POLICY NOTE

THE FIRST-TIER TRIBUNAL FOR SCOTLAND SOCIAL SECURITY CHAMBER AND THE UPPER TRIBUNAL FOR SCOTLAND (COMPOSITION) REGULATIONS 2018

SSI 2018/xxx

The above instrument was made in exercise of the powers conferred by sections 38(1) and 40(1) of the Tribunals (Scotland) Act 2014 (the 2014 Act). The instrument is subject to the affirmative procedure. In accordance with section 11(2) of the 2014 Act the President of the Scottish Tribunals has been consulted.

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.

The 2014 Act allows Scottish Ministers to determine the composition of the First-tier Tribunal or the Upper Tribunal when convened to decide any matter in a case before it.

These Regulations set out the composition of the Social Security Chamber of the First-tier Tribunal for Scotland and of Upper Tribunal for Scotland when dealing with social security appeals.

In relation to the Social Security Chamber, the default position will be that cases before it will be decided by a legal member sitting alone. Exceptions will be made only where there is a need for particular specialism, as in cases involving claims for disability assistance and employment-injury assistance. In these cases legal members will always be accompanied by an ordinary member with medical experience. In disability assistance cases, there will also be an ordinary member with disability experience.

The possibility is left open that ordinary members with medical and/or disability experience will be involved in any cases involving entitlement to assistance by way of a top-up of a reserved benefit. A maximum of two ordinary members may be involved. In the event there are two, one must have medical expeirence and the other disability experience. This will be a possibility in practice only if the Scottish Ministers make Regulations to introduce top-up and, if so, the Regulations carry a right of appeal. Top-up would allow Scottish Ministers to provide assistance to a person entitled to a reserved benefit, if they were thought to be in need of assistance over and above the level of that benefit.

The Upper Tribunal, when dealing with proceedings appealed from the Social Security Chamber, may consist of one member, acting alone, or a group of two or three members, acting together. Each of these members may be either legal or judicial members. There is nothing to prevent there being two legal members, or two judicial members, as opposed to one of each. Alternatively, the Chamber President of the Social Security Chamber may become involved (assuming they have had no previous involvement in the case, and that they are not assigned to the Chamber on a temporary basis). The Chamber President may act alone, with the President of the Scottish Tribunals or the Lord President, or with a maximum of two members of the Upper Tribunal. Again, the members may be legal or judicial members. And again there is nothing to prevent there being two legal members, or two judicial members, as opposed to one of each.

The definitions of an ordinary member with medical experience and an ordinary member with disability experience will be set out in the Scottish Tribunals (Eligibility for Appointment) Regulations 2015. The 2015 Regulations are to be amended by the Scottish Tribunals (Eligibility for Appointment) Amendment Regulations 2018, which are due to come into force at the same time as these Composition Regulations. For the purposes of these Composition Regulations, a judicial member means a judge of the Court of Session.

Consultation

There is no requirement to consult with anyone other than the President of the Scottish Tribunals in relation to these Regulations. However, 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

There was broad support for the proposals for the proposed composition of the Social Security Chamber when determining cases relating to particular types of assistance. It was suggested by some respondents that having an ordinary member with lived experience of the relevant area of the social security system involved in all appeals, and especially those relating to overpayments, may improve decision making.

The Scottish Government considered these views and is of the view that a legal member acting alone, except for cases involving disability or employment injury assistance claims, would achieve the outcome of making decisions fairly. Given that they are focussed on the impact of a particular condition, there is clearly merit in having a requirement of targeted experience in the contexts of disability and employment injury, and this might include lived experience. In relation to other forms of assistance, such as early years assistance, there is less likely to be significant advantage. And such a requirement would mean that a member with suitable lived experience would always have to be found. This could lead to operational issues and potentially delay decision-making.

The draft composition Regulations as consulted upon set out that social security cases before the Upper Tribunal could be heard by a maximum of two members of the Tribunal, in different permutations. These have been adjusted in response to feedback from the consultation. The result is that cases may be heard by panels comprising up to three members of the Upper Tribunal, rather than being restricted always to two members. And where the Chamber President, President of the Scottish Tribunals or the Lord President is involved, they may be accompanied by a maximum of two members of the Upper Tribunal, rather than this being restricted to one. This is again a product of consultation; respondents to the consultation called for this flexibility.

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