POLICY NOTE

THE REDRESS FOR SURVIVORS (HISTORICAL CHILD ABUSE IN CARE) (RECONSIDERATION AND REVIEW OF DETERMINATIONS) (SCOTLAND) REGULATIONS 2022

SSI 2022/44

The above instrument is made in exercise of the powers conferred by sections 78(1), 107(1) and 108(1) of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 ("the Act"). The instrument is subject to the *affirmative procedure*.

Summary Box

The purpose of these Regulations is to make further provision about the reconsideration of a determination under section 75 of the Act and any review of it under section 76.

These Regulations make provision for the payment of legal fees and the reimbursement of costs and expenses in relation to reconsiderations and reviews. They also set out procedures to be followed in connection with these payments and reimbursements and make provision for liability where they have been made in error.

These Regulations also amend the Act to make further provision in relation to what happens when a determination relating to the outcome of a redress application is reconsidered or reviewed.

Policy Objectives

The Act creates a redress scheme for survivors, and in some circumstances their next of kin, in relation to historical child abuse in relevant care settings in Scotland.

Section 75 of the Act sets out a procedure for the reconsideration of determinations made under Part 4 of the Act which may have been materially affected by error (including as a result of fraudulent misrepresentations), while section 76 allows for a review of a determination reached under section 75.

Whilst it is not anticipated that the reconsideration and review process will be engaged frequently, as robust processes have been put in place to reduce the opportunity for error and potential fraud, it is necessary to build and maintain confidence that there are clear processes in place to deal with errors where they do arise.

The policy objectives of these Regulations are:

- to give support to applicants engaged in the reconsideration and review process by way of payment of legal fees and reimbursement of costs and expenses in certain circumstances,

- to set out clear procedures to be followed for requesting payment of legal fees and reimbursement of costs and expenses, as well as the procedures for considering these requests,
- to ensure fairness in making provision allowing for the review of the outcome of the consideration of a request for payment of legal fees or for reimbursement of costs and expenses,
- to make provision about liability where legal fees, costs and expenses are paid in error, and
- to amend the Act to make further provision in relation to the potential outcomes of a reconsideration or review where it is linked to the determination of a redress payment. This includes setting out how reconsiderations and reviews affect any offer of a redress payment already made or accepted (including any waivers already signed and returned).

Legal fees, costs and expenses

These Regulations make provision for the payment of legal fees and costs and expenses incurred in connection with a reconsideration or review under section 75 or section 76 of the Act.

The key policy objective in this regard is to give survivors, their representatives and next of kin applicants access to the support and advice that they need to allow them to fully understand and engage with the reconsideration and review processes. This is particularly important where the processes may impact on a previous offer of a redress payment or waiver. Recognising that access to legal advice is crucial to safeguard a person's rights, we have afforded the same level of legal fees as made available for reviews under The Redress for Survivors (Historical Child Abuse in Care) (Payment of Legal Fees) (Scotland) Regulations 2021. Whilst the fixed fee approach provides a level of certainty that legal work undertaken will be paid, a solicitor is able to apply for a bespoke assessment in relation to fees to be carried out in cases where there are exceptional or unexpected circumstances justifying the payment of an additional sum. This ensures that complex work undertaken in connection with reconsiderations and reviews with possible implications for offers and waivers can be recognised and remunerated fairly.

The Regulations also set out the circumstances in which costs and expenses can be claimed, as well as the level of legal fees payable in connection with reconsiderations and reviews of the following determinations under Part 4 of the Act:

- a determination under section 36 of the Act (determination of applications).
- a determination of a review under section 57 of the Act (outcome of a review).
- a determination made under section 60(4) of the Act (applicants etc. with convictions for serious offences).
- a determination of a review under section 63 of the Act (outcome of a section 62 review).
- a determination under section 66(3) of the Act (determination of whether a nominated beneficiary is to be invited to take over application).
- a determination of the outcome of a review under section 69 of the Act

(outcome of section 68 review).

- a determination made under section 75(5) of the Act (reconsideration of determination where possible material error).
- a determination made under section 77 of the Act (outcome of a section 76 review).

The Regulations set out the processes for making a fee payment request in respect of legal work undertaken as part of a reconsideration or review and for making a request for reimbursement of costs and expenses linked to a reconsideration or review. These requests will be considered by Redress Scotland and the person affected by the outcome may request a review if they are not content with it.

The Regulations also set out the procedure for reconsideration of a decision where Redress Scotland has, or the Scottish Ministers have, cause to believe that a decision to pay fees, or to reimburse costs and expenses under these Regulations has been made in error. In addition, they provide that a person is liable to repay the Scottish Ministers any fees, costs and expenses to the extent that they have been paid in error, as it is essential for the operation and integrity of the redress scheme that where errors are identified, monies are restored to the public purse where appropriate. The Regulations ensure a fair process which reinforces the mechanisms within the scheme to provide a robust system with sound financial controls.

Although the exercise of the recovery powers will sit with Scottish Ministers in their general administration of the scheme, consideration of whether decisions to make payments under the Regulations have been materially affected by error will be undertaken by Redress Scotland. The Regulations provide a process for these decisions to be reconsidered, for the persons affected by them to be notified and given the opportunity to make representations, and for the outcome of the reconsideration to be reviewed. This will ensure that process underpinning any potential recovery of payments is robust, effective and proportionate.

Modifications of the Act – outcomes of reconsideration and review relating to determination of redress application

The Act itself (sections 75 to 77) provides a 'reconsideration process' so that Redress Scotland can revisit a determination already made should a concern arise that it was materially affected by error (including because of fraudulent misrepresentations).

The Act (section 74) also provides that one consequence of the reconsideration process may be that an applicant is liable to repay a redress payment (or part of a redress payment). Discretion as to whether to recover those payments lies with the Scottish Ministers, recognising that there may be some circumstances in which it would not be appropriate to do so (e.g. if a considerable amount of time had passed).

The Act, however, does not currently set out what is to happen to waivers already signed, if the conclusion of the reconsideration process is that a different redress payment ought to have been offered, or that no redress payment ought to have been offered. Waiver is a key aspect of the Act and it is essential that the way in which it operates is fair to applicants. So as envisaged by the regulation-making power in section 78 of the Act, it is necessary to make provision to ensure that there is a way to deal with waivers previously signed and returned in

respect of redress payments that the applicant is no longer entitled to receive or no longer entitled to keep.

Provision is therefore made in the Regulations, to ensure that, where the reconsiderationprocess requires it, there is a clear legal framework to address the consequences of the material error. This could result where appropriate in previous waivers being overturned or giving applicants another opportunity to consider the waiver they previously signed. For example:

- if the result of the reconsideration process is that an applicant should not have received a redress payment (and therefore the applicant is liable to the Scottish Ministers to repay any payment already received) it is not fair to that applicant for them to continue to have their right to raise civil action restricted by the waiver they previously signed.
- if the result of the reconsideration process is that an applicant should receive a lower redress payment than previously accepted (and again that would mean that the applicant is liable to the Scottish Ministers to repay the overpayment), then this is a fundamental change to the terms of the offer upon which they based their previous decision to sign the waiver. So in the interests of fairness they have the opportunity to consider whether the redress scheme, and the restriction on their rights to raise civil action, remains in their best interests.
- in some circumstances a reconsideration may actually result in a determination that the applicant is entitled to a higher payment, or a payment where they were previously determined ineligible.

The key policy objective in this regard is therefore to be as transparent and fair as possible, by setting out the potential outcomes and consequences of a reconsideration or review on the face of the Act. This will ensure that there is clarity for survivors, their representatives and next of kin applicants around what may happen to an offer of payment and any existing waiver where a material error has been made in the determination of a redress application. As mentioned above, funded legal advice will be available in connection with reconsiderations and reviews and provision has been made for reimbursement of reasonable costs and expenses in connection with these. Providing for this funding and support ensures people can make fully informed decisions regarding the most appropriate action to take following a reconsideration or review.

Where possible, existing waivers will remain unaffected by the outcome of a reconsideration or review. For example, where a person is given a higher or lower offer of payment than one which they have previously accepted, a previous waiver will only be affected where the new offer is actively rejected. In this case, the previous waiver will be rendered of no effect and the person will be liable to repay any redress payment made to them. If the person does accept the new offer, they will find themselves in the same position as they would have been, had an error not have been made.

Where a person has accepted a previous offer of a redress payment and they do nothing in response to a new offer (that is, they neither accept nor reject it within the window within which they can do so), provision is made in the Regulations for the person to have been deemed to have accepted the new offer. We believe that this position causes least detriment to a person who has accepted a previous offer. First, it means that a person will automatically

be paid an additional sum where the previous offer was higher than the sum they accepted before. Second, it means that where a person does nothing in response to a notification that they have been offered a lower payment than that which they previously accepted, they will not be liable to repay the whole redress payment which they have received and the waiver they previously signed will be unaffected.

There are however, some circumstances in which the Regulations provide for automatic consequences for a waiver. For example, where following a reconsideration, it is determined that a person is not eligible for a redress payment, any waiver signed to accept a payment offered in error will be rendered of no effect.

Consultation

A formal consultation was not considered appropriate, given previous consultations on the redress scheme and the recent Parliamentary passage of the Act. Due to the technical nature of these Regulations, stakeholder views were not sought during recent targeted engagement on redress secondary legislation.

Impact Assessments

Where necessary, the impact assessments for the Act and relevant secondary legislation enabled by it will be updated to reflect these draft Regulations in the near future.

Financial Effects

The Deputy First Minister and Cabinet Secretary for Covid Recovery confirms that no standalone BRIA is necessary for this instrument. Instead, the existing BRIA for the Act and other relevant secondary legislation will be updated to reflect the financial impact this instrument may have on the Scottish Government, local government or on business.

Scottish Government
Children and Families Directorate

7 December 2021