



# Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021

2021 asp 15

## PART 3

### ELIGIBILITY AND KEY CONCEPTS

#### *Eligibility to apply for redress payments*

#### **18 Eligibility to apply for a redress payment**

- (1) A person may apply for a redress payment if the person or, in the case of an application for a next of kin payment, the person in respect of whom the application is made was abused while—
  - (a) a child, and
  - (b) resident in a relevant care setting in Scotland.
- (2) The abuse must have occurred before 1 December 2004.
- (3) In this Act, “child” means a person under the age of 18 years.
- (4) But subsection (3) does not apply, in relation to an application for a next of kin payment, to a reference to a child of a deceased person.
- (5) This section is subject to section 23.

#### *Meaning of “abuse”*

#### **19 Meaning of “abuse”**

- (1) In this Act, “abuse”, in relation to references to a person having been abused, includes—
  - (a) sexual abuse,
  - (b) physical abuse,
  - (c) emotional abuse,

- (d) abuse which takes the form of neglect.
- (2) For the purpose of subsection (1)(b), “physical abuse” includes corporal punishment to the extent that, at the time it was administered, it was not permitted under or by virtue of any enactment or rule of law because it was—
  - (a) excessive, arbitrary or cruel,
  - (b) administered for an improper motive, or
  - (c) not so permitted for another reason.

*Meanings of “relevant care setting” and “resident”*

## 20 Meaning of “relevant care setting”

- (1) In this Act, “relevant care setting” means—
  - (a) a residential institution in which the day-to-day care of children was provided by or on behalf of a person other than a parent or guardian of the children resident there,
  - (b) a place, other than a residential institution, in which a child resided while being—
    - (i) boarded-out,
    - (ii) fostered.
- (2) But a place is not a relevant care setting by virtue of subsection (1)(b) where the child was boarded-out or fostered—
  - (a) with a relative or guardian of the child, or
  - (b) under arrangements between a parent or guardian of the child and another person unless that other person was either—
    - (i) a public authority, or
    - (ii) a voluntary organisation exercising functions in relation to the safeguarding or promotion of the welfare of the child or the protection or furthering of the child’s interests.
- (3) In this section and in section 22, “residential institution” means—
  - (a) a children’s home,
  - (b) a penal institution,
  - (c) a residential care facility,
  - (d) school-related accommodation,
  - (e) secure accommodation.
- (4) The Scottish Ministers may by regulations—
  - (a) modify the meaning of “residential institution” by—
    - (i) adding a description of establishment as a residential institution to those mentioned in subsection (3),
    - (ii) varying the description of a residential institution in that subsection,
  - (b) modify section 21(1) as Ministers consider appropriate in consequence of any modification of subsection (3) or otherwise.
- (5) The Scottish Ministers may make regulations under subsection (4) only if satisfied, so far as reasonably practicable, that doing so will not have the effect that persons who would otherwise be eligible to apply for redress payments will cease to be so eligible.

## 21 Meaning of “residential institution”: further provision

(1) For the purpose of this section and section 20—

“children’s home” means a residential establishment which provided accommodation for children in order to safeguard or promote their welfare or otherwise to protect or further their interests,

“penal institution” means an establishment in which children were detained or imprisoned on remand or in pursuance of a sentence imposed by a court of criminal jurisdiction (other than a court-martial),

“personal care” means care which relates to—

(a) the day-to-day physical tasks and needs of the person cared for (for example, but without prejudice to that generality, eating and washing), and

(b) the mental processes related to those tasks and needs (for example, but without prejudice to that generality, remembering to eat and wash),

“personal support” means counselling, or other help, as part of a planned programme of care,

“residential care facility” means an establishment, including a hospital—

(a) which provided long-term residential accommodation for children for the purpose of meeting needs arising from a mental or physical condition, whether or not medical care or treatment, nursing, or personal care or support was also provided, and

(b) in which the child resided under arrangements made by or on behalf of—  
(i) a public authority, or  
(ii) a voluntary organisation exercising functions in relation to the safeguarding or promotion of the welfare of the child or the protection or furthering of the child’s interests,

“school” includes a school other than a public school only where the child’s attendance at the school was arranged and paid for by or on behalf of—

(a) a local authority or an education authority, or

(b) a voluntary organisation exercising functions in relation to the safeguarding or promotion of the welfare of the child or the protection or furthering of the child’s interests,

“school-related accommodation” means an establishment (not including domestic premises)—

(a) provided by, or under arrangements made by, a person who provided or managed a school, and

(b) which provided residential accommodation for children for the purpose of or in connection with their attendance at the school,

“secure accommodation” means a residential establishment, other than a penal institution, provided for the purpose of restricting the liberty of children (whether or not the establishment was also provided in order to safeguard or promote the welfare or otherwise to protect or further the interests of children).

(2) In subsection (1), references to an establishment include references to—

(a) part of an establishment, and

(b) an establishment which forms part of another establishment.

**22 Meaning of “resident”**

- (1) A reference to being resident in a relevant care setting includes a reference to being absent from the care setting while under the care of—
  - (a) the person who provided residential accommodation for the child in the residential institution or other place, or
  - (b) a person authorised by that person.
- (2) For the purpose of subsection (1), it is immaterial whether the child was within or outside Scotland during the period of absence from the relevant care setting.

*Exceptions to eligibility***23 Power to create exceptions to eligibility**

- (1) The Scottish Ministers may by regulations provide that an application may not be made under section 18—
  - (a) if the person who carried out the abuse was of a specified description,
  - (b) if the abuse was carried out in circumstances of a specified description,
  - (c) if the person who was abused came to be resident in the relevant care setting concerned in specified circumstances, or
  - (d) if the person who was abused was resident in the relevant care setting concerned for a specified purpose.
- (2) In subsection (1), “specified” means specified in the regulations.

*Eligibility to apply for next of kin payments***24 Eligibility to apply for a next of kin payment**

- (1) A person may apply for a redress payment under section 18 which takes the form of a next of kin payment only if—
  - (a) the person meets the eligibility criteria to apply for a next of kin payment, or
  - (b) the person is granted permission to apply for a next of kin payment under section 25, or on a review under section 26, due to exceptional circumstances.
- (2) A person meets the eligibility criteria to apply for a next of kin payment where—
  - (a) the person is the specified next of kin of someone who died on or after 1 December 2004 (“the deceased person”),
  - (b) the deceased person would, if alive, have been eligible to apply for a redress payment under section 18 (other than for a next of kin payment), and
  - (c) where the deceased person died on or after the day section 18 came into force, the condition in subsection (3) is met.
- (3) The condition referred to in subsection (2)(c) is that—
  - (a) the deceased person had not applied for a fixed rate payment or an individually assessed payment, or
  - (b) the deceased person had applied for such a redress payment but—
    - (i) died while the application was ongoing,
    - (ii) where the application was for an individually assessed payment, had not previously been paid a fixed rate payment, and

- (iii) either a nominated beneficiary is not taking over, or has not taken over, the application by virtue of section 71 or, if the application was so taken over, it was brought to an end in the circumstances described in section 73(2) without the nominated beneficiary having accepted any redress payment in respect of the application.
- (4) For the purpose of subsection (3)(b)(i), whether an application is ongoing is to be determined in accordance with section 66(6) and (7).

## **25 Eligibility to apply for a next of kin payment: exceptional circumstances**

- (1) A person may apply for permission to apply for a next of kin payment due to exceptional circumstances where—
  - (a) the person is the specified next of kin of someone who died (“the deceased person”),
  - (b) the deceased person had applied for, and been offered, a fixed rate payment or an individually assessed payment but the offer was not accepted during the period it was valid and the deceased person subsequently died, and
  - (c) if the application was for an individually assessed payment, the deceased person had not previously been paid a fixed rate payment.
- (2) An application under subsection (1) must—
  - (a) be made to the Scottish Ministers,
  - (b) be made in such form, if any, as Ministers require,
  - (c) specify the exceptional circumstances due to which permission is being sought, and
  - (d) contain or be accompanied by any information the applicant considers relevant.
- (3) The Scottish Ministers must, as soon as reasonably practicable after receiving an application under subsection (1), provide the application, and any information accompanying it, to Redress Scotland.
- (4) The Scottish Ministers must publicise any requirements which are for the time being set under subsection (2)(b).
- (5) An application under subsection (1) is to be determined on behalf of Redress Scotland by a panel of at least 2 members of Redress Scotland appointed by the chairing member.
- (6) The procedure for determining an application under subsection (1) is to be determined by Redress Scotland.
- (7) The panel appointed under subsection (5) to determine the application may grant the applicant permission to apply for a next of kin payment only where it considers that there are exceptional circumstances which merit it.
- (8) Once the panel has determined whether or not to grant the applicant permission to apply for a next of kin payment due to exceptional circumstances, Redress Scotland must inform the Scottish Ministers who must, as soon as reasonably practicable—
  - (a) notify the applicant of the determination, and
  - (b) provide the applicant with a summary, provided by Redress Scotland, of the panel’s reasons for reaching that determination.

**26 Review of determination made under section 25**

- (1) Where an applicant is notified of a determination under section 25 that permission to apply for a next of kin payment due to exceptional circumstances is not being granted, the applicant may request a review of the determination.
- (2) A request for a review must—
  - (a) be made to the Scottish Ministers,
  - (b) be made before the end of the period of 8 weeks beginning with the date on which notice of the determination was received by the applicant,
  - (c) be made in such form, if any, as Ministers require,
  - (d) specify why a review is being requested, and
  - (e) contain or be accompanied by any information the applicant considers relevant.
- (3) The Scottish Ministers must, as soon as reasonably practicable after receiving a request for a review, provide the request, and any information accompanying it, to Redress Scotland.
- (4) A review may be conducted despite the request for it not being made within the period specified in subsection (2)(b) if Redress Scotland is satisfied that the applicant has a good reason for not requesting a review sooner.
- (5) The Scottish Ministers must publicise any requirements which are for the time being set under subsection (2)(c).
- (6) Sections 55, 56 and 59(1) to (5) apply for the purposes of a review under this section as they apply for the purposes of a review under section 54, subject to the modification that the reference in section 59(1) to a determination being made under section 57 is to be read as a reference to a determination being made under section 27.

**27 Outcome of a section 26 review**

- (1) On a review under section 26, the review panel appointed under section 55 to conduct it—
  - (a) must consider—
    - (i) whether the panel appointed under section 25(5) to determine whether or not to grant permission to apply for a next of kin payment due to exceptional circumstances ought to have reached a different determination, and
    - (ii) in a case where additional evidence is provided to or obtained by the review panel, whether the application ought to be determined differently as a result,
  - (b) may uphold or reverse the determination.
- (2) Once the review panel has conducted the review, Redress Scotland must inform the Scottish Ministers who must, as soon as reasonably practicable—
  - (a) notify the applicant of the review panel's determination, and
  - (b) provide the applicant with a summary, provided by Redress Scotland, of the review panel's reasons for reaching that determination.
- (3) The determination of the review panel under this section is final.

## **28      Meaning of “specified next of kin”**

- (1) In this Act, “specified next of kin”, in relation to a deceased person, means—
- (a) the person who, immediately before the death of the deceased person, was—
    - (i) the spouse or civil partner of the deceased person, or
    - (ii) the cohabitant of the deceased person,
  - (b) where the condition in subsection (3) is met, a child of the deceased person.
- (2) In a case where there is or was both a person falling within subsection (1)(a)(i) and a person falling within subsection (1)(a)(ii), subsection (1)(a) is to be read as including only the person who was the cohabitant of the deceased person.
- (3) The condition referred to in subsection (1)(b) is that—
- (a) there is nobody who falls within subsection (1)(a) (either because there was no such person or because the person has since died), and
  - (b) in a case where the person has since died, the person had not accepted an offer of a next of kin payment in respect of the deceased person.
- (4) In this section—
- “child of the deceased person” includes—
    - (a) a stepchild of the deceased person, and
    - (b) a person who was treated by the deceased person as the deceased person’s child,
  - “cohabitant of the deceased person” means a person who—
    - (a) was neither married to nor in a civil partnership with the deceased person, but
    - (b) was living with that person as if they were married to each other and had been so living for a period of at least 6 months.