



Informing Progress - Shaping the Future

FOIL Scotland Quarterly Review

Autumn 2020 - *Sponsored by*



Introduction

Welcome to this second edition of FOIL Scotland's quarterly review of developments affecting members of FOIL who practise within the jurisdiction of the Scottish court system.

Members of FOIL Scotland are invited both to influence the content of future editions and also to submit material for inclusion. Ideas and/or submissions for the next edition of the *Review* should be sent to FOIL's Technical Author, Geoff Owen: geoff.todcourt@btinternet.com and should be with him by no later than 8 March 2021.

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[Redress for Survivors \(Historical Child Abuse in Care\) \(Scotland\) Bill](#)

The Bill as introduced sets up a scheme to make financial payments ('redress payments') to survivors of historical child abuse in care in Scotland. In some circumstances where the survivor has died, these can be paid to their partner or children. The Bill sets up a new independent public body, Redress Scotland, to make decisions about payments. The scheme replaces an interim scheme called the advance payment scheme.

The Bill allows organisations involved with residential care of children in the past to pay financial contributions to the scheme. In return, survivors who accept a redress payment will have to agree not to take legal action against these organisations or the Scottish Government.

The Bill also provides survivors of abuse with other practical and emotional support.

The Bill was created because many children in care in Scotland in the past were not treated with love or with respect. They were abused by those responsible for their care.

Survivors of historical abuse in care have campaigned for redress. They want, and the Scottish Government believes they deserve, to be listened to, heard and believed. Making redress payments is an important part of dealing with the wrongs of the past.

The Bill aims to provide practical recognition of the harm caused by historical child abuse in care in Scotland. The Bill aims to treat survivors with dignity and respect. It is part of facing up to the wrongs of the past with compassion.

As well as the Bill, other actions are being taken to support survivors of historical child abuse. These include apologies and other forms of support.

Organisations which were responsible for the care of children at the time of the abuse are being asked to contribute to the scheme. This is what survivors have said that they want. It also allows those organisations to help deal with the wrongs of the past.

Part 1 of the Bill contains an overview of all the redress activity the Bill provides for and defines the “redress scheme”.

Part 2 establishes Redress Scotland and sets out its functions and the support it will receive from the Scottish Ministers. It also requires that a list of contributors to the redress scheme be established and maintained, and facilitates charities becoming scheme contributors to the scheme where they wish to do so.

Part 3 sets out eligibility criteria for all applicants to the redress scheme, including for applications by next of kin.

Part 4 sets out how the application process will function, and makes provision about the requirements that will apply to applications, how they will be determined, types of redress payments, treatment of previous payments in respect of abuse, waiver, the time period during which offers are to remain valid, payment, review mechanisms, determination of applications where the applicant or person in respect of whom the payment is sought has a serious criminal conviction, the process if an applicant dies, recovery of payments made in error and the reconsideration process, and information sharing and confidentiality.

Part 5 makes provision with respect to the support available to applicants during the application process, including general support with the application, wider support for applicants and certain others in particular circumstances, reimbursement of costs.

Part 6 creates a requirement for contributors to the redress scheme to report on their wider activity in connection with redress.

Part 7 provides for the dissolution of the National Confidential Forum, the eventual dissolution of Redress Scotland, the interpretation of this Act, the issuing of guidance and making of regulations, and the commencement of this Act and its short title.

Stage 1 of consideration of the Bill is due to be completed by 23 December 2020.

Full details of the Bill may be found at: <https://beta.parliament.scot/bills/redress-for-survivors-historical-child-abuse-in-care-scotland-bill>

[Consultation on the Prescription \(Scotland\) Act 2018 commencement regulations](#)

On 13 July, the Scottish Government commenced a consultation on commencement regulations for the Prescription (Scotland) Act 2018. As practitioners will be aware, negative prescription sets time-limits for when obligations (and rights), such as obligations under a contract, are extinguished. The rules of negative prescription as they currently stand are, for the most part, to be found in the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”).

The Prescription (Scotland) Act 2018 (“the 2018 Act”), when commenced, will make a number of changes to the rules of negative prescription, addressing certain issues which have caused or may cause difficulty in practice.

The 2018 Act takes forward the legislative recommendations contained in the Scottish Law Commission (“the Commission”) Report on Prescription of July 2017 (“the Report”). Greater detail as to the legal and practical issues which informed the Act are set out in the Report and also in the Discussion Paper on Prescription of February 2016.

Scots law, like many legal systems, recognises that it is fair, in certain circumstances, for legal rights to expire with the passage of time. Prescription is justified by a number of policy considerations. There are clear benefits to bringing actions early, in particular, delay may adversely affect the quality of justice. Evidence may deteriorate or be lost, including witnesses dying or becoming incapacitated. Considerations of legal certainty justify, as a general rule, a cut-off beyond which obligations are extinguished and therefore claims may not be litigated. Prescription is an essential part of balancing individual interests on one hand and serving the wider public interest on the other. This means that there will be individual cases where prescription appears to operate harshly to extinguish a creditor’s right but, in the wider interests of fairness, justice and certainty, prescription needs to strike a fair balance overall

The changes made by the 2018 Act are designed to increase clarity, legal certainty and fairness as well as promote a more efficient use of resources, such as pursuers being less likely to have to raise court proceedings to preserve a right, and reduce costs for those involved in litigation and insurance.

The Act makes these changes by amending the 1973 Act. Most notably, the 2018 Act makes changes in the following areas:

- the scope of the 5-year negative prescription;
- section 11(3) of the 1973 Act and the discoverability test;
- the long-stop prescriptive periods under sections 7 and 8 of the 1973 Act; and,
- contracting out and standstill agreements.

Very little was said about commencement of the 2018 Act during parliamentary passage, except that sufficient time be given to creditors/debtors to arrange their affairs and that any such provisions should avoid the potential for claims which have already prescribed under the current law from being revived as a result of any provisions in the 2018 Act. The purpose of this consultation is to seek the views of interested parties on the Scottish Government’s proposed commencement regulations.

The FOIL Professional Indemnity SFT responded to the consultation as follows and the response, together with others may be found at: https://consult.gov.scot/private-law-unit/prescription-commencement-regulations/consultation/view_respondent?uuld=706823626

[Liability for NHS Charges \(Treatment of Industrial Disease\) \(Scotland\) Bill 2020](#)

In the Spring edition of this review, we gave notice that this Bill had been introduced.

On 15 September 2020, the Delegated Powers and Law Reform Committee considered the Bill and has reported back: Stage 1.

This Member's Bill is intended to allow the Scottish Government to recover the cost of treating industrial diseases in NHS hospitals in cases where a payment of compensation has been made to the injured person in respect of the disease.

There is an existing legislative framework which allows the Scottish Government to recover the costs of treating any injury, whether physical or psychological in NHS hospitals in cases where another person is responsible for the injury. Currently, injury is defined in Part 3 of the Health and Social Care (Community Health and Standards) Act 2003 (the "2003 Act") to exclude any disease (other than diseases attributable to the injury). The Bill amends Part 3 of the 2003 Act so that in Scotland the existing system of NHS cost-recovery is extended to cover cases of industrial disease in addition to injury cases.

Section 2 of the Bill inserts four new subsections into section 153 of the 2003 Act, which provides for how the amounts of NHS charges that compensators are to repay are calculated. The four subsections make provision for the amounts in certificates (i.e. the amounts to be repaid) to be reduced by a proportion reflecting the pre-commencement period of exposure of the injured person to harmful events.

The purpose of the provisions is to ensure that the application of the Bill is non-retrospective and that an industrial employer's liability (to repay NHS charges) only relates to that part of the period during which the employer exposed the worker to harmful events which was after the date on which the core provisions of the Bill came into force.

Subsection (3C) provides for the amount of that reduction to be calculated under regulation and enables the Scottish Ministers to provide a formula for calculating how the pre-commencement proportion is to be calculated.

The first regulations made under the power are subject to the affirmative procedure, with following regulations being subject to the negative procedure.

This affirmative and negative procedure approach is already contained within 2003 Act and similar regulations have been made in accordance with this approach. It is suggested the Committee could be content that the first regulations made under the power are subject to the affirmative procedure, with further regulations subject to the negative procedure.

FOIL's response to the consultation on the Bill may be found on the members' website. FOIL expressed concern that the Bill, if passed, could have a number of unintended consequences. It would add a new layer of complexity to disease claims; could lead to satellite litigation on issues such as the correct diagnosis of a condition; would almost certainly lead to an increase in insurance premiums; without any clear evidence that there would be any tangible financial benefit to the state.

The Stage 1 consideration of the Bill is due to be completed by 15 January 2021.

Further detail of the Bill is available at: <https://beta.parliament.scot/bills/liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill>

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