# POLICY NOTE

# THE LEGAL AID AND ADVICE AND ASSISTANCE (MISCELLANEOUS AMENDMENT) (SCOTLAND) (NO. 2) REGULATIONS 2021

## SSI 2021/333

The above instrument is to be made in exercise of the powers conferred by sections 12(3), 17(2B), 36(2)(a) and 42 of the Legal Aid (Scotland) Act 1986) and by all other powers enabling them to do so. The instrument is subject to the negative procedure.

**This instrument will allow for payments made under Part 4 of the Redress for Survivors (Historical Child Abuse in Care) Act 2021 ("the 2021 Act") and certain other payments not covered by the statutory financial redress scheme to be disregarded from financial assessments for legal aid eligibility.**

### Background

On 23 October 2018 in the Scottish Parliament, the Deputy First Minister offered an unreserved apology on behalf of the Scottish Government to all those who were abused as children in care , and committed to establish a financial redress scheme for the survivors of historical abuse in-care.

The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill was introduced to the Scottish Parliament on 13 August 2020 and received unanimous support. The Bill became an Act on 23 April 2021. The Act seeks to provide tangible recognition of the harm caused to those who were abused as children in relevant residential care settings before 1 December 2004.

The Act allows survivors of historical child abuse in care in Scotland prior to 2004 the opportunity to apply for financial redress payments of up to £80,000 from a new independent body to be set up, Redress Scotland, who will assess applications.

In 2019, while work was on-going to develop the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill (now the 2021 Act), an advanced payment scheme was established to provide redress payments to survivors of historical in care abuse who were older or had a terminal illness. This was to ensure that those survivors had the immediate benefit towards redress by way of an advance payment.

### Policy Objectives

1. The Scottish Government is committed to ensuring that individuals living in Scotland should not lose access to legal aid for which they would otherwise have qualified solely as a result of receiving, only in redress of historical in-care abuse to which the 2021 Act applies, any of the following:

    (i) a payment made under Part 4 of the 2021 Act,
    (ii) a payment made under the non-statutory advanced payment scheme, or
    (iii) certain other payments, meaning any of an award of damages or compensation from a court, a payment in settlement of a claim (whether or not court proceedings were commenced), an award of compensation under the Criminal Injuries

Compensation Scheme or a payment under any other statutory or non-statutory scheme.

Were this instrument not to be made, the payments listed at (i), (ii) or (iii) above would automatically be considered as part of an applicant's financial resources from which legal fees should be paid when being assessed by the Scottish Legal Aid Board (SLAB) to determine their eligibility for publically funded legal assistance. As a result, an applicant might find that they require to make a contribution to legal fees or costs, or may even become ineligible for publically funded legal assistance.

The Scottish Government does not consider that it would be appropriate to disadvantage individuals by requiring them to utilise their redress payments in this manner. It is critical that a payment to compensate survivors of abuse does not impact on the ability of such persons to access justice in the future. The Scottish Government therefore considers it correct to disregard these payments from financial assessment when calculating legal assistance eligibility in Scotland.

The main purpose of this instrument is to amend the Advice and Assistance (Scotland) Regulations 1996 (S.I. 1996/2447), the Civil Legal Aid (Scotland) Regulations 2002 (S.S.I. 2002/494) and the Children's Legal Assistance (Scotland) Regulations 2013 (S.S.I. 2013/200) so that payments listed at (i), (ii) and (iii) above will be disregarded by SLAB when assessing the disposable capital or income of a person who wishes to receive advice and assistance, civil legal aid or children's legal aid.

2. This instrument also makes a minor correction to an incorrect reference to the Advice and Assistance (Scotland) Regulations 1996 (S.I. 1996/2447) made in the Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2020 (S.S.I. 2020/424).

**Consultation**

The representative body for solicitors in Scotland is the Law Society of Scotland (the LSS) and the representative body for advocates in Scotland is the Faculty of Advocates (the FoA). The LSS, the FoA and SLAB have been consulted on these regulations.

**Impact Assessments**

An Equality Impact Assessment and Child Rights and Wellbeing Impact Assessment have been completed on this instrument and are attached. There are no equality impact issues or child rights and wellbeing issues.

**Financial Effects**

A Business and Regulatory Impact Assessment has been completed on the instrument and is attached.

There will some additional cost to the Scottish Legal Aid Fund in respect of this policy to provide exemptions for payments from the advance payment scheme, under Part 4 of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 and certain other payments as defined above. This is because people who previously may not have been entitled to publically funded legal assistance, or would have had to pay a contribution, may now be entitled to legal assistance once the specified payments are disregards when calculating eligibility for publically funded legal assistance.

It has been estimated that there are likely to be around 9,500 applicants for redress payments in total, split between survivor and next of kin applicants.

The estimated cost to the Scottish Legal Aid Fund of this Redress for Survivors disregard is approximately between £375 and £2,369 per individual, depending on the type of legal assistance that is required.

It should be noted, however, that as only around 2% of the Scottish population access legal aid each year and, as SLAB will still take into account an applicant's disposable income and other aspects of their capital not related to redress scheme payments for the purposes of financial eligibility assessment, the number of individuals to whom this Redress for Survivors disregard will apply is likely to be relatively small.

**Scottish Government**
**Justice Directorate**
**21 September 2021**