

## **Business and Regulatory Impact Assessment**

# **The Redress for Survivors (Historical Child Abuse in Care) (Payment of Legal Fees) Scotland Regulations 2021**

**September 2021**



**Scottish Government**  
Riaghaltas na h-Alba  
gov.scot

## **1. Purpose and intended effect**

### **1.1 Background**

The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 (“the Act”) establishes a redress scheme for survivors of historical child abuse in relevant care settings in Scotland, and, where eligible, their next of kin.

Funding for applicants to obtain independent legal advice is a key element of the redress scheme. It is essential to give applicants a meaningful opportunity to obtain the support and advice that they need, in connection with making their application and to allow them to make fully informed decisions when considering an offer of a redress payment. This includes survivors, next of kin and nominated beneficiaries.

The Act sets out that Regulations may be made under sections 94(3), (4) & (6) and under section 95(5)<sup>1</sup> (“the Regulations”). These Regulations set out the rules surrounding fee payment requests relating to legal work carried out in connection with the redress scheme, as well as the rules surrounding seeking approval to undertake legal work in exceptional or unexpected circumstances. They prescribe the level of fixed fees for legal fees funded by the Redress Scheme and the conditions under which they will be paid. Finally, they set out further rules about reviews by Redress Scotland of fee payment requests.

### **1.2 Objective**

The Regulations form an essential part of the legislation required for the redress scheme established by the Act to open. The Scottish Government has committed to open the scheme as soon as possible, and by the end of 2021.

An applicant may choose whether they apply for redress with or without legal representation, however they will be strongly encouraged to obtain independent legal advice before signing a waiver. (If an applicant wishes to accept an offer of redress, the Act requires that they sign a waiver relinquishing the right to begin legal action, and requiring abandonment of current legal action, against Scottish Ministers and scheme contributors). It is therefore important that the scheme provides an opportunity for all applicants to access funded legal advice. Fees for legal work reasonably undertaken on behalf of applicants to the redress scheme will be funded by the scheme.

The Act provides for a simplified system of fixed fees to be paid, subject to two important safeguards. The first is a mechanism to ensure greater consideration is given where there is a concern that work may not have been reasonably undertaken. These cases will be decided by Redress Scotland. The second is to ensure that additional fees can be sought in cases in which legal work, over and above that encompassed within the fixed fee, is necessary. Solicitors must apply for prior approval from Redress Scotland in cases where there are exceptional or unexpected circumstances which the solicitor believes may justify the payment of an additional

---

<sup>1</sup> [Redress for Survivors \(Historical Child Abuse in Care\) \(Scotland\) Act 2021](#)

sum. Where justified, Redress Scotland may allow additional legal fees to be paid without such prior approval.

The Regulations set out the rules surrounding fee payment requests relating to legal work carried out in connection with the redress scheme. This includes providing for time limits for making a fee payment request, the form and content of the request, the information and evidence to be provided on or with the request and the rules surrounding prior approval to undertake legal work in exceptional or unexpected circumstances.

They prescribe the level of fixed fees for legal fees funded by the Redress Scheme and the conditions under which these will be payable.

They also set out further rules about reviews by Redress Scotland of fee payment requests, including about the time limit for requesting a review, the required form and content of a request for a review, the outcome of a review and the powers available to a review panel, and the suspension of the payment of a sum in respect of the work until a request for a review is determined.

## **2. Consultation**

### **2.1 Within Government**

In preparing the Act and the Regulations, the Redress, Relations, and Response Division, which sits within the Scottish Government's Children and Families Directorate, engaged with the following internal stakeholders:

#### *Scottish Government*

- Civil Law and Legal System Division, Directorate for Justice
- Internal Audit – Director General Education, Communities, and Justice
- Finance Business Partner – Education, Directorate for Financial Management and Health, Directorate for Financial Management
- Improvement, Attainment and Wellbeing Division, Directorate for Learning
- Youth Justice and Children's Hearings Unit, Directorate for Children and Families
- Scottish Government Legal Directorate (SGLD)

Scottish Government Legal Directorate have had a key role throughout development of the legislation in ensuring policy is lawful.

### **2.2 Public Consultation**

The Scottish Government ran a pre-legislative public consultation on the subject of redress from 2 September to 25 November 2019. This focussed on the design and implementation of a financial redress scheme. 280 responses were received, 229 from individuals and 51 from organisations, of whom 201 identified as survivors. Independent analysis of all consultation responses was carried out.

The pre-legislative consultation asked for views on a number of different topics including which parts of the redress process might require independent legal advice and how the costs of legal advice might be managed. There was support for various variations of both set fees and capped fees. Suggestions on how legal costs should be funded included by the public purse, the redress scheme or by care providers.

The responses have been published, where the Scottish Government has permission to do so, at: [https://consult.gov.scot/redress-survivor-relations/financial-redress-historical-child-abuse-in-care/consultation/published\\_select\\_respondent](https://consult.gov.scot/redress-survivor-relations/financial-redress-historical-child-abuse-in-care/consultation/published_select_respondent).

In addition the Scottish Government has published an independent analysis report which is available at: <https://www.gov.scot/publications/financial-redress-historical-child-abuse-care-analysis-consultation-responses/>.

In respect of the Regulations, a further formal consultation was not considered appropriate given previous consultations on the scheme, the recent Parliamentary passage of the legislation which included the publication of indicative fixed fees for legal work (from which level we are not departing) and the technical nature of the regulations. Instead, stakeholder views were obtained through a targeted engagement exercise with survivor organisations, representatives of the legal profession, care providers and others.

## **2.3 Business**

The Scottish Government has contacted legal professionals and organisations within the legal community for their input on the Regulations including the Law Society of Scotland and the Faculty of Advocates. Engagement with these organisations has continued throughout the development and passage of the Bill and will continue as the implementation and delivery of the scheme progresses.

## **3. Options Analysis**

The Regulations set out the rules surrounding fee payment requests relating to legal work carried out in connection with the Redress Scheme, the rules surrounding prior approval to undertake legal work in exceptional or unexpected circumstances and the rules surrounding reviews of fee payment requests. They also prescribe the level of fixed fees for legal fees funded by the Redress Scheme and the conditions under which these will be payable.

The revised Financial Memorandum published at Stage 2 contained illustrations of potential approaches to the prescribed level of legal fees. One approach tied the fee to the process being undertaken and not to the amount of financial redress that was ultimately determined by Redress Scotland. An alternative approach tied the fee to the ultimate redress payment determined.

### **3.1 Sectors and groups affected**

The following sectors and groups may be affected by these Regulations:

- Survivors of historical abuse in care; and
- Legal sector.

### **3.2 Options: Benefits and Costs**

This section describes the benefits and costs (disbenefits) of the different options considered by the Scottish Government in deciding to take forward the Regulations.

#### **3.2.1 Option 1: Fixed fees for legal work tied to the process being undertaken**

This option ties the fixed fees for legal work carried out in connection with the redress scheme to the process being undertaken (e.g. fixed rate application, individually assessed application, next of kin application etc.). This means that the amount of redress payment determined does not impact the amount of legal fees paid.

Option 1 recognises that the work or complexity involved in an application for redress does not necessarily diminish or increase depending on the value of the redress payment. The evidential requirements for individually assessed redress payments are the same regardless of the potential value of the application. This option ensures that there is no unintended disincentive to solicitors in terms of accepting instructions from survivors whose experiences fall at the lower end of the payment levels.

There was however some concern expressed by some, but not all in the legal community, that this approach may jeopardise that appropriately trained and experienced lawyers engage in this work supporting survivors, leading to a downgrading of expertise or turning these cases into a more administrative exercise.

Option 1 is the preferred option, recognising that fixed fees for legal work should be linked to the process being undertaken. Solicitors retain the right to seek an additional sum in any case where exceptional or unexpected circumstances justify that.

This option has cost implications and operational impact on Redress Scotland, the Scottish Government and the legal community.

The high-level benefits, from a business and regulatory perspective, would include:

- More certainty around the costs of legal fees for the Scottish Government
- More certainty to the legal community about the amount of legal fees paid by the Redress Scheme
- Processes would be more straight-forward as legal fees would not have to be linked to the redress payment determined

There remain uncertainties in estimating the cost of Option 1 given the uncertainties around the number of potential applicants to the redress scheme. For the purposes of the revised Financial Memorandum, the costs of option 1 ("illustrative costs of potential structure 2" in the Financial Memorandum) were assumed and it was estimated that the legal fee costs for the scheme would have an average annual cost of £3.5 m, and an overall scheme cost of approximately £17.7 m over five years<sup>2</sup>.

More detail is provided in Section 12. The full costs anticipated by the implementation of the Act are detailed in the Financial Memorandum and Revised Financial Memorandum (amended following Stage 2 of the Bill process).

### **3.2.2. Option 2: Fixed fees for legal work scaled to the level of financial redress payment**

Option 2 ties fixed fees for legal work carried out in connection with the redress scheme to the redress payment determined. This means that for Individually Assessed Payments, the amount of legal fees paid varies depending on the level of redress payment determined.

Option 2 is more in line with the Compulsory Pre-Action Protocol for personal injury claims.

There was a concern from some organisations, that tying legal fees to the value of redress payment determined may influence the behaviour of solicitors and encourage them to routinely seek higher levels of redress payment. Furthermore, the level of financial redress payment offered in any application for an individually

---

<sup>2</sup> The fixed fees in the regulations have evolved since the estimates in the revised financial memorandum were produced, but these estimates are the closest that we currently have.

assessed payment is not necessarily correlated to its complexity or the work involved by the legal representative.

This option would have cost implications and operational impact on Redress Scotland, the Scottish Government and the legal community.

The high-level benefits, from a business and regulatory perspective, would include:

- Potentially higher legal fees available for the legal community for some Individually Assessed Applications.

The high-level disbenefits, from a business and regulatory perspective, would include:

- Less certainty around the costs of legal fees for the Scottish Government;
- Less certainty to the legal community about the amount of legal fees paid by the Redress Scheme – these would not be known at the outset of the application process and may discourage some solicitors from taking on lower value cases;
- Processes would be more complex as legal fees would have to be linked to the redress payment determined.

There are greater and significant uncertainties in estimating the cost of Option 2 given both the uncertainties around the number of potential applicants to the redress scheme and the value of redress payments that will be offered. For the purposes of the revised Financial Memorandum, the costs of option 2 ("illustrative costs of potential structure 3" in the Financial Memorandum) were assumed and it was estimated that the legal fee costs for the scheme would have an average annual cost of £3.7 m, and an overall scheme cost of approximately £18.7 m over five years<sup>3</sup>.

The full costs anticipated by the implementation of the Act are detailed in the Financial Memorandum and Revised Financial Memorandum (amended following Stage 2 of the Bill process).

---

<sup>3</sup> The fixed fees in the regulations have evolved since the estimates in the revised financial memorandum were produced, but these estimates are the closest that we currently have.

#### **4. Scottish Firms Impact Test**

These Regulations will have an impact upon the legal community in Scotland and the rest of the UK insofar as they will prescribe the level of fixed fees for legal fees funded by the Redress Scheme and the conditions under which these will be payable.



## **5. Competition Assessment**

### **5.1 Legal sector**

Any legal firm will have the opportunity to offer advice to applicants and request fees from Scottish Government so there are no competition concerns.

## **6. Consumer Assessment**

### **6.1 Redress applicants' access to legal advice**

Though independent legal advice will not be mandatory for applicants, they will be strongly encouraged to seek legal advice, particularly at the point at which an offer of redress is made and the waiver is signed. It is also the intention that legal advice given at other stages of the application process will be funded, and this will include the point at which a decision is made on whether or not to apply and legal assistance in completing the application form.

The Act places a duty on the Scottish Ministers to pay legal fees reasonably incurred by applicants to the redress scheme. This includes applicants who are survivors of abuse, next of kin applicants and nominated beneficiaries. It is recognised that legal fees could be reasonably incurred in relation to applications that are ultimately unsuccessful or withdrawn. They do not include any fees incurred in connection with legal advice and assistance on whether to pursue litigation as an alternative to making an application for a redress payment unless this forms a part of other advice given.

Applicants to the redress scheme will have the opportunity to approach any legal firm of their choosing which should incentivise competition between firms and ensure a good service for applicants.

Fee payment requests will be submitted directly by the legal representative to the Scottish Government Division carrying out the administrative and processing functions of the redress scheme for payment. Any fee payment requests requiring an element of discretionary decision making will be passed to Redress Scotland for assessment and decision.

The Scottish Government will offer clear guidance to solicitors and survivors in relation to the rules surrounding the payment of legal fees.

## **7. Test run of business forms**

New forms associated with the redress scheme will include:

- Forms for lawyers to request payment of fees.

## **8. Digital Impact Test**

Careful consideration will be given to the opportunities afforded by use of digital technology in all aspects of redress implementation, including in connection with legal fees. Digital platforms and services will be used to promote efficiency wherever possible whilst ensuring that the redress scheme is accessible to survivors who are not digitally literate. All necessary data security measures will be put in place to ensure personal and sensitive information is handled confidentially. The redress implementation team will draw upon the expertise of the Scottish Government's Digital Directorate and Digital Assurance Team throughout the development of the scheme.

## **9. Legal Aid Impact Test**

Legal Aid will have no direct role in the redress scheme as the Scottish Government will pay applicants' legal costs, directly. Survivors will be able to approach any lawyer of their choosing

## **10. Enforcement, sanctions and monitoring**

The amount of legal fees being paid will be monitored as the scheme opens and applications begin to be assessed. Details on the cost of this will be monitored and published within the annual report of the scheme.

It will be important to review and monitor whether the amounts set are appropriate to allow applicants to receive effective legal advice. This will be monitored on an ongoing basis throughout the lifetime of the scheme.

In paragraph 17 of Schedule 1 in the Act, Redress Scotland are required to produce an annual report<sup>4</sup>. This includes matters such as:

- an assessment of whether applicants for redress payments appear to have had the opportunity to make informed choices

Such feedback from Redress Scotland will allow the Scottish Government to assess and amend the approach being taken in regards to the information being shared with both applicants and the legal community.

The Survivor Forum will also be able to provide feedback on how the funded legal advice is working in practice for applicants to the scheme. The Scottish Government will use this feedback to change the processes and delivery of the scheme where appropriate.

---

<sup>4</sup> Paragraph 17(1) of Schedule 1 of the Act states: “Redress Scotland must, as soon as practicable after the end of each financial year, prepare a report on its activities during that year”.

## **11. Implementation and delivery plan**

### **11.1 Key milestones**

The Bill completed its passage through Parliament on 11 March 2021 and received Royal Assent on 23 April 2021.

Secondary legislation is required and other implementation activity is underway. Included in the secondary legislation is the Redress for Survivors (Historical Child Abuse in Care) (Payment of Legal Fees) (Scotland) Regulations 2021.

These Regulations under sections 94(3), (4) & (6) and 95(5) of the Act are subject to negative procedure.

These Regulations will be made on 13 September 2021 and laid on 15 September 2021. The Regulations will come in to force on 1 December 2021.

### **11.2 Post-implementation review**

The Scottish Government will review the legislation on an ongoing basis following enactment to ensure that it supports effective operational delivery of the scheme. Monitoring and evaluation of scheme delivery will be informed by the feedback of the Survivor Forum and other stakeholder groups.

## **12. Summary and recommendation**

### **12.1 Recommendation**

The recommended policy option is to tie fixed fees for legal work to the process undertaken.

This approach recognises that the work or complexity involved in an application for redress does not necessarily diminish or increase depending on the value of the redress payment. The evidential requirements for individually assessed redress payments are the same regardless of the potential value of the application. Solicitors retain the right to seek an additional sum in any case where exceptional or unexpected circumstances justify that.

### **12.2 Summary costs**

The costs anticipated by the implementation of the Act are described in detail in the Financial Memorandum and Revised Financial Memorandum which accompanied the Bill. Below is a summary of estimated costs of legal fees from the Revised Financial Memorandum.



Table 6: Illustrative legal fee costs – potential structure 2

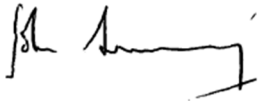
<b>Payment type</b>	<b>Legal fee ceiling limits</b>	<b>Number of applicants</b>	<b>Total illustrative cost (based on 100% uptake of legal advice funding)</b>
Fixed rate payment or next of kin payment	£450 + VAT	2,300 (10% of survivor applicants (800) and all next of kin applicants (1500))	£1.2 m
Individually assessed payment (where threshold for an IAP Level 1-5 is not met)	£450 + VAT	400 (5% of survivor applicants)	£0.2 m
Individually assessed payment (where threshold for an IAP Level 1-5 is met)	£2000 + VAT	6,400 (80% of survivor applicants)	£15.4 m
Reviews	£250 + VAT (additional to application legal fees)	2850 (30% review rate including NOK applications)	£0.9 m
<b>Total cost</b>			<b>£17.7 m</b>

For the purposes of the Financial Memorandum, these illustrative costs of potential structure 2 were assumed. This means that the legal fee costs for the scheme would have an average annual cost of £3.5 m, and an overall scheme cost of approximately £17.7 m over five years.

### **13. Declaration and publication**

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

A handwritten signature in black ink, appearing to read 'John Swinney', written in a cursive style.

Date: 13 September 2021

Minister's name: John Swinney

Minister's title: Deputy First Minister and Cabinet Secretary for Covid Recovery

Scottish Government Contact point:

Donald Henderson, Deputy Director of Redress, Relations and Response Division