

# **Draft Tribunal Regulations**

**Scottish Government response to the  
consultation on the Draft Regulations  
making provision in relation to Social  
Security Appeals**

**September 2018**

## Ministerial Foreword



The Scottish Government has embarked upon a series of public consultations in order to build a new rights-based Scottish social security system that is grounded in the principles of dignity, fairness and respect. An important aspect of that is people's right to appeal if they think Social Security Scotland has not made the right decision in relation to their entitlement. In order to realise that right a new chamber of the First-tier Tribunal is being created that will hear appeals in relation to devolved social security benefits.

The Scottish Government has been working with the Scottish Courts and Tribunal Services to ensure what we create in Scotland meets the needs of people using the system.

The overarching aim is to create a chamber which is efficient and effective in dealing with appeals whilst ensuring the dignity and respect of individuals at the heart of the social security system. The new chamber will be in place in time for the start of the delivery of Best Start Grant, the first benefit which carries a right of appeal to be delivered by Social Security Scotland.

In order to set up a new chamber of the First-tier Tribunal for Scotland, and ensure necessary provision is made for the Upper Tribunal for Scotland to deal with social security appeals, six sets of Regulations need to be in force. The Regulations are being made under the Tribunals (Scotland) Act 2014. We consulted on the draft Regulations between January and July 2018. This included a full public consultation and consultation with senior members of the judiciary that the Tribunals (Scotland) Act 2014 requires. In addition, the Social Security Committee of the Scottish Parliament undertook an evidence gathering session with key stakeholders.

I am grateful to all who responded to the consultation and for the broad support for the draft Regulations. The responses reflect the views of those with lived experience of the existing UK social security system and appeals process and their input has been invaluable in shaping the final Regulations.

This report from the Scottish Government covers the views of all those who provided feedback during the consultation process and explains where the draft Regulations have been revised. In doing so it was necessary to balance the views of respondents, the judiciary and the Social Security Committee's evidence gathering session, while ensuring that what is proposed does not lead to operational or other difficulties.

This process has been supported through the Judicial Reference Group, which was established under the direction of the President of the Scottish Tribunals to support the establishment of the new chamber. I would like to thank members of the Group for their advice, guidance and support to the Scottish Government throughout the process.

The final Regulations as amended are being laid in Parliament today.

A handwritten signature in black ink, appearing to read 'S Anne Somerville'.

**Shirley-Anne Somerville MSP**

Cabinet Secretary for Social Security and Older People

## Background

1. The Scotland Act 2016 gives the Scottish Parliament legislative competence in relation to 11 social security benefits. These represent about 15% of UK social security spend in Scotland, ultimately worth around £3.3 billion annually. Delivery of the 11 benefits, in some form, will become a devolved responsibility of the Scottish Ministers. The 11 benefits, as currently delivered by the Department for Work and Pensions (DWP) are:

- Attendance Allowance;
- Sure Start Maternity Grant;
- Carer's Allowance;
- Cold Weather Payment
- Disability Living Allowance;
- Discretionary Housing Payments;
- Funeral Payment;
- Industrial Injuries Disablement Benefit;
- Personal Independence Payment;
- Severe Disablement Allowance; and
- Winter Fuel Payment.

2. The Social Security (Scotland) Act 2018 (the 2018 Act) allows Scottish Ministers to deliver new, improved benefits, to replace the 11 DWP benefits as listed.

3. The then Cabinet Secretary for Communities, Social Security and Equalities statement to Parliament on 30 May 2017 set out that the Scottish Government will begin to deliver the first wave of social security benefits by Summer 2019. 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.

4. 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.

5. The Scottish Government is introducing a different approach to decision making and appeals, one which aims to get decisions right first time. It is taking a rights based approach that respects the dignity of the individual. The Scottish Government has always been clear that people will have a right to challenge if they believe that the new agency, Social Security Scotland, has not made the right decision and that the process for challenging a decision is as simple and straight forward as possible.

6. 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 devolution of the reserved tribunals, including the Social Security and Child Support Tribunal, under the Scotland Act 2016. The transfer will not take place prior to the first wave of social security benefits being delivered and it has therefore been necessary to set up a new chamber within the First-tier Tribunal for Scotland.

### **Working in Partnership**

7. Since spring 2017, Scottish Government has been working closely with the Scottish Courts and Tribunals Service (SCTS) to set up the new chamber. The project is overseen by a Project Board, which includes representation from SCTS, Judicial Office for Scotland and officials from Scottish Government's Social Security Directorate.

8. A Judicial Reference Group (JRG) was also established in February 2018 under the direction of the President of the Scottish Tribunals, who gave the group the authority to provide advice, guidance and to assist with the establishment of the new chamber. It consists of legal members of the First-tier Tribunal for Scotland, who are also judges in the current reserved Social Entitlement Chamber and supporting officials from the Judicial Office for Scotland and SCTS. The judiciary was recognised as a key partner and its advice and assistance has been essential in the delivery of a functioning tribunal service. This support has been fully appreciated by the Scottish Government

### **Consultation on the draft Tribunals Regulations**

9. In order to set up a new chamber of the First-tier Tribunal for Scotland, and ensure necessary provision is made for the Upper Tribunal for Scotland when dealing with social security appeals, six sets of regulations (Tribunals Regulations) are required to be made under the Tribunals (Scotland) Act 2014 (the 2014 Act).

10. 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.

11. The full public consultation lasted for 12 weeks and took place from 22 January to 16 April 2018. The suite of Regulations comprised the following:

- The First-tier Tribunal for Scotland Social Security Chamber (Establishment and Functions) Regulations 2018 – provided for the establishment of the new chamber of the First-tier Tribunal, to be known as the First-tier Tribunal for Scotland Social Security Chamber, and set out its functions;
- The First-tier Tribunal for Scotland (Chambers) Amendment Regulations 2018 added the Social Security Chamber to the list in regulation 2 of the First-Tier

Tribunal for Scotland (Chambers) Regulations 2016 of chambers into which the First-tier Tribunal for Scotland is divided;

- The First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018 set out the rules for procedures for the Social Security Chamber;
- The First-tier Tribunal for Scotland Social Security Chamber and Upper Tribunal for Scotland (Composition) Regulations 2018 set out the type and number of members of the Scottish Tribunals who can consider cases before the Social Security Chamber, and, when cases are appealed from there, before the Upper Tribunal.
- The Scottish Tribunals (Eligibility for Appointment) Amendment Regulations 2018 set out the eligibility criteria for appointment to the First-tier Tribunal of ordinary members with medical and disability experience. These members, alongside legal members of the Tribunal, will be responsible for deciding cases coming before the Social Security Chamber; and
- The Upper Tribunal for Scotland (Social Security Rules of Procedure) Regulations 2018 set out specific rules of procedure of the Upper Tribunal for Scotland when dealing with proceedings under the 2018 Act, or under Regulations which are made under the 2018 Act, and create a right of appeal. Proceedings will arise where cases are appealed from the Social Security Chamber to the Upper Tribunal.

12. In embarking upon the process of drafting the necessary Regulations for consultation, the starting point (particularly in the context of the rules of procedure for the Social Security Chamber) was to look at the approach of the rules of procedure of the existing chambers of the First-tier Tribunal for Scotland. A key consideration was ensuring so far as appropriate the aim of having broad uniformity of approach, across the chambers in Scotland. These were considered alongside the rules of the Social Entitlement Chamber (the 2008 Rules) which currently deal with social security appeals for reserved benefits in Scotland. The Regulations as consulted upon were framed with the overall principles of the Scottish social security system in mind, to establish what adjustments might be needed.

13. For the Upper Tribunal for Scotland, a similar exercise was carried out. The generic rules of procedure of the Upper Tribunal for Scotland were looked at, alongside the rules of procedure for the Upper Tribunal, as they apply to social security cases.

14. There were 25 responses, 4 from individuals and 21 from representative organisations. 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](https://consult.gov.scot/social-security/provision-for-social-security-appeals/consultation/published_select_respondent)

15. The Scottish Parliament's Social Security Committee also took evidence on the draft Tribunals Regulations from a range of stakeholders on 29 March. The Committee wrote to the then Minister for Social Security on 13 April indicating they were broadly content with the draft Regulations but raised specific points in relation to the social security charter, expenses, role of supporters and representatives, and publication of decisions.

16. The Official Report from 29 March can be accessed at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11459&mode=pd>. The Committee's letter to the then Minister for Social Security is available at [http://www.parliament.scot/S5\\_Social\\_Security/Inquiries/20180413\\_Convener\\_to\\_MinisterSS\\_socialsecurityappeals.pdf](http://www.parliament.scot/S5_Social_Security/Inquiries/20180413_Convener_to_MinisterSS_socialsecurityappeals.pdf)

17. The independent analysis of the responses was undertaken by KSO Research. They provided an interim report on 2 May and their final report was received on 17 August. The analysis report is available at [www.gov.scot/ISBN/9781787811928](http://www.gov.scot/ISBN/9781787811928)

18. Under the obligations set out under Section 11 of the 2014 Act, the Scottish Government sought the views of the President of the Scottish Tribunals and the approval of the Lord President for the establishment of the new chamber and allocating functions to it. This took place following the conclusion of the public consultation.

19. The Scottish Government has considered all of the views provided during the public consultation, the feedback from the Social Security Committee and the formal consultation with the President of the Scottish Tribunals and the Lord President. Throughout the consultation process, the Scottish Government discussed with the JRG how the draft rules could be amended in order to balance the differing views whilst ensuring that dignity and respect is at the heart of the system and what was being proposed did not lead to operational or other difficulties. The JRG's contribution has been invaluable in providing an understanding of how the appeals process will work in the Scottish Tribunals.

20. The Scottish Government's proposals for amending the Regulations as consulted upon are set out below. Some of the provisions in the draft Regulations had to be updated to reflect the changes that were made to the then Social Security (Scotland) Bill (the Bill) which are now enacted in the 2018 Act. This includes: reference to the Scottish social security charter, how the agency will have a role in supporting individuals who wish to exercise their right to appeal, creation of new appeal rights for challenging process decisions, duty to promote uptake and inclusive communication, amongst other changes.

21. In addition to giving effect to the views of the respondents, further changes have been taken forward in areas where there was no direct input from respondents. This was the product of identifying an element where there seemed scope for change to ensure that the dignity and respect agenda is fully given effect to or, more generally, to lay the foundations of an effective chamber. The same principle applies to the rules of procedure applicable to the Upper Tribunal when dealing with social security appeals.

## **Changes to Procedural Rules**

### Changes to the draft rules of procedure for the First-tier Tribunal for Scotland Social Security Chamber and the Upper Tribunal for Scotland

22. The draft rules of procedure appear in the schedule of the procedure Regulations for both Tribunals. The Regulations as consulted upon allowed respondents to answer whichever question they chose to answer rather than requiring them to answer all the questions. Therefore, the issues sets out below are the substantial issues raised by respondents. Each section sets out what was consulted on, the views of the respondents and how those views have been given effect to, either resulting in a change or the reasons for not making a change.

### **Overriding Objective**

23. The rules of procedure for chambers of the First-tier Tribunal for Scotland and Upper Tribunal for Scotland contain provisions related to the overriding objective that proceedings be dealt with fairly and justly. This will also feature in the Social Security Chamber. There then follows a list of matters that may be covered as part of the fair and just handling of proceedings. One is ensuring that parties are able to participate fully in the proceedings.

### Social Security Charter

24. At consultation, the draft rules of procedure made express reference to account being taken of the Scottish social security charter, where relevant.

25. There were mixed views and its inclusion was not welcomed by all respondents. The concerns lay around how taking cognisance of the social security charter would sit alongside the standards by which Tribunal members must already abide (including the SCTS User Charter and the Principles of Judicial Ethics) as well as potential compromising of judicial independence.

26. The consultation took place while the Bill was undergoing its passage through the Scottish Parliament. At that time, there was no provision in the Bill allowing a court or tribunal to take the charter into account. However, the Bill as passed was amended to include provision after the consultation on the draft rules was launched. Section 19 of the 2018 Act makes clear that a court or tribunal may take the charter into account when determining any question arising in the proceedings to which the charter is relevant. As a result, the Scottish Government believes it unnecessary for similar provision to be duplicated in the Regulations. There is, therefore, no reference to it in the Regulations as laid.

### Delegation to staff

27. Rules of procedure for some of the chambers of the First-tier Tribunal include provision for certain functions to be delegated to SCTS staff. The general approach is that those members of staff must have appropriate legal qualifications. At consultation, the draft rules for the Social Security Chamber included similar provision.

28. Concerns were raised by respondents that this could impinge upon the efficient running of cases, in a way which is unnecessary. Requiring staff have appropriate legal qualification is likely to lead to delays if there is a lack of appropriately trained people. As the functions to be delegated will in practice be administrative in nature, the 'appropriate legal qualification' is not required and has been therefore removed from the First-tier Tribunal procedural rules.

29. As consulted upon, the draft rules for the Upper Tribunal for social security did not contain any provisions for delegation to SCTS staff. The view was expressed at consultation that provision for delegation to staff in cases before the Upper Tribunal would be helpful. A delegation to staff provision to the same effect has therefore been added to the Upper Tribunal procedural rules for social security cases.

### Mediation

30. The draft rules as consulted replicated the provisions for mediation as they appear in some of the other chambers of the First-tier Tribunal for Scotland. The respondents queried that it was unclear how mediation can be applied in a rights based system where entitlement to assistance is firmly based on the eligibility criteria being met. It was suggested that this should be removed from the rules of procedure. The Scottish Government agrees with these views and the provision on mediation does not, therefore, feature in the Regulations as laid.

### Immediate dismissal; reinstatement of dismissed or withdrawn cases

31. The 2008 Rules for the reserved Social Entitlement Chamber allow for immediate dismissal of a party's case where the Tribunal considers that there is no reasonable prospect of the appellant's case succeeding. This was not included in the draft rules as consulted. It is rarely used and the Scottish Government's view was that it is unlikely that a Tribunal can know in advance if there is any real prospect of a case succeeding.

32. There were mixed views from respondents with some supporting its removal whereas others felt the rule should be retained. Those asking for its retention was on the basis that it allows for cases to be struck out where an appellant is trying to come forward with what is an obviously fruitless appeal. An example cited by consultees was where there has been an application for the mobility component of Child Disability Living Allowance before the child has reached the age at which they are potentially eligible for that.

33. The Scottish Government has carefully considered the views and believes there is merit in including provision in the rules, but that the scope should be narrower for automatic dismissal than the 2008 Rules. This would be to only allow dismissal where there is clearly no possibility of eligibility criteria being met.

34. The general approach of rules of procedure of chambers of the First-tier Tribunal for Scotland is that there is no possibility of either party applying for reinstatement of a case which has been dismissed or withdrawn.



35. The draft rules as consulted upon included provision for application for reinstatement, without qualification. Either party to a case, the appellant or a respondent, has the right to withdraw a case. The Scottish Government believed it necessary to give effect to the dignity and respect agenda. In particular, it provides some protection against the possibility that appellants in a state of vulnerability may later regret a decision to withdraw. Respondents to the consultation suggested this may be vulnerable to misuse and there was a need for a fairer system. A “good reason” requirement has therefore been introduced, to help protect against use of the process for spurious reasons. In other words, a party (whether the appellant or the respondent), in applying for reinstatement, will have to set out the basis on which they are asking for reinstatement and will have to satisfy the Tribunal that they have good reason to do so.

#### Orders for expenses

36. The draft rules of procedure as consulted upon, made provision for the Tribunals to make orders for payment of travel and subsistence expenses, as well as loss of remunerative time, to parties required to attend hearings, and to witnesses. The provision was intended to allow people to reclaim expenses for travel and subsistence and loss of remunerative time only and not for any other expenses to be claimed or for either party to make a claim against the other.

37. However, many respondents were concerned that the provision may allow more substantive payments to be ordered, and potentially to be ordered against the appellant, and could therefore act as a barrier to bringing an appeal if the appellant thought they might face potential expenses claims from the agency. Concerns were also expressed that expenses provisions would give rise to an unwelcome distraction from the intended function of the Tribunals.

38. The clear consensus among respondents was that claims for attendance expenses should be dealt with administratively. Provision for expenses has therefore been removed from the rules of procedure for the Social Security Chamber, and the Upper Tribunal. Separate Regulations have been made under the 2018 Act to provide a basis for a scheme for travel and subsistence expenses, as well as allowances towards loss of remunerative time to be administered. This will be for parties (other than representatives of the Scottish Ministers) attending hearings, as well witnesses cited to attend. SCTS will administer the scheme, with the policy underlying it being the responsibility of Scottish Ministers.

#### Interpreters

39. As consulted upon, the draft rules for the Social Security Chamber contained express provision requiring that any interpreter appointed to assist the Tribunal be independent of the circumstances of any case. No such express provision exists in the 2008 Rules for the reserved Social Entitlement Chamber. Instead, reliance on the overriding objective is used to appoint an interpreter by Her Majesty’s Courts and Tribunal Services where they are required to assist the Tribunal. Respondents to the consultation welcomed the express provision as it provided a specific requirement for independent interpreters in the rules.

40. It will be for SCTS to arrange and provide for interpreters to assist the First-tier Tribunal as necessary. The independence requirement should promote impartiality in the proceedings, as well as acting as a potential quality control mechanism as the rule is likely to necessitate appointment of a professional interpreter with the necessary level of skill.

41. The rules of procedure for the Upper Tribunal do not contain express provision in relation to independence of interpreters. Given the technical nature of the proceedings, involvement of interpreters is likely to be minimal. Where they are required, the overriding objective of the Upper Tribunal rules (in particular the requirement that all parties should be able to participate fully in the proceedings) should in itself produce a requirement of impartiality.

### Role of Supporters and Representatives

42. The rules as consulted upon replicated the provision on supporters that is typically included in the rules of the chambers of the First-tier Tribunal for Scotland. The provision sets out the specific ways in which a supporter may assist a party, including by advising on points of law and procedure and issues which the party might want to raise with the Tribunal. There were concerns amongst representative organisations that this element of the provision might give rise to overlap with the role of a representative, giving cause for doubt as to where boundaries lay between supporters and representatives.

43. It was suggested by respondents that the overriding objective of the 2008 Rules in the reserved system is relied upon effectively to ensure that appellants are provided with support where they are in need of it. There is no provision in those rules dealing expressly with “supporters”, yet the Tribunal can invite people who are there offering support to input into the hearing, where the appellant gives permission for this. Some respondents thought that this approach should be followed in the rules of the Social Security Chamber, rather than having specific provision for supporters.

44. The Scottish Government has carefully considered the differing views expressed. As ensuring that people have a right to a supporter is key to the principle of dignity and respect, the provision has been simplified to explain more clearly the intention behind involving supporters. A person can be accompanied by a person, who is not acting as their representative, to provide them with support even if this goes no further than being ‘there’. But this support might also include making submissions to the Tribunal, where the supporter is invited to do so.

45. An equivalent provision on supporters was included in the draft social security rules for the Upper Tribunal for Scotland, as they went to consultation. The same change has been made there.

46. Respondents viewed the rule on having to communicate in advance the details of a representative as unnecessarily inflexible. If a different representative attended the hearing on the day and the Tribunal was not informed, they were concerned that the representative could therefore be excluded from the hearing.

47. The provision in relation to details of a representative have therefore been amended to remove the requirement to inform the Tribunal in advance of the representative's contact details. This is to ensure an appellant can be fully supported at a hearing, even if there is a last minute change in representative, or there is no representative at all until the last minute.

#### Barring of people from acting as representatives or supporters in proceedings

48. As consulted upon, the draft rules of procedure for both the First-tier and Upper Tribunals, contained express provision for excluding people from acting as supporters or representatives of parties. The purpose would be to tackle disruptive behaviour or to prevent intimidation by others giving evidence. It could mean that a person was barred from acting as a supporter or representative in a particular set of proceedings, or in any proceedings before the relevant Tribunal.

49. Some respondents, including the Social Security Committee, were of the view that express provision for this was not required as reliance on the overriding objectives would achieve the same purpose. The Scottish Government agrees with this view and the provision has been removed from the Regulations which have been laid.

#### Recording of hearings

50. In Scotland only, hearings of social security cases in the reserved Social Entitlement Chamber are recorded as a matter of routine. However, there is no *requirement* for this in the rules of procedure of the Social Entitlement Chamber.

51. The draft rules of procedure consulted upon for the Social Security Chamber contained an express requirement that hearings be recorded was generally welcomed. Some concerns were expressed by a small number of respondents about the effects of recordings of hearings on those with certain health conditions and that it may add to the formality of the proceedings. But the balance of feedback was that this would be a positive step towards transparency, fairness and accuracy. It was highlighted that if the recording equipment were to fail that should not lead to the postponement of a hearing.

52. The rules therefore contain provision that hearings of the Social Security Chamber will be recorded as a matter of routine. This will be done for the purpose of providing an accurate record of proceedings. Hearings will generally be recorded digitally. In the event that equipment failure prevents a hearing from being digitally recorded, a written note of proceedings will be produced by the legal member.

53. As cases appearing before the Upper Tribunal deal only with points of law, it was concluded that it is unnecessary to provide for a requirement for routine recording of hearings within the Upper Tribunal rules.

### Cases to be resolved, where possible, without an oral hearing

54. For the Social Security Chamber, the draft rules as consulted upon set out that the First-tier Tribunal is to consider a case after holding an oral hearing unless it is satisfied that it can make a decision without such a hearing, and no party has objected to that. During the consultation, respondents highlighted that the rules did not clearly set out that a case could be dealt with through consideration only of the papers (a “paper case”) without an oral hearing taking place.

55. The Regulations that have been laid therefore contain express reference to paper-based cases and indicate the circumstances in which matters may go ahead without an oral hearing. This will ensure that oral hearings are avoided where there is consensus that an oral hearing is not needed. But equally, it will allow an appellant to have the opportunity to express a preference to present their case in person, if they wish to do so.

56. The draft rules for the Upper Tribunal as consulted upon followed the generic rules of procedure of the Upper Tribunal for Scotland in starting from the point that a decision may be made without an oral hearing. However, they also included a requirement that account be taken of any views expressed by a party as to whether an oral hearing should be held and, if so, the form it should take. This was an addition to the generic rules of procedure. No respondent expressed concern on any aspect of this approach and therefore the provision has been retained in the Regulations as laid.

### Venue for hearings

57. On venue, the draft rules of procedure as consulted upon replicated the approach of the rules for the Tax Chamber, and the generic rules of the Upper Tribunal for Scotland, in providing that hearings are to take place at such time and place in Scotland as the President of the Scottish Tribunals determined.

58. The consensus view from the consultation was that venues should most appropriately be determined administratively rather than through the rules of procedure.

59. SCTS administrative policy is to offer a venue as close as possible, geographically, to the appellant’s home. If an appellant is not content with the proposed venue, they are able to request an alternative venue. SCTS will do their utmost to accommodate requests, where possible. If, though, the appellant is not happy with the outcome at this stage, matters will normally be referred to the chairing member of the Tribunal. The chairing member must look at the request and exercise appropriate discretion, applying the overriding objective which applies to chambers of the First-tier Tribunal, and to the Upper Tribunal. This will allow people to challenge decisions on the location of proceedings.

60. As the overriding objective includes ensuring that parties are able to participate fully in proceedings, the Scottish Government therefore agrees with the consultation findings that there is already scope for individuals to challenge decisions on venue, and that express provision in the rules is not needed. The provisions on venue have therefore been removed from the Regulations as laid.

#### Independent Medical Examinations

61. The draft rules for the Social Security Chamber, as consulted upon, made provision for the Tribunal to refer appellants for medical examination, by a medical practitioner independent of the case rather than it carry out a medical examination at the hearing. The intention was to give the First-tier Tribunal the opportunity to gather further evidence, on the rare occasions where this was needed, to allow it to reach a decision.

62. Various comments were received during the consultation which the Scottish Government will consider further. For example, the term medical examination is unlikely to be the right term as (a) it could exclude mental health conditions and (b) entitlement decisions will be based on the impact of a condition on the person's functionality rather than on a particular condition.

63. As this provision is not needed for the first benefits being delivered by the agency which relate to maternity, early stages of bringing up a child and with funerals, the provision has been removed from the Regulations as laid.

64. Provision maybe needed when the agency starts to deliver disability benefits and the Scottish Government will consider the issue further at that stage.

#### Publication of decisions

65. In relation to both the First-tier and Upper Tribunals, the rules of procedure as consulted upon conferred a general discretion to publish decisions where this was thought to be in the public interest. With regard to the First-tier Tribunal in particular, respondents were concerned that even if the decisions were redacted there would be a risk that appellants could be identified. Conversely, the level of redaction needed could be such that publication ceased to have merit in giving a flavour of the decision reached.

66. It was suggested the approach of the Health and Education Chamber be adopted. This leaves open the option of publishing, but with express safeguards that the welfare, wellbeing and interests of the appellant and any other person be taken into account.

67. As this ensures the privacy of the appellant remains at the heart of decision making and is consistent with the principle of dignity and respect agenda, the rules of procedure have been revised to replicate this approach.

68. The draft rules for the Upper Tribunal as consulted upon, included a discretion for the Tribunal to publish its decisions, on the grounds that this is in the public interest. This is consistent with the provision in the generic rules for the Upper Tribunal for Scotland. The Tribunal would be bound to take account of the welfare, wellbeing and interests of the appellant, in any circumstances where the nature of information covered by the decision was such as to make this relevant. Respondents to the consultation did not raise any issue with this provision and the Regulations as laid therefore remain unchanged.

#### Review of decisions of the Social Security Chamber

69. The draft rules for the Social Security Chamber, as consulted upon, followed the approach taken in other chambers. That is, that following an appeal to the First tier Tribunal, an individual could request a review. A review request would require the First-tier Tribunal to look again its decision. This might lead to an outcome the appellant is content with and therefore prevent the need for an onward appeal, to the Upper Tribunal. For example, the First tier Tribunal might decide to set aside the decision (in other words, declare that it no longer holds good) and substituted a new one in its place. However, if, the appellant was not happy with the outcome, they would still be able to apply for permission to appeal to the Upper Tribunal.

70. Respondents to the consultation expressed concerns that unless the grounds of review were in some way limited, there is a risk that the Upper Tribunal may be called on to determine issues of fact. This would not be appropriate as the function of the Upper Tribunal is, first and foremost, to determine points of law. This could arise as a risk because the First-tier Tribunal may refer a case to the Upper Tribunal, in the course of dealing with a review.

71. There was also concern that the provisions allowed a review and appeal to be ongoing at the same time, which seemed to be a waste of resources. It was suggested that provision should be made in the First-tier Tribunal rules to allow the time period for seeking permission to appeal to be suspended until the review had been dealt with and the outcome was known.

72. Having considered the views from the consultation, the Scottish Government has proposed that the request for a review should be limited to alleged points of law. In addition, the review request is to be treated also as an application for permission to appeal, unless the appellant specifically states they do not wish it to be treated as an appeal. This will mean that, once the review outcome is known, the appellant will be asked if they would like to go forward with an appeal. There will also be the opportunity to go straight to appeal, if the appellant does not wish a review.

73. From the point of view of the appellant, as well as one imposing a minimal burden upon them, this system offers advantages of being an efficient option. There is no automatic suspension of the running of time while a review happens, and no two stage process of requesting a review and then, later, potentially having to continue an appeal or ask for permission to appeal. This would make the process more protracted for the appellant. The appellant only has to request a review, and the review/appeal process will run from there, so far as the appellant wants it to do so. To further promote efficiency, the period for requesting a review remains at 14 days; it has not been extended to 30, as suggested at consultation.

74. So far as can be seen there is no precedent in the rules of other chambers of the First-tier Tribunal for Scotland for requests for review to be classed as applications for permission to appeal. However, by going down this route, a precedent could be set for providing for a more appellant friendly approach.

#### Application for permission to appeal/giving notice of appeal to the Upper Tribunal

75. The rules for social security cases as consulted upon, followed the approach of the generic rules in having one rule dealing with (a) applying for permission to appeal to the Upper Tribunal (this will be necessary where the First-tier Tribunal has refused permission to appeal) and (b) giving notice of appeal to the Upper Tribunal. Respondents to the consultation suggested that it would make for a more accessible and user friendly system to have two separate rules dealing with this. The Regulations as laid therefore contain two separate rules dealing with permission to appeal and giving notice of appeal. The rules also state expressly that if it is necessary to seek the permission of the Upper Tribunal to appeal, and this is given, matters will go forward as though the appellant had lodged a notice of appeal. They will not have to actually lodge a notice. This was not a feature of the rules consulted upon and there is no express statement about it in the generic rules of procedure for the Upper Tribunal. But it does not seem necessary to require the appellant to submit a notice of appeal in this situation.

76. These changes to the rules aim to promote a more user-friendly system.

#### Dispatch of information and running of time

77. The rules as consulted upon did not contain any provisions about how the running of time would be calculated. The position was that time would run from when information was sent to an appellant, whereas for the respondent and the Tribunal it would only begin to run when they had received the information. Concern was raised that time began to run earlier against appellants than against respondents and the Tribunal. Respondents highlighted that apart from the obvious imbalance arising from this, it was unclear how the appellant was expected to know when the information had been sent.

78. To address this, the rules of procedure for the new chamber have been amended to provide that time will run against the appellant only from the day on which the appellant will be presumed to have received particular information. This will be presumed to have happened 48 hours after it is sent by post or email. An equivalent change has been effected in the rules for the Upper Tribunal.

## **Other changes**

### Allocation of Functions Regulations: re-naming

79. The draft Establishment and Functions Regulations as consulted upon set out that the new chamber was being established and what its functions would be. On reflection, it seems that all that is needed is Regulations which allocate certain functions to the new chamber. The chamber itself is brought into being by amending the First-tier Tribunal for Scotland (Chambers) Regulations 2016. Appropriate amending Regulations were included in the package of Regulations at consultation and so there was, in effect, duplication of provision. On a general level, respondents were supportive of the new chamber being created and the functions that were to be allocated to it.

80. 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.

81. It is anticipated that the temporary president will be in place during delivery of the first wave of benefits, including Best Start Grant and Funeral Expense Assistance. A dedicated chamber president will be appointed in time for when the second wave of benefits, including disability benefits, begins 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 will also enable the expertise of an existing chamber president to be brought to the newly established chamber.

### Composition Regulations

82. The draft Composition Regulations as consulted upon set out that when determining cases at Upper Tribunal, the panel can consist of a maximum of up to two members in different permutations. These have been adjusted in response to feedback from the consultation that there be provision for cases to be heard by panels comprising up to three members of the Upper Tribunal, rather than being restricted always to two members.





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