do not lend themselves to a process of calculation or precise quantification.’

In addition, the Court has noted that its decisions when awarding non-pecuniary damage are guided by:

‘the principle of equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage.’

Q21. What are your views on which factors in relation to the abuse and its impact might lead to higher levels of payment?

Our approach with respect to levels of payment is based on the jurisprudence of the European Court of Human Rights in its decisions in relation to Article 41 on Just Satisfaction.

The Court sets out an approach to pecuniary damage in which there must be a clear causal relationship between the damage claimed by the applicant and the violation of the Convention. While such damages may not always be awarded, they can include compensation in respect of loss of earnings.

With respect to non-pecuniary damage, the Court acknowledges that the exercise of determining an amount is inherently subjective, but relies on the principle of equity. This encompasses ‘flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case.’

Analysis of the Court’s decisions by Altwicker-Hàmori and colleagues suggests there are a number of factors which the Court will take into account when determining the level of non-pecuniary damage to award. These include:

* Seriousness, which is comprised of the intensity of the violation, the consequences of the violation for the applicant and the duration of the violation.
* Applicant related factors, for example the age and protected characteristics of the child at the time of abuse, for example disability
* Economic capacity of the state concerned to respond.

It would therefore seem appropriate to take these factors into account.

Q22. Do you think:

* the redress payment is primarily for the abuse suffered

N/A

* the redress payment is primarily for the impact the abuse has had

N/A

* both the abuse suffered and the impact it has had should be treated equally

N/A

Please explain your answer.

The Commission takes the view that the redress payment should reflect both the pecuniary and non-pecuniary damage experienced by the survivor, and should thus reflect both the abuse experienced and the impact which the abuse has had. However, each case will be different and it will not necessarily be the case that the redress payment will or should reflect the abuse and the impact of the abuse equally. The Commission points again to the Van Boven principles which clearly set out the 5 different elements of reparation at principles 19-23. Those are: restitution, compensation, rehabilition, satisfaction and guarantees of non-recurrence. Effective reparation encompasses many different factors and will vary on a case by case. It is therefore unhelpful to attempt to categorise what the redress payment is for in general terms.

In the case law of the European Court, pecuniary damage is ‘“loss actually suffered as a direct result of the alleged violation.” It is a damage which involves the decrease of the economic wealth or fortune of a person. It can therefore be calculated by relying on market prices.’ With respect to pecuniary damage, the Court has established that there should be ‘a clear causal connection between the damage claimed by the applicants and the violation of the Convention,’ which was later confirmed in the case of *E and Others v The United Kingdom*.

Q23. How do you think the scheme should ensure all parties are treated fairly and that the assessment and award process is sufficiently robust?

Adopting a rights based approach should assist in ensuring fairness. A rights based approach has the aim of ensuring that the individual’s rights to an effective remedy are met and the state’s duties in implementing this are fulfilled. However, as indicated in our response to Q2, a rights based approach can also inform the process by which these aims are achieved, for example by ensuring that:

* there is meaningful participation of those affected in the design and delivery of the scheme;
* there is no direct or indirect discrimination in the eligibility criteria or in relation to the decisions being taken;
* the process is accessible and adaptable to the needs of survivors, for example, recognising that some survivors will need more support or a quicker response;
* assessment criteria and levels of awards are informed by case law of the European Court on Human Rights on just satisfaction;
* applicants are given information and support to understand how panel made its decisions, including the level of their award; and
* decisions are made within a reasonable timescale.

## Consideration of other payments

Q24. Do you agree that anyone who has received a payment from another source for the abuse they suffered in care in Scotland should still be eligible to apply to the redress scheme?

Yes

Please explain your answer.

The Commission believes that access to the redress scheme should be accessible to all eligible survivors, regardless of whether they have previously received compensation. Further explanation is included in the Commission’s response to Q25.

Q25. Do you agree that any previous payments received by an applicant should be taken into account in assessing the amount of the redress payment from this scheme?

Yes

Please explain your answer.

The Commission agrees that previous payments should be taken into account to ensure compensation is not paid twice to the same individual. This is important to safeguard the credibility of the redress scheme and ensure the scheme retains the confidence of survivors and the wider public.

Survivors may have in the past received unsatisfactory or low settlements for a variety of reasons, and the Commission believes it is important that all survivors therefore have access to the redress scheme to afford the opportunity for a redress scheme payment to ‘top up’ their previous settlement and place all survivors on an equal footing. It is important to remember that court settlements can also affect a person’s social security entitlements, and receiving a past settlement could have meant a survivor’s payments were stopped or substantially reduced, forcing them to use their court award or settlement to live on. Related to this, it is vital that redress payments made under the scheme do not impact a person’s social security entitlement. Redress payments are an essential part of effective reparations for human rights abuses; they should not be regarded as additional income.

## Choosing between accepting a redress payment and seeking a payment from another source

Q26. Do you agree applicants should choose between accepting a redress payment or pursuing a civil court action?

No

Please explain your answer.

The consultation paper states that “many redress schemes in other countries have required applicants to choose between accepting a redress payment and pursuing remedies in the civil courts”. This does not reflect the variety of arrangements in place in other redress schemes, and the Commission believes other options should be considered which do not require survivors to choose a particular compensation route at the exclusion of others.

The third report of the InterAction Review Group, presented to the Deputy First Minister in September 2018, set out descriptive summaries of redress schemes in other countries. It is correct that in some countries, applicants had to waive the right to take further civil action; however, the Commission does not believe this is best practice and hopes the Scottish scheme will allow survivors to benefit from the range of avenues open to them. It should be noted that some other countries have made it possible for applicants to retain the right to pursue a civil action, or to pursue a particular individual, while accessing the state’s financial redress scheme.

The Commission draws attention to the Northern Irish experience, particularly the Position Paper & Recommendations of the Panel of Experts on Redress, published in April 2017. The Commission agrees with the Panel of Experts’ conclusion that requiring survivors to choose a particular compensation route is an unnecessary restriction of a survivors’ right to remedy. The right to remedy encompasses a number of different components, including compensation, restitution of rights, disclosure of the truth in a public forum and guarantees of non-recurrence. More than one redress forum is required to achieve all aspects of the right to effective remedy. Further, international standards do not preclude the exhaustion of more than one avenue to obtain fair compensation.

It should be borne in mind that the pursuit of a civil action is important for a variety of reasons unrelated to compensation, including for the opportunity to air matters in a public forum and for a finding of liability by a court. It appears disproportionate to exclude recipients of financial redress from pursuing civil justice altogether. It further appears inconsistent to allow applications from survivors who have already pursued civil action (which the Commission supports), but to limit future options for those who have not. The Commission suggests that a more reciprocal approach could be considered, such as a court taking the previous receipt of redress under the scheme into account when awarding damages in a civil action.

Finally, the proposal in the consultation paper suggests that survivors would “find out how much they would receive by way of a redress payment and take legal advice before deciding whether to accept it, or reject it and pursue an award in the civil courts instead”. Notwithstanding the Commission’s views set out above, if this approach is adopted, the need for free and independent legal advice would be particularly important.

# Part 1.4: Making an Application

## Time period for making an application

Q27. We are proposing that the redress scheme will be open for applications for a period of five years. Do you agree this is a reasonable timescale?

N/A

Please explain your answer.

The Commission notes that the timeframe during which applications may be made will need to be sufficient to allow for survivors to assess the relative benefits and disadvantages of making an application, to seek out and receive support for any trauma which arises from this decision, potentially time for civil actions to be resolved, and also an awareness that as many survivors are older and have long term conditions or caring responsibilities, there may be practical and emotional barriers to making an application. A timescale of 5 years may not therefore be adequate for all survivors. If a time limit is adopted, sufficient flexibility should be built in to allow Ministers to extend the scheme, or exercise discretion is accepting applications after the deadline.

## Practical help making an application

Q28. Should provision be made by the redress scheme administrators to assist survivors obtain documentary records required for the application process?

Yes

Please explain your answer.

As we have noted in our answers to Q13 above, there are positive obligations on the state to facilitate access to individual records under the right to respect for private and family life, home and correspondence, whether the applicant is in search of clarity on their past or whether they seek to use the records and information in a legal process. Given that this is a key barrier for survivors, it will be important for the redress scheme to assist survivors to obtain documentary records.

## Legal advice

Q29. In your view, which parts of the redress process might require independent legal advice? Please tick all that apply.

* In making the decision to apply

Yes

* During the application process

Yes

* At the point of accepting a redress payment and signing a waiver?

Yes

Q30. How do you think the costs of independent legal advice could best be managed?

As articulated elsewhere in the Commission’s response, it is important that independent legal advice is provided to survivors when engaging with the redress scheme. Human rights law does not stipulate the exact manner in which the State must meet this obligation nor how the State should manage the costs of this. The Commission recommends consultation with the legal community and Law Society to arrive at a workable solution. One potential avenue would be for the Scottish Legal Aid Board to a designate an independent third party to deal with requests for legal aid from survivors, providing regular reports to Scottish Ministers on criteria being applied, the number of applications granted and refused and the reasoning for those decisions.

# Part 1.5: Next-of-Kin

We intend that surviving spouses and children of those who meet all the eligibility criteria, including that they were abused in an eligible residential setting in Scotland, prior to 1 December 2004, should be able to apply to the financial redress scheme for a “next-of-kin payment”.

Q31. What are your views on our proposed approach to allow surviving spouses and children to apply for a next-of-kin payment?

The Commission agrees that surviving spouses, civil partners and children of those who would have met the eligibility criteria should be able to apply to the financial redress scheme for a next-of-kin payment. As we have set out above, the Commission is of the view that the cut-off date of 1st December 2004 should be replaced with a later date, which better reflects the point at which redress processes became more readily available to survivors.

Q32. We are considering three options for the cut-off date for next-of-kin applications (meaning that a survivor would have had to have died after that date in order for a next-of-kin application to be made). Our proposal is to use 17 November 2016.

* 17 December 2014 - the announcement of the Scottish Child Abuse Inquiry

No

* 17 November 2016 – the announcement of the earlier consultation and engagement work on the potential provision of financial redress

No

* 23 October 2018 – the announcement that there would be a statutory financial redress scheme in Scotland

No

What are your views on which date would be the most appropriate?

The Commission does not agree with any of the proposed dates, on the basis that they provide an extremely limited and restrictive window of eligibility for next-of kin payments.

The rationale for enabling next-of-kin payments is that the family of the deceased person should receive some acknowledgment and remedy on behalf of the person who experienced the abuse. The value of a redress scheme is in its recognition of the harm done to the victim and some pecuniary and non-pecuniary damages for that harm. By setting the cut-off date as late as is proposed, opportunities for redress for the families of survivors are much more limited.

If a cut-off date is applied, it will be necessary to provide appropriate transitional arrangements to apply the same criteria to any future claimants.

Q33. We propose that to apply for a next-of-kin payment, surviving spouses or children would have to provide supporting documentation to show that their family member met all the eligibility criteria. What forms of evidence of abuse should next-of-kin be able to submit to support their application?

N/A

Q34. What are your views on the proportion of the next-of-kin payment in relation to the level at which the redress Stage One payment will be set in due course?

• 25%

• 50%

• 75%

• 100%

Please explain your answer.

It is perhaps helpful to return to the proposed purpose of the redress scheme in deciding the level of payment; given that the redress payments aims to provide a form of reparation in recognition of the abuse, the harm caused by the abuse, and the fact that this would almost certainly have had an impact on the lives of the next of kin of survivors, it is not clear why next of kin should receive a smaller payment.

# Part 1.6: Financial Contributions

## Contributions to the redress scheme

Q35. We think those bearing responsibility for the abuse should be expected to provide financial contributions to the costs of redress. Do you agree?

Yes

Please explain your answer.

International human rights law provides that both the State and private institutions should contribute to reparations packages to the extent to which they are responsible for causing harm. While ensuring adequate, effective and prompt reparation is an obligation of the State, “in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.” Individual reparations should also be determined with the participation victims and should be appropriate and proportionate to the gravity of the violation and the harm suffered.

As the Commission indicated in our submission to the Scottish Parliament Justice Committee on the Limitation (Childhood Abuse) (Scotland) Bill, a rights based approach can help to assess the rights of victims of abuse for effective remedy against the rights of those bearing responsibility to peaceful enjoyment of property under Article 1, Protocol 1 of the European Convention on Human Rights. This right is qualified and can be limited where a fair balance is struck between the demands of the general interests of the community and the requirements of the protection of the individual’s fundamental rights.

The right to peaceful enjoyment of possessions protected by Article 1 of Protocol 1 of the ECHR has extensively been discussed in the AXA case. Among other issues considered in the case was the balancing of human rights of alleged victims of asbestos related disease to bring damages claims, with the rights of the private companies providing employers liability insurance to peaceful enjoyment of their funds - since they would be defending those claims. The right protected by Article 1 Protocol 1 extends to both natural and legal persons and so would apply equally to residential child care providers and their insurers.

Article 1 of Protocol No. 1 comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property. The second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognises that Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The three rules are not “distinct” in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule. Both forms of interference defined must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised.

The ECtHR has made clear that eliminating what are judged to be social injustices are a function of a modern legislature, and gives a wide margin of appreciation to the State in relation to such decisions, noting that:

“Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is ‘in the public interest’.

Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken.

Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.

Furthermore, the notion of ‘public interest’ is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment be manifestly without reasonable foundation.”

The availability of this particular component of the overall effective remedy for victims of childhood historic abuse does not mean that the potential burden being placed on parties being asked to contribute to the scheme is disproportionate.

The fact that there are other ways to provide reparation to victims of childhood abuse, does not affect whether a private party’s contribution is justified in the public interest: As the Supreme Court observed in AXA, the ECtHR had considered this point in James v United Kingdom, para 51 observing:

“The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a ‘fair balance’. Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way.”

In assessing whether a fair balance is struck the court will also consider whether the a party will be “substantially prejudiced” or if their rights will be disproportionately impacted. In each individual instance, consideration will be given to whether the legitimate aim, in this instance the access to justice of a survivor of historic child abuse, is being pursued in a way which is proportionate to the interference with the right to property of the defender in question. This analysis will take into account the gravity of alleged abuse and the overriding aim of the legislation.

Q36. Please tell us about how you think contributions by those responsible should work. Should those responsible make:

• an upfront contribution to the scheme

• a contribution based on the number of applicants who come forward from their institution or service

• another approach to making a financial

contribution to the redress scheme costs?

Please explain your answer.

N/A

Any other comments?

Q37. Are there any barriers to providing contributions, and if so how might these be overcome?

N/A

Q38. Should the impact of making financial contributions on current services be taken into account and if so how?

Yes

Please explain your answer.

The impact of making financial contributions on current services is a relevant consideration in assessing whether a fair balance has been struck between the requirement to provide reparation to victims, right to peaceful enjoyment of property and the general interest of the community; however, it must be carefully balanced against survivors’ need for redress for suffering human rights violations in the past. Demand for and the importance of a particular public service should not automatically mean the organisation concerned should not be required to contribute. Practical solutions can be arrived at, such as the State paying the initial contribution and agreeing a repayment plan with a particular organisation.

Q39. What other impacts might there be and how could those be addressed?

N/A

Q40. How should circumstances where a responsible organisation no longer exists in the form it did at the time of the abuse, or where an organisation has no assets, be treated?

N/A

Q41. What is a fair and meaningful financial contribution from those bearing responsibility for the abuse?

N/A

Q42. What would be the most effective way of encouraging those responsible to make fair and meaningful contributions to the scheme?

N/A

Q43. Should there be consequences for those responsible who do not make a fair and meaningful financial contribution?

N/A

If yes, what might these be?

N/A

## Contributions to wider reparations

In some other countries, the care provider representatives have funded support services, separate from any contribution to financial redress.

Q44. In addition to their financial contributions to the redress scheme, what other contributions should those responsible for abuse make to wider reparations?

The Government may wish to consider consulting with survivors as to their views on whether organisations responsible for abuse should contribute to a memorial or other form of commemoration. The Commission notes that survivors may wish for some form of commemoration but may have strong views on who funds this and how their role in both the abuse and the funding of the commemoration is acknowledged.

# PART 2: Scheme Administration and Wider Reparations

This part includes questions related to the implementation of the statutory financial redress scheme and the opportunity to bring together related elements of a package of reparations, including acknowledgment, apology and support.

# Part 2.1: Decision-Making Panel for Redress

The financial redress scheme will be administered and governed independently of the Scottish Government. This will ensure that decisions on assessment of applications to the scheme will not be made by the Scottish Government.

Q45. Do you agree that the decision making panel should consist of three members?

N/A

Please explain your answer.

Q46. Do you agree that the key skills and knowledge for panel members should be an understanding of human rights, legal knowledge, and knowledge of complex trauma and its impact?

Yes

Are there other specific professional backgrounds or skills you feel are essential for the decision making panel?

The Commission agrees that an understanding of human rights, legal knowledge and knowledge of complex trauma are important skills for the members of the panel. However, the Commission notes that at the core of a human rights based approach is the principle of participation, namely that people must be involved in decisions which affect their rights, and that this participation should also be at the heart of accountability mechanisms for redress. The Commission notes that the involvement of survivors in the Interactions and in the Interaction Review Group has immeasurably strengthened the legitimacy, relevance and robustness of the Group’s activities and recommendations. It is therefore not clear to the Commission why it would not be appropriate to have survivor members on the decision making panel. The results of the survivor consultation and engagement on the potential for a compensation/redress scheme published in September 2018 is clear that respondents viewed the direct involvement of survivors at all stages of the design and implementation of the scheme as essential to the success of the scheme. Some survivors felt that survivor membership on the decision making panel was needed.

The Commission notes that many survivors have provided support, information, signposting, advice and advocacy to others and are thus well placed to undertake a more formal role in decision making on claims of redress. The consultation paper indicates that to have survivors on this panel would raise confidentiality issues. It is not clear to the Commission that it would not be possible to manage any arising confidentiality issues, for example by a survivor making a declaration that they would not sit on the panel in relation to claims from specific organisations or sites.

Monitoring and ongoing evaluation of the scheme’s operation is an area where survivors could play a very important role. The Commission recommends the Scottish Government considers the possibility of survivor participation on an external monitoring and evaluation body, with direct reference to the scheme’s guiding principles and to relevant human rights standards. The Commission believes a more formal scrutiny body aside from the proposed Survivor Panel is required.

Q47. We propose that a Survivor Panel be established to advise and inform the redress scheme governance and administration, ensuring survivor experience of the application process is considered as part of a culture of continuous improvement.

Do you agree?

Yes

Please explain your answer.

The Commission notes that at the core of a human rights based approach is the principle of participation, namely that people must be involved in decisions which affect their rights, and must also be involved in accountability mechanisms aimed at redress. The Commission notes that the involvement of survivors in the Interactions and in the Interaction Review Group has immeasurably strengthened the legitimacy, relevance and robustness of the Group’s activities and recommendations and therefore agrees that survivors should be included, paid and properly supported for participation in any Survivor Panel. However, as we have noted above, it is not clear to the Commission why it would not be appropriate to have survivor members on the decision making panel itself. The consultation paper indicates that to have survivors on this panel would raise confidentiality issues. It is not clear to the Commission that it would not be possible to manage any arising confidentiality issues, for example by a survivor making a declaration that they would not sit on the panel in relation to claims from specific organisations or sites. The Commission notes that many survivors have provided support, information, signposting, advice and advocacy to others and are thus well placed to undertake a more formal role in decision making on claims of redress.

How do you think survivors should be recruited and selected for this panel?

N/A

# Part 2.2: Public Body

We propose that the financial redress scheme will be administered and governed by a new public body which, although accountable to Scottish Ministers, will be operationally independent of them in particular in regards to the decision making panel and process.

Q48. Do you agree that the financial redress scheme administration should be located in a new public body?

Yes

Please explain your answer.

N/A

Q49. Do you have any views as to where the public body should be located and what it should be called?

No

What factors should be taken into account when deciding where the public body should be?

Clearly the location of the new public body should be somewhere which is accessible to survivors and which enables survivors who need to attend the building to have privacy and discretion.

Q50. How can survivors be involved in the recruitment process for these posts?

Survivors can be involved in:

* Developing job descriptions and person specifications for the panel roles
* Shortlisting applications
* Interviewing candidates
* Having an equal say in decisions about appointments

The Commission recommends that the Government seeks out the expertise of organisations which regularly support the people who use their services to recruit employees, such as social care organisations.

How should survivors be selected to take part in this process?

The Commission notes the importance of ensuring that the survivors involved in this process represent the different types of care setting, as well as ensuring that survivors with different protected characteristics under the Equality Act 2010 are represented and well supported. For example, it will be important to ensure that people with learning disabilities who are survivors are supported to participate meaningfully.

It will be vitally important to support survivors with any potential retraumatisation impact as a result of this participation, and survivors should also be able to promptly step away from involvement if this is becoming too difficult.

# Part 2.3: Wider Reparations

Learning from other countries has highlighted the unique circumstances of individual survivors and that, whilst not every survivor will want or need any wider reparation, choice and access to a broad range of remedies is important. These remedies often include acknowledgment, apology and support.

Q51. What are your views on bringing together the administration of other elements of a reparation package such as support and acknowledgement with financial redress?

International human rights law is clear that full and effective reparation takes a number of forms. The Commission recognises that bringing together the administration of other reparation elements with financial redress would be attractive from an administrative perspective and may also simplify matters for some survivors. That said, there are clear data protection and confidentiality concerns for survivors who may not wish their information to be shared between bodies, and did not consent to sharing when they accessed services before the financial redress scheme was contemplated.

What would be the advantages?

Would there be any disadvantages, and if so, how might these be addressed?

As the Commission has noted above, there are clear data protection and confidentiality concerns for survivors who may not wish their information to be shared between bodies, and did not consent to sharing when they accessed services before the financial redress scheme was contemplated.

Q52. Do you agree that it would be beneficial if the administration of these elements were located in the same physical building?

N/A

What would be the advantages?

Would there be any disadvantages, and if so, how might these be addressed?

Q53. Should wider reparation be available to everyone who meets the eligibility criteria for the financial redress scheme?

N/A

Please explain your answer.

The Commission is strongly of the view that claims to the financial scheme should not be a gateway to applying for other forms of redress. It should not be necessary to meet the eligibility criteria of the financial redress scheme to benefit from wider reparations such as mental health and psychological support.

Q54. Should there be priority access to wider reparation for certain groups, for example elderly and ill?

Yes

Please explain your answer.

The Commission agrees that there should be priority access to wider reparation for certain groups, for example the elderly and ill.

As we have indicated in our response to Q2 , the Human Rights Committee, which has responsibility for overseeing the implementation of the International Covenant on Civil and Political Rights, has set out in General Comment 31 that States Parties, including the UK have a general obligation to ensure that individuals:

‘have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children.’

Q55. If a person is eligible for redress, should they have the same or comparable access to other elements of reparation whether they live in Scotland or elsewhere?

Yes

Please explain your answer.

Survivors should be entitled to access all reparation elements regardless of whether they currently live in Scotland or elsewhere. Access to these services is not based on residency or financial contributions such as tax or national insurance. Services are being provided due to survivors suffering past harm in Scotland, or as a child migrant, and a survivor’s current residency should have no bearing on their ability to access services in Scotland.

## Acknowledgement and apology

Q56. To allow us more flexibility in considering how acknowledgment is delivered in the future, we intend to include provision in the redress legislation to repeal the sections of the Victims and Witnesses (Scotland) Act 2014 which established the National Confidential Forum.

Do you have any views on this?

The Commission recognises the sensitive and important work which has been undertaken by the National Confidential Forum during the last few years, and notes that for many survivors, this was the first opportunity to have their experiences heard in an official forum.

The National Confidential Forum provides acknowledgement to survivors and this is an important aspect of the package of reparations available to survivors. The Commission is of the view that there is a need for acknowledgement to be part of the financial redress scheme and consideration should be given to incorporating acknowledgement processes into the activities of any new public body aimed at facilitating redress.

It will be vital that the learning from the National Confidential Forum on the best way to support survivors and on changing current social care practices is not lost.

Q57. Do you have any views on how acknowledgment should be provided in the future?

N/A

Q58. Do you think a personal apology should be given alongside a redress payment?

Yes

Please explain your answer.

As the Commission has noted in our previous submissions, an apology is an integral part of a package of reparations.

If so, who should give the apology?

As the Commission has indicated previously, an apology should come from both the Scottish Government, and if possible, from the organisation which was responsible for the abuse. Both the government and the organisation responsible essentially represent the historic duty bearers who would have had duties to protect the rights of the child at the time at which the abuse took place. An apology from both organisations serves as one part of a package of reparations and the accountability needed for the abuse.

## Support

Q59. Do you think there is a need for a dedicated support service for in care survivors once the financial redress scheme is in place?

Yes

Please explain your answer.

Q60. Do you have any initial views on how support for in care survivors might be delivered in Scotland, alongside a redress scheme?

The Commission does not take a view upon the precise nature of the support available to survivors, other than to stress the importance of the views and wishes of survivors in the way that this is delivered and provided. This is one of the core principles of a human rights based approach.

The Commission would draw attention to other rights to which survivors are entitled, such as the highest available standard of physical and mental health. This includes obligations on states to ensure that services which promote and protect health are available, with implications for counselling and mental health support for survivors, as well as ongoing care for physical injuries caused by abuse.