

POLICY NOTE

THE REDRESS FOR SURVIVORS (HISTORICAL CHILD ABUSE IN CARE) (PAYMENT OF LEGAL FEES) (SCOTLAND) REGULATIONS 2021

SSI 2021/313

The above instrument was made in exercise of the powers conferred by sections 94(3), (4) and (6) and 95(5) of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 (“the Act”). The instrument is subject to *negative procedure*.

Summary Box

<p>The purpose of these Regulations is to 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 prior approval to undertake legal work in exceptional or unexpected circumstances. They prescribe the level of the fixed fees for legal fees funded by the Redress Scheme and the conditions under which these will be payable. Finally, they set out further rules about reviews by Redress Scotland of fee payment requests.</p>
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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.

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.

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. The ‘summary of options’ document produced in accordance with Section 9 of the Act and provided to applicants both when they submit an application and when they are notified of Redress Scotland’s determination of their application, must set out information about the importance of obtaining independent legal advice before accepting an offer of a redress payment and signing a waiver.

There is a need to manage legal costs and, learning lessons from other redress schemes in which legal costs have escalated, section 92 of the Act provides for fixed fees to be paid to solicitors in respect of legal work reasonably undertaken in making an application for redress (including in exceptional or unexpected circumstances where an application was not in fact submitted). These Regulations provide further detail on the arrangements that will apply and the level of those fixed fees.

Importantly, the Act provides for an element of flexibility. In accordance with section 93(3) Scottish Ministers must pay additional sums, in excess of the fixed fees, where Redress Scotland are satisfied that there are exceptional or unexpected circumstances which justify it. The Regulations set out a process of prior approval to be followed in those circumstances, but

also allow that process to be dispensed with, where Redress Scotland is satisfied there was good reason for prior approval not having been obtained.

The fixed fees to apply are set out in the Table of Fees in the Schedule. The headline fees for work in connection with applications for fixed rate or individually assessed redress payments were included as one of the potential options within the revised Financial Memorandum published during the Parliamentary passage of the Act.

The Table of Fees reflects the opportunities within the Act for applicants to pause and withdraw their applications, or, in some circumstances to make subsequent applications, and provides certainty to solicitors of the level of fee that will be paid in those circumstances (subject to additional sums being sought where the circumstances are exceptional or unexpected). Fixed fees are available in connection with applications from survivors, next of kin and nominated beneficiaries.

The Regulations also set out further provisions relating to the review of decisions of by Redress Scotland in relation to fee payment requests. These broadly follow other review provisions within the Act.

Consultation

A 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.

During the engagement exercise, questions were asked about the level of the fixed fees and whether the fixed fees ought to be tied to the process being undertaken and the type of application, or whether it should be scaled to the level of financial redress payment ultimately offered. Views were mixed, including within the legal community itself. Taking on board all of the views provided, the approach adopted is to tie fixed legal fees to process and not value of payment.

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 all individually assessed applications 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.

It also ensures that there is no unintended disincentive to solicitors in terms of accepting instructions from survivors whose experiences may fall at the lower end of the redress payment levels.

Impact Assessments

The legislative impact assessments under the Act have been updated to reflect the impact of these Regulations.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is that it will prescribe the level of fixed fees for legal fees funded by the Redress Scheme and the conditions under which these will be payable. These Regulations will affect the legal community in Scotland and elsewhere in the UK.

Scottish Government
Children and Families Directorate

15 September 2021