POLICY NOTE

THE FIRST-TIER TRIBUNAL FOR SCOTLAND (ALLOCATION OF FUNCTIONS TO THE SOCIAL SECURITY CHAMBER) REGULATIONS 2018

SSI 2018/xxx

The above instrument was made in exercise of the power conferred by section 20(2) of the Tribunals (Scotland) Act 2014 (the 2014 Act). The instrument is subject to the affirmative procedure. In accordance with section 11(1) of that Act, it has been approved by the Lord President.

Policy Objectives

Background

The Social Security (Scotland) Act 2018 (the 2018 Act) allows Scottish Ministers to deliver new, improved benefits, to replace the 11 Department for Work and Pensions benefits for which legislative competence has been transferred to the Scottish Parliament. The Scottish Ministers will deliver those benefits in a phased manner. The First Minister announced on 4 September in the Programme for Government that the first full benefit to be delivered by Social Security Scotland (the agency) will be the Best Start Grant (BSG). The agency will start making payments for BSG by this Christmas.

The Scottish Government has made clear its intention is to take a different approach that is rights-based and to build a social security system that is founded on the principles of fairness, dignity and respect ensuring those with lived experience of the current system co-design the new social security system in Scotland. These ambitions are at the heart of everything the new system will do, including how the tribunal system for social security appeals will operate.

The Scottish Government has always been clear that people will have a right to challenge if they believe that the agency has not made the right decision and that the process for challenging a decision is as simple and straight forward as possible.

To ensure an individual is able to challenge the decision of the agency through an independent institution, Scottish Ministers decided that a new chamber of the First-tier Tribunal for Scotland will be created to hear appeals in relation to social security cases in the Scottish system. This was decided against the background of discussions that are currently taking place with the UK Government on the transfer of responsibility for the management and operation of reserved tribunals, including the Social Security and Child Support Tribunal, in terns of the changes to the devolution settlement brought about by the Scotland Act 2016. The transfer will not take place prior to the first wave of social security benefits being delivered by the agency and it has therefore been necessary to set up a new chamber of the First-tier Tribunal for Scotland and ensure necessary provisions are made for the Upper Tribunal for Scotland in relation to social security cases from First-tier Tribunbal.

What the Social Security Chamber will do

The Social Security Chamber will have responsibility for dealing with appeals brought against determinations of entitlement under the 2018 Act. These will include appeals against process decisions. If Regulations are made to provide for top up of reserved benefits, and they carry a right of appeal, the chamber will also deal with those appeals. The chamber will have the power to look at all aspects of a determination rather than just the particular aspects that are the subject of the appeal. It may also take account of the jurisprudence of the reserved Social Entitlement Chamber, where all social security appeals are dealt with at present.

Temporary chamber president and disapplication of section 21(2) of the 2014 Act

The Allocation of Functions Regulations include a transitional provision excluding the application of section 21(2) of the 2014 Act on a temporary basis. Section 21(2) prevents the same person from being president of more than one chamber of the First-tier Tribunal at the same time. The purpose of the exclusion is to allow an existing chamber president to take on the role of temporary president of the new chamber. This is the product of further thought and discussion during the consultation period. The transitional provision was not included in the draft regulations as consulted upon.

It is anticipated that the temporary president will be in place for the duration of delivery of the first wave of benefits. A dedicated chamber president will be appointed in time for when the second wave of benefits, including disability benefits, begin to be delivered. This is a sensible and proportionate approach, given that relatively low numbers of appeals are anticipated in relation to the first wave of benefits. It is preferable to treat the chamber as carrying a temporary vacancy for the period when only wave 1 benefits are being delivered, and so put in place a temporary chamber president, rather than appoint a chamber president who will initially be significantly under deployed. It will also enable the expertise of an existing chamber president to be brought to the newly established chamber.

Consultation

Section 11(1) of the 2014 Act makes clear that, as well as gaining the approval of the Lord President, the Scottish Ministers must consult such other persons as they consider appropriate, before Regulations under section 20(2) are made.

A consultation process was undertaken in relation to the draft Regulations between January and July 2018. This included a full public consultation and consultation with senior members of the judiciary that the 2014 Act requires. In addition, the Social Security Committee of the Scottish Parliament undertook an evidence gathering session with key stakeholders. The full public consultation lasted for 12 weeks and took place from 22 January to 16 April 2018. There were 25 responses to the full public consultation, 4 from individuals and 21 from representative organisations. The independent analysis of the responses was undertaken by KSO Research. Where permission was received, individual responses were published online on the Citizen Space website at:
https://consult.gov.scot/social-security/provision-for-social-security-appeals/consultation/published_select_respondent

The full Scottish Government response to the consultation is available at www.gov.scot/ISBN/9781787812123

An emerging theme arising from consultation responses was the need to ensure that prospective appellants were aware of the possibility that all aspects of a determination would be considered, in looking at an appeal, rather than just the particular aspects which were the focus of the appeal. The thinking behind this was the need for awareness that they could end up with a less favourable result than the one with which they started off. This is, however, a matter for operational guidance, rather than the face of the Regulations.

Another key theme emerged was that the Regulations did not address the implications of having two separate systems for appeals – one for reserved benefits and the other for devolved benefits. The Smith Commission proposed the devolution of the management and operation of the reserved tribunals to Scotland but discussions are still on-going with UK Government. The Scottish Government is only therefore able to legislate for appeals provided for in the 2018 Act and Regulations made under it which create a right of appeal. Although the intention remains the one set of rules should operate for both reserved and devolved cases, these will require to be reviewed at the point of devolution of the relevant tribunal, the Social Security and Child Support Tribunal.

Impact Assessments

The following impact assessments have been completed and are attached separately:
- The Equality Impact Assessment
- Islands Communities Screening Assessment
- Child Rights and Wellbeing Impact Assessment

Financial Effects

A partial Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. No impacts of this policy were found on business. The Scottish Courts and Tribunals Service will be expected to handle appeals related to social security, which it does not currently, and ensure sufficient members are available to deal with matters before the Tribunal. The impact of the new system on local organisations is that they would be expected to provide advice on the new system whereas the burden on such organisations having to lodge appeals on behalf of their clients will be undertaken by Social Security Scotland. The overall impact would therefore be neutral.

Scottish Government
Social Security Directorate

13 September 2018