

Payments Materially Affected by Error - SG/2023/45

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Status of this Guidance

This guidance is issued under section 106 of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 (“the Act”) insofar as it relates to the operation of the Act. This guidance refers to the [The Redress for Survivors \(Historical Child Abuse in Care\) \(Payments Materially Affected by Error\) \(Scotland\) Regulations 2021 \(legislation.gov.uk\)](#) (“the Payment Regulations”) and the Redress for Survivors (Historical Child Abuse in Care) (Reimbursement of Costs and Expenses) (Scotland) Regulations 2021 (“the Reimbursement Regulations”).

1. This guidance is issued to all those with an interest in connection with the making, or consideration of an application for redress. This includes applicants to the redress scheme, their legal representatives, professional service providers and Redress Scotland, who must have regard to the guidance (as per section 106(2) of the Act). The reconsideration review process outlined in this guidance applies to payments, other than redress payments, which are made in error. For example, payments made in respect of specified reports, payments made in relation to specified support, payments made by way of reimbursement of specified costs and expenses and payments of specified fees for legal work in making a redress application or in connection with a proposed application.
2. To be clear, redress payments received by redress applicants under the Act are not subject to the reconsideration process under section 98.
3. This guidance covers:
 - the legislative background and purpose of the recovery of payments, other than redress payments, made in error;
 - the circumstances where payments are considered to have been materially affected by error;
 - liability for recovery of payments, other than redress payments, affected by error;
 - the reconsideration process to be followed when it is considered that a payment, other than a redress payment, has been affected by error;
 - to set out the review process when the person disagrees with the decision made in the reconsideration;
 - to explain the right of withdrawal from review.

Legislative background

4. Section 97 of the Act allows for the recovery of payments made in connection with redress applications, other than the redress payments themselves (which are covered by section 74 of the Act), where those payments were made due to a material error.

This list is non-exhaustive, but could include payments for

- expert reports;
 - payments made by way of reimbursement of costs and expenses;
 - payment of fees for legal work in making a redress application or in connection with a proposed application.
5. Section 98 of the Act allows Scottish Ministers to make regulations about or in connection with the consideration of whether decisions to make payments (other than redress payments) were materially affected by error, and recovery powers in respect of them. [The Redress for Survivors \(Historical Child Abuse in Care\) \(Payments Materially Affected by Error\) \(Scotland\) Regulations 2021 \(legislation.gov.uk\)](#) were made under section 98 of the Act.

Circumstances of Material Error

- A material error could arise in relation to:
 - an error in the making of the payment (e.g. the incorrect amount was paid);
 - an error in the decision to make the payment, including where the decision was based on incorrect or misleading information (e.g. a fraudulent invoice where services were not actually provided).

Liability for Repayment to Scottish Ministers

6. The provisions of the Act and subsequent Regulations should instil confidence in the processes and mechanisms which are in place to deal with situations of error or fraud.
7. For the purposes of the Act and the Payment Regulations, a “relevant person” is either: a person to whom a relevant payment was made; or a person who received payment in respect of a report, support or, as the case

may be, the matter in relation to which costs or expenses were reimbursed as part of a relevant payment.

8. Section 97(2) of the Act outlines the types of “relevant payment” which could be subject to recovery if materially affected by error, namely: payments in respect of a report commissioned by Scottish Ministers; the provision of support; the reimbursement of costs and expenses occurred in connection with the making of an application; and fees for legal work. However, payments made due to error that fall under any of these categories cannot be recovered from the applicant to whose redress application they relate (who will not have been the real beneficiary of the payment) (section 75(6)).
9. A relevant person is liable to pay Scottish Ministers the erroneous portion of any such payment (section 97(4)).
10. An “error” includes an error when making the payment in a way which materially affected the decision. It also includes an error which Scottish Ministers consider led to the decision to make the payment being made incorrectly, or correctly but on the basis of incorrect or misleading information, in a way which materially affected the decision.
11. Under section 83(1) of the Act, “reports” include any necessary reports commissioned or arranged by Scottish Ministers with the consent of the applicant, for the purpose of progressing or determining an application or for review and reconsideration purposes.
12. In the context of the scheme, “support” includes emotional, psychological, or practical support as Scottish Ministers consider necessary given the person’s needs, in connection with deciding whether to make an application or with the making of an application (section 89(2)). It can, in certain circumstances, also include emotional or psychological support in connection with the abuse to which an application relates, given the person’s needs, and for such period as they consider appropriate (section 90(5)).
13. In relation to costs and expenses, Scottish Ministers have made regulations as required by section 91: [the Redress for Survivors \(Historical Child Abuse in Care\) \(Reimbursement of Costs and Expenses\) \(Scotland\) Regulations 2021](#).
14. The costs and expenses which may have been incurred could have been in relation to:
 - a) obtaining information or evidence in connection with an application,

- b) verifying such information or evidence for the purposes of an application,
- c) the reasonable travel, accommodation, subsistence and care costs (for the care of children or other dependants) associated with an applicant (and one person accompanying the applicant) who has been invited to make oral representations to Redress Scotland,
- d) any other cost and expenses which Scottish Ministers are satisfied was reasonably incurred in connection with the application, for example:
 - i. the cost of an applicant instructing or attending a psychological/medical assessment in support of their application,
 - ii. the cost of translation services or other services to assist an applicant requiring support for the purposes of applying to the scheme,
 - iii. the cost of bank charges where the applicant has a bank account outside of the UK.

15. Under the Act, “legal work” includes legal work reasonably carried out in relation to a proposed application or in the making of an application for redress. Scottish Ministers have a duty to pay certain fees for such work, including, where applicable, in exceptional or unexpected circumstances.

16. Regulation 2(1) of the Payments Regulations sets out that the decision on whether to recover payments materially affected by error lies with Scottish Ministers and Redress Scotland. There may be some circumstances in which, following full consideration, it would not be appropriate to seek recovery.

17. Repayment arrangements will be made in consultation with the relevant person who received the payment in error. The amount to be paid will be the full amount, or the difference between what was paid and what should have been paid had the error not occurred. As such, if for example £530 is paid in error instead of £350, an obligation to repay only arises in respect of the overpaid amount (i.e. £180).

Reconsideration process – Scottish Ministers

18. Regulation 2 of the Payment Regulations sets out the process for the reconsideration of a decision to make a payment which may have been materially affected by error.

19. Redress Scotland or Scottish Ministers, where they have cause to believe that a decision to make a relevant payment may have been affected by error, may

refer the decision for reconsideration (regardless of whether or not the payment has been made).

20. The consequences of such a process could include that a person who has received or was due to receive a relevant payment, may be liable to repay Scottish Ministers to the extent that they have been paid in error following a reconsideration or review. This may apply to the payment in whole or in part depending on the circumstances.
21. As soon as reasonably practicable after receiving a request for a review, Scottish Ministers must provide the request, and any information accompanying it to Redress Scotland.
22. Scottish Ministers must, as soon as reasonably practicable, notify the relevant person in writing that the decision is being reconsidered, and of the reasons provided by Redress Scotland (or, as the case may be, Scottish Ministers) for the reconsideration. Scottish Ministers must also provide the relevant person with information about the implications of the decision being reconsidered.
23. Notification to the relevant person is made regardless of whether or not the payment in question has been made.
24. The relevant person has a period of at least 8 weeks, beginning with the date on which the notice of the reconsideration was received by the person, to make written representations in connection with the reconsideration. A reconsideration panel may allow longer than 8 weeks for the relevant person to make written representations if satisfied that the person had a good reason for not making those representations sooner. This may include circumstances where the person was seriously ill or had personal circumstances which prevented them from making a request within the prescribed time limit. Personal circumstances would not extend to pressure of business or other business related matters.

Reconsideration process – Redress Scotland

25. After the period for the relevant person to make representations has ended, the panel will consider all available information to determine if the original determination was affected by error. The panel must determine whether the original decision was affected by error, and, if it was so affected, redetermine it on the basis of how it would have been decided had the error not been made.

26. The reconsideration will be determined on behalf of Redress Scotland by a panel of at least two members of Redress Scotland who are appointed by the chairing member.
27. Upon Redress Scotland reaching its determination, Redress Scotland must inform Scottish Ministers who must, as soon as reasonably practicable, notify the relevant person of its decision in writing and provide a brief account of the reasons why the determination has been reached.

Rights of Review

28. Relevant persons who are notified of the outcome of a reconsideration under the Payment Regulations may request a review of it. A request for a review must be made in writing to Scottish Ministers and be made by the end of the period of 8 weeks beginning with the date on which notice of the outcome was received by the relevant person. The request for review must also specify why a review is being requested and contain any information the person requesting the review considers relevant.
29. Given the reconsideration relates to a professional business related payment, the relevant person is not entitled to access any of the services available in connection with support, legal advice and reimbursement of costs and expenses. These services are reserved for applicants to the scheme only.
30. The person may request a review of the decision to the extent that a person is not entitled to reimbursement of a cost or expense or that the cost and expense to be reimbursed is less than the sum requested.
31. Where the named person fails to submit a request for a review within this timeframe, a review may still be conducted despite the request for it not being made within the 8 weeks period mentioned in regulation 3(2)(b) of the Payment Regulations. This may occur where Redress Scotland is satisfied that the person had good reason for not requesting a review sooner. This may include circumstances where the person was seriously ill or had personal circumstances which prevented them from making a request within the prescribed time limit. This information will be used by Redress Scotland in determining whether the review will be permitted to go ahead outside of the normal timeframe.
32. The review will be carried out by a review panel of at least two members of Redress Scotland appointed by the chairing member and must not include any member of the reconsideration panel which determined the outcome which is the subject of a request for review. The review will be based on the evidence originally considered by Redress Scotland when assessing the

reconsideration, and any further evidence provided to or obtained by the review panel.

33. The review panel will not include any panel members which determined the reconsideration now subject to review.
34. Under section 10 of the Act, Scottish Ministers must provide such administrative support to Redress Scotland as they consider necessary to enable Redress Scotland to perform the functions conferred on it under or by virtue of the Act. Redress Scotland may, from time to time, ask Scottish Ministers to request further information from the relevant person in order to support a fair and thorough examination of the review.
35. The review panel may uphold, reverse or vary any part of the outcome of the reconsideration (whether the request for a review relates to that part of it or not).
36. Once the review panel has conducted the review, Redress Scotland must inform Scottish Ministers who must, as soon as reasonably practicable, notify the person who requested the review of the review panel's determination. Scottish Ministers must also provide the person with a summary, provided by Redress Scotland, of the review panel's reasons for reaching that determination.
37. The determination of the review panel under regulation 4 of the Payment Regulations is final. However, this does not prevent the determination of the review panel being the subject of a referral under regulation 2 of the Payment Regulations provided that the referral relates to a different error from the one which previously led to the review.
38. At any point prior to the determination of the review, a relevant person can inform Scottish Ministers, in writing, that they wish to withdraw their request for a review.
39. Scottish Ministers must inform Redress Scotland of the request to withdraw the request for review and all consideration of the request for review must cease.
40. Where a request for review is withdrawn it is not possible to reinstate the request at a later date. The exception to this is when the further request is made for a different reason.



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