

Redress For Survivors (Historical Child Abuse In Care) (Scotland) Act 2021: Statutory Guidance - Eligibility

December 2021



Scottish Government
Riaghaltas na h-Alba
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Eligibility

Status of this Guidance

1. This guidance is issued under section 106 of the Redress for Survivors (Historical Abuse in Care) (Scotland) Act 2021 (“the Act”).
2. This guidance applies 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 and Redress Scotland, who must have regard to the guidance.
3. This guidance covers:
 - The meaning of “child”
 - The meaning of “abuse”, including the treatment of peer abuse and corporal punishment under the scheme
 - The meaning of “relevant care setting”
 - The treatment of short-term care which was for the purposes of respite or holiday care under the scheme.

Introduction

4. Part 3 of the Act sets out the eligibility requirements for the redress scheme. It is in respect of people who were abused while they were a child and resident in a relevant care setting in Scotland. In accordance with section 18(2), the abuse must have taken place before 1 December 2004.

Meaning of “child”

5. Section 18(3) of the Act defines a “child” to mean a person under the age of 18 years. Therefore, to be eligible, abuse must have occurred before 1 December 2004 to a person who was under 18 at that time.

Meaning of “abuse”

General

6. “Abuse” is defined in section 19(1) of the Act as including sexual abuse, physical abuse, emotional abuse and abuse that takes the form of neglect. We set out here further guidance on the meaning of each of these terms¹.

¹ This further guidance on the meaning of these terms is based on the National Guidance for Child protection in Scotland 2021 ([national-guidance-child-protection-scotland-2021 \(1\).pdf](#)), but has been subject to appropriate modification to reflect the context of the redress scheme.

Physical abuse

7. Physical abuse is the causing of physical harm to a child or young person. Physical abuse may involve hitting, shaking, throwing, poisoning, burning or scalding, drowning or suffocating. Physical harm may also be caused when a parent or carer feigns the symptoms of, or deliberately causes, ill health to a child they are looking after. Other examples may include:

- unlawful corporal punishment (see guidance below in relation to section 19(2) of the Act);
- forced labour beyond a child's physical capacity and/or in extreme conditions.

Emotional abuse

8. Emotional abuse is persistent emotional ill treatment that has - or is likely to have - severe and persistent adverse effects on a child's emotional development. "Persistent" means there is a continuous or intermittent pattern which has caused, or is likely to cause, significant harm. Emotional abuse is present to some extent in all types of ill treatment of a child, but it can also occur independently of other forms of abuse. It may involve:

- conveying to a child that they are worthless or unloved, inadequate or valued only in so far as they meet the needs of another person;
- exploitation or corruption of a child, or the imposition of demands inappropriate for their age or stage of development;
- repeated silencing, ridiculing or intimidation;
- verbal abuse;
- living in constant fear and alarm;
- being told inaccurate information about family members;
- acts of degradation;
- humiliation – including around basic needs – bedwetting and food;
- severing contact with family;
- being forced to engage in abuse of others/watch others being abused;
- isolation;
- being moved without any explanation;
- religion – either being forced to adopt another religion or being denied access to your own religion;
- racial abuse – by peers and adults;
- abuse specific to the travelling community, i.e. denial of culture;
- criminal exploitation – where a child is coerced, controlled, or manipulated into any criminal activity.

Sexual abuse

9. Sexual abuse is an act that involves a child in any activity for the sexual gratification of another person, whether or not it is claimed that the child either consented or assented. Sexual abuse involves forcing or enticing a child to take part

in sexual activities, whether or not the child is aware of what is happening. The activities may involve physical contact, including penetrative or non-penetrative acts. They may include non-contact activities, such as involving children in looking at or in the production of indecent images, in watching sexual activities, using sexual language towards a child, or encouraging children to behave in sexually inappropriate ways.

10. Child sexual exploitation is a form of child sexual abuse. It occurs where an individual or group takes advantage of an imbalance of power to coerce, manipulate or deceive a child into sexual activity in exchange for something the victim needs or wants, and/or for the financial advantage or increased status of the perpetrator or facilitator. The victim may have been sexually exploited even if the sexual activity appears consensual. Child sexual exploitation does not always involve physical contact. Children who are trafficked across borders or within the UK may be at particular risk of sexual abuse.

Neglect

11. Neglect consists in a persistent failure to meet a child's basic physical and/or psychological needs, which is likely to result in the serious impairment of the child's health or development. "Persistent" means there is a pattern which may be continuous or intermittent which has caused, or is likely to cause significant harm. However, single instances of neglectful behaviour can cause significant harm, particularly by a person in a position of responsibility.

12. It may involve a carer failing to:

- provide adequate food, shelter and clothing;
- protect a child from physical or emotional harm or danger;
- ensure adequate supervision;
- ensure a child receives an education;
- ensure access to appropriate medical care or treatment;
- respond to a child's essential emotional needs;
- respond appropriately (by omission or commission) taking account of the age, stage and basic developmental needs of a child in relation to food, education, bedwetting and physical or emotional safety.

13. Neglect may also result in faltering growth. Malnutrition, lack of nurturing and lack of stimulation can lead to serious long-term effects such as greater susceptibility to serious childhood illnesses and reduction in potential stature. For very young children the impact could quickly become life-threatening. Chronic physical and emotional neglect may also have a significant impact on teenagers.

Peer Abuse

14. “Peer-on-peer abuse” may be used to refer to any form of physical, sexual, emotional and financial abuse, and coercive control, by peers who are the same or similar age.

15. Children can experience a range of unacceptable behaviour from peers and the impact can extend from upsetting and worrying through to distressing behaviour which may result in significant harm. Where the behaviour amounts to “abuse” within the meaning of the Act (see definitions above) it will be eligible under the scheme where it occurred whilst a person was resident as a child in a relevant care setting before 1 December 2004.

16. A distinction can, however, be drawn between “abusive” acts and the sorts of incidents and behaviours that can commonly occur between children and young people of a similar age or developmental stage, for example, a one-off fight that did not result in significant injury or harm. The latter example would not ordinarily constitute “abuse”. If however there were other features present (such as a large difference in age or developmental stage between those concerned, or the encouragement of or collusion in such behaviour by the institution in question or its employees, perhaps by supporting the children that carried out the acts in question), it is possible that such behaviour could, alongside those features, constitute abuse within the meaning of the Act. Moreover, where the behaviour formed part of a sustained course of conduct it would also be likely to amount to “abuse”.

Corporal punishment

17. Section 19(2) of the Act provides that “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:

- excessive, arbitrary or cruel;
- administered for an improper purpose; or
- not so permitted for another reason.

18. As noted in relevant findings of the Scottish Child Abuse Inquiry, at times “the corporal punishment inflicted was above and beyond what would even have been acceptable in a school setting, approved school setting or family setting”². Such cases would in light of section 19(2) of the Act constitute “abuse” for the purposes of the scheme.

19. However, where corporal punishment was administered in a way that was permitted under or by virtue of any regulations, enactment or rule of law in force at the time it will not be considered “abuse” for the purposes of the scheme.

² For example, Case Study no. 2 The provision of residential care for children in Scotland by the Sisters of Nazareth between 1933 and 1984 in the Nazareth Houses in Aberdeen, Cardonald, Lasswade, and Kilmarnock Evidential Hearings: page 23

Meaning of “relevant care setting”³

General

20. Section 20 of the Act defines “relevant care setting” to mean either:

- 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, or
- a place, other than a residential institution, in which a child resided while being boarded-out or fostered. It should be noted that this does not include private arrangements (i.e. those which were not instigated primarily as a result of arrangements made in exercise of public functions) or situations where a child was boarded-out or fostered with a relative or guardian.

21. “Residential institution” is in turn defined to mean a children’s home, a penal institution, a residential care facility, school-related accommodation, and secure accommodation. Each of these individual categories is then further defined in broad terms in section 21, in recognition of the fact that the terminology used for different types of accommodation may not have been applied consistently, and may also have changed over the period to which the scheme applies.

22. For some categories of setting, the circumstances in which a child came to reside there will affect eligibility, to achieve consistency with the underlying purposes of the scheme. Where this is the case, this is made clear below.

³ The Policy Memorandum for the Bill explains the underlying rationale for the definition of “relevant care setting” as follows:

“81. In broad terms, the scheme aims to cover two categories of care setting in Scotland. The first category concerns children who were “in care” because their families (including extended families) were unable to look after them on a day to day basis and, in consequence, the children required to be placed in an institutional care setting (for example, residence in a children’s home provided by a public authority or voluntary organisation) or other public care setting (for example, residence with foster carers). The second category concerns children who were subject to some form of intervention by a body exercising public functions (for example, where a court order placed a child in an approved school, or arrangements were made by a local or education authority in relation to the boarding of children in schools not managed by that authority and the authority met the costs of that).”

82. Consistent with that aim, the scheme is not therefore intended to cover arrangements where a child resided with their family or extended family (such as, for example, kinship care arrangements), nor private arrangements by which a child came to reside somewhere other than with a family or extended family member and which were not instigated primarily as a result of arrangements made in exercise of public functions (such as, for example, private fostering or private healthcare arrangements). In this context, “public functions” should be understood as including functions exercised by both public authorities and voluntary organisations 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. The inclusion of such voluntary organisations reflects the evolution of “the state” over the period in question”.

Types of institution

23. “Children’s home”: this means a residential establishment which provided accommodation for children in order to safeguard and promote their welfare or otherwise to protect or further their interests. It should be noted that the circumstances which led to a child or young person being accommodated in an children’s home are not relevant for the purposes of the scheme, and eligibility is not affected by having been placed on a voluntary basis by a parent or guardian.

24. “Penal institution”: this 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). It includes prisons, remand centres, young offenders’ institutions, detention centres, and borstals. We do not consider that very short term detention in police cells would be covered however, as the redress scheme is for abuse which occurred while a person was “resident” in a relevant care setting, and overnight stays in a police cell for example would not meet that criterion.

25. “Residential care facility”: this means an establishment, including a hospital, 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. The following additional criteria as regards eligibility should be noted however:

- the child must have resided under arrangements made by or on behalf of a public authority or 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. Care arranged privately by parents is therefore not included;
- the establishment must have provided “long-term” residential accommodation. This therefore does not include, for example, hospitals providing short-term care for the purposes of medical or surgical treatment. See further discussion on this below.

26. “School-related accommodation”: this means an establishment providing residential accommodation for children for the purposes of, or in connection with, their attendance at school. It includes state-funded school hostels and other accommodation provided in connection with attendance at a public (i.e. a state) school.

27. However, the term “school-related accommodation” only includes accommodation related to attendance at a private school such as an independent or grant-aided school (including a grant-aided special school) in specific circumstances, namely where the child’s attendance at the school was arranged and paid for in its entirety by or on behalf of a local or education authority, or 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.

28. The term “school-related accommodation” does not therefore include those who resided in a private boarding school in the following circumstances:

- where the child’s attendance and residence at the school was arranged and paid for in its entirety by their parents or guardian;
- where the child’s attendance and residence at the school was arranged and paid for in full by an organisation other than a local or education authority, or 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;
- where the child was in receipt of a bursary or other type of financial assistance for the purpose of attendance and residence at the school, from a person other than a local or education authority or 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 (whether this covered the cost of such attendance or residence in whole or in part).

29. “Secure accommodation”: this is defined to mean 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).

30. In essence, the scheme focuses on abuse in care settings where a public authority or a voluntary organisation exercising public functions, rather than the child’s family, became primarily responsible for the day to day care of the child.

Short-term care

Short term care for the purposes of medical or surgical treatment

31. As noted above, the definition of “residential care facility” only applies to establishments which provided long-term residential accommodation, and does not include, for example, hospitals providing short-term care for the purposes of medical or surgical treatment. These types of circumstances were intended to be temporary in nature and with no intention that responsibility for the day-to-day care of the child would be taken over on a long-term basis by the establishment rather than the child’s family.

Short-term care for the purposes of respite or holiday care

32. Regulations have been made by the Scottish Ministers under section 23 of the Act to exclude certain situations from the scheme, to the extent that they were intended to be temporary in nature. They provide that an application for a redress payment may not be made in respect of abuse that occurred when a person was

resident in a relevant care setting for the purpose of being provided with short-term respite or holiday care. This must have been under arrangements made between their parent or guardian and another person. Whilst the abuse of children in all circumstances and settings is wrong and harmful, the exclusion of those abused in short-term respite or holiday care is in-keeping with the core purpose of the redress scheme, which is primarily for those vulnerable children who were in long-term care, often isolated with limited or no contact with their families.

33. In the case of short-term respite or holiday care however, such arrangements were intended to be temporary, and there was no intention at the time of the placement that responsibility for the day-to-day care of the child would be taken over on a long-term basis by another carer, rather than the child's family.

34. In assessing whether a placement was "short-term" or not, the focus should be on the underlying purpose of the placement at the time it came about, and all relevant factual circumstances will need to be taken into account.

35. By way of example, we envisage that the following types of situation would not fall within the scheme:

- stays in a convalescence home for the purpose of recovering from surgery or illness;
- stays to provide short-term respite and support to both a child and their family;
- stays in the types of "holiday" homes that were provided to give children from inner cities a short break in a healthier environment, or again to provide short-term respite and support to the child and their family.

36. Equally, where a child spent a number of consecutive periods in short-term respite or holiday care or was subject to regularly recurring periods of such care, this would not fall within the scheme, if there was no intention that responsibility for the day-to-day care of the child would be taken over on a long-term basis by another carer rather than the child's family.

37. In some situations care could have become long-term (and therefore potentially eligible for the scheme), even where it had been intended to be short-term at the outset. Each application will be considered on its own merits, having particular regard to the purpose of the stay in question.

38. Where the information provided in an application is unclear or indicates that abuse may have occurred under arrangements which are excluded, further investigation may be required and further information is likely to be sought from the applicant.

39. As a final point it should be noted that a person who experienced abuse in these circumstances is not precluded from applying to the scheme if they also experienced abuse whilst resident in a relevant care setting in circumstances which are eligible for the scheme.

Abuse away from the care setting

40. Section 22 of the Act provides that a reference to a person being “resident” in a relevant care setting includes a reference to being absent from that setting if they remained under the care of the person who provided the residential accommodation or someone authorised by that person.

41. This ensures that children who were resident in a relevant care setting but who were abused outwith that setting (for example on a day or holiday excursion) would be eligible to apply to the redress scheme in respect of that abuse. It does not matter whether the child was within or outside Scotland during the period of absence from the relevant care setting.



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This publication is available at www.gov.scot

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The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-80201-657-4 (web only)

Published by The Scottish Government, December 2021

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS977006 (12/21)

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