
EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision in connection with the redress scheme established by the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 (asp 15) (“the Act”).

Section 75 of that Act sets out a procedure for the reconsideration of determinations made under Part 4 of the Act. Such reconsideration must be undertaken where Redress Scotland (the body established under the Act to make determinations in relation to the redress scheme) has, or the Scottish Ministers have, cause to believe that a determination under that Part (“the original determination”) may have been materially affected by an error (as defined in section 75(9)). A person who is notified of the outcome of the reconsideration under section 75 of the Act may request a review in accordance with section 76.

These Regulations make provision for the payment of fees and reimbursement of costs and expenses in connection with reconsiderations and reviews of reconsidered determinations, and for a person’s liability to repay to the Scottish Ministers any fees or expenses which are paid or reimbursed due to error. The Regulations also make provision in relation to the effect of any reconsideration or review on any offer of a redress payment which has already been made or accepted.

Regulation 2 requires the Scottish Ministers, on request, to pay the relevant sum (as defined in that regulation with reference to the schedule) to a solicitor in respect of the legal work reasonably undertaken in connection with a reconsideration or review.

Regulations 3 and 4 outline how and when a fee payment request can be made.

Regulation 5 requires Redress Scotland to give prior authorisation before legal work is undertaken in exceptional or unexpected circumstances.

Regulation 6 sets out a review process which can be invoked where a solicitor has not been given such prior authorisation or where Redress Scotland considers that a lower sum than that which a solicitor has specified as their likely fee is appropriate.

Regulation 7 makes provision in relation to assessment and notification of fee payment requests.

Regulation 8 provides that a solicitor may make a request for Redress Scotland to review its assessment of a fee payment request in certain circumstances, and sets out how and when this can be done.

Regulations 9 to 11 outline how a panel appointed to conduct a review of a fee payment request should be constituted, set out procedural requirements for that panel and make provision for the panel’s powers in determining the outcome of a fee review.

Regulation 12 enables a request for a review of the assessment of a fee payment request to be withdrawn at any time prior to its consideration by the review panel of Redress Scotland.

Regulation 13 requires the Scottish Ministers to reimburse costs and expenses reasonably incurred by or in respect of a relevant person (as defined in regulation 1) in connection with a reconsideration under section 75 of the Act or a review under section 76 of the Act. The regulation sets out what can be claimed for, how a request for reimbursement can be made and provides that, on receipt of a request for reimbursement, the Scottish Ministers must assess it as soon as practicable.

Regulations 14 to 17 make provision for the review of decisions by the Scottish Ministers in relation to reimbursement requests, and the timescales and procedures for such review.

Draft Legislation: This is a draft item of legislation. This draft has since been made as a Scottish Statutory Instrument: *The Redress for Survivors (Historical Child Abuse in Care) (Reconsideration and Review of Determinations) (Scotland) Regulations 2022 No. 44*

Regulation 18 enables a request for a review of a fee payment request to be withdrawn at any time prior to its consideration by the review panel of Redress Scotland.

Regulation 19 provides that a person is liable to pay the Scottish Ministers any sum paid or costs and expenses reimbursed under the Regulations insofar as the payment or reimbursement was due to a “relevant error” (as defined in regulation 19(4)).

The definition of “relevant error” includes an error which the Scottish Ministers consider led to a decision to make a payment or to reimburse costs and expenses under the Regulations being made incorrectly, or correctly but on the basis of incorrect or misleading information, in a way which materially affected the decision. Regulation 20 sets out the process that must be followed where the Scottish Ministers or Redress Scotland have cause to believe that this kind of error – defined in regulation 20(9)(b) as a “decision error” - has occurred.

Regulation 21 makes provision for review of the outcome of the regulation 20 process. A request for such a review can be withdrawn in accordance with regulation 22 at any time prior to the review determination being made.

Regulation 23 amends provisions in section 46 of the Act to ensure that they operate effectively where entitlement to a redress payment arises following a reconsideration under section 75 or a review under section 76. In these cases, the effective date of the waiver will be the date on which it should have been determined that the applicant was eligible for a redress payment, had the original determination not been materially affected by an error.

Regulation 24 makes amendments to section 75 of the Act (reconsideration of determination where possible material error) in consequence of the new provisions inserted into the Act by regulation 25.

Regulation 25 inserts new sections 75A to 75F into the Act.

The effect of new section 75A is that where an offer of a redress payment which is still valid has not been accepted when the underlying determination is referred for reconsideration under section 75(1) of the Act, the offer is suspended. The offer is revived if, following the reconsideration, it is determined under section 75(5)(a) that a determination referred for reconsideration was not materially affected by error. Sections 49 to 53 or, as the case may be, sections 50 to 58, apply to the revived offer with certain modifications.

New section 75A of the Act also makes provision for what happens when a request for a review has been made, but not determined, in respect of a determination which is referred for reconsideration under section 75(1).

New section 75B of the Act applies where a determination is referred for reconsideration under section 75(1) if an offer has been accepted, but payment has not been made (in whole or in part). The effect of the new section is that any entitlement to the payment under section 50(2) of the Act is suspended following referral for reconsideration, but is restored where it is determined under section 75(5)(a) that the original determination was not materially affected by an error.

New section 75C provides that a waiver signed and returned in accordance with section 46(1) of the Act in respect of an offer made under the original determination is of no effect in three scenarios. Those are where the reconsideration panel determines, under section 75(5)(b) of the Act, that a person is not eligible for a redress payment; they are so eligible, but no payment is to be offered; or that a person is precluded from being offered a redress payment.

New section 75D makes provision for scenarios where a reconsideration panel determines under section 75(5)(b) that an offer of a redress payment is to be made, both where a previous offer was not made as a result of the original determination and where such an offer was made, but was not yet accepted when the determination was referred for reconsideration. In these cases, the reconsideration panel will make a fresh offer to a person and sections 46, 47, 49 and 53 of the Act will apply to that offer as they apply to an offer made under a determination under section 36. New section 75D(2)(b) and (3) make certain modifications to those sections so that they operate effectively in the context of a fresh offer made following a review. The options available to a person receiving such an offer

are to accept it, reject it or request a review of the reconsideration outcome, in accordance with section 76 of the Act.

New section 75E applies in scenarios where three conditions are met. The first is that a reconsideration panel determines under section 75(5)(b) that an offer of a redress payment is to be made. The second is that an offer of a redress payment was made under the original determination reconsidered by a reconsideration panel (“the original offer.”) The third is that, at the point the original determination was referred for reconsideration, the original offer had been accepted.

There are two possible outcomes where these three conditions are met. First, the reconsideration panel may determine that the same amount as the original offer is to be offered to a relevant person following reconsideration. In this case, section 75E(2) and (3) will apply, to the effect that the new offer will be deemed to be accepted and the previous waiver signed and returned to accept it previous offer will remain in place. Second, the reconsideration panel may determine that a higher or lower offer than the original offer is to be given to a relevant person. In this case, section 75E(4) to (8) will apply, with the effect that the relevant person can accept it, reject it or request a review of the offer in accordance with section 76. If none of these things is done within the period for which the offer is valid, the relevant person will be deemed to have accepted the offer. By virtue of new section 75E(6) of the Act, where that person accepts the new offer or is treated as having accepted it, any waiver signed and returned in accordance with section 46(1) in respect of the original offer continues to have effect. Under new section 75E(7) of the Act, if a relevant person rejects the new offer, any waiver signed and returned in accordance with section 46(1) is of no effect. Section 75(8) clarifies that this does not, however, apply in a case where the original offer relates to an application for an individually assessed payment made by virtue of section 30(2) or, as the case may be, (3) of the Act and the waiver signed is in relation to an offer of a redress payment made previously to or in respect of the applicant.

Section 75F applies when an original offer of a redress payment has been accepted and payment in respect of it has been made (in whole or in part); a reconsideration panel considers that a new offer is to be made; and a relevant person rejects that new offer. In this scenario, a person is liable to pay the Scottish Ministers the value of any redress payment paid in respect of the original offer (whether or not that person is also liable to pay any amount by virtue of section 74).

Regulation 26 amends section 77 of the Act to make provision about the information that Redress Scotland should give a person when a review under section 76 has been completed. Regulation 26 also inserts new provisions into section 77 of the Act to provide for what should happen when a review panel under section 76 determines that an offer of a redress payment should be made.

Regulation 27 inserts new sections 77A and 77B into the Act. Section 77A applies where a request for review is made in relation to a determination under section 75(5)(b) under which an offer of payment was made and that review is withdrawn. In this case, the offer is extended by the number of days in the period beginning on the date on which the request for a review was made, and ending on the date on which the request was withdrawn. Section 77B applies where an offer which was previously accepted has been replaced with a new offer following a reconsideration or review and a person decides to reject the new offer. In this case, the person is liable to pay the Scottish Ministers the value of any redress payment paid in respect of the original offer.

Impact assessments have been prepared in relation to the Act and instruments made under it and will be published online at www.gov.scot.