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Tribunals (Scotland) Act 2014: Analysis of Consultation Responses on Draft Regulations Making Provision in Relation to Social Security Appeals

EQUALITY AND WELFARE

social research

Tribunals (Scotland) Act 2014: Analysis of Consultation Responses on Draft Regulations Making Provision in Relation to Social Security Appeals

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Background

The Scotland Act 2016 transferred new powers to the Scottish Parliament relating to social security, including responsibility over certain benefits.

As part of its ongoing commitment to engage key stakeholders in the future development of social security in Scotland, the Scottish Government committed to a series of social security related consultations. One such consultation related to the draft Regulations making provision in relation to Social Security Appeals and the findings from that consultation are set out here.

Methodology

The consultation opened on 22 January 2018 and ran until 16 April 2018. It included a total of 7 closed and 22 open questions and a total of 25 substantive responses were received (4 from individuals and 21 from organisations).

Given the small number of individuals compared to organisations who responded, and the small numbers of responses overall, it was not possible to carry out any reliable disaggregate analysis to compare responses between 'types' of respondent. The views presented here should also not be taken as representative of the wide range of stakeholders invited to respond to this consultation.

Main Findings

The analysis of responses suggests the following main findings in relation to each of the six core sets of draft Regulations set out in the consultation[1].

Annex A - the establishment of the new chamber of the First-tier Tribunal (FtT), to be known as the First-tier Tribunal for Scotland Social Security chamber, and its proposed functions:

- although generally supported, it was suggested that there may be need for greater clarity on the description of functions exercisable by the Social Security chamber in considering devolved appeals especially relating to deductions for overpayments;
- several comments were made in relation to the need to ensure that appellants have legal guidance or representation to assist them in any appeal;
- some concerns were raised that powers to look at all aspects of a determination may act as a disincentive to challenge award decisions and that this needed to be addressed more expressly in the draft Regulations; and
- other specific concerns, raised by only a couple of respondents each, included the need for guarantees that entitlements would never be reduced as a result of an appeal, concerns about how the devolved and reserved appeal

[1] Consultation document available at: https://www.gov.scot/Resource/0053/00530358.pdf

systems might dovetail and the need for flexibility in the appeals process to accommodate individual differences.

Annex B - adding the Social Security chamber to the list of chambers into which the First-tier Tribunal for Scotland is divided:

- there were no objections to adding the Social Security chamber to the list of chambers into which the First-tier Tribunal for Scotland is divided. This area of the consultation attracted the least response overall.

Annex C - the proposed Rules of procedure for the new Social Security chamber, which largely mirror the Rules of procedure for the Social Entitlement chamber but include some changes to update procedures and make them consistent with other chambers of the First-tier Tribunal:

- this part of the consultation generated a significant response, with all but one respondent providing detailed input;
- among the proposals put forward, there was support for the use of digital recordings of hearings as standard, providing that these were made available in a range of accessible formats. There was also support for an extended role of supporters of appellants at hearings, as long as their remit was clearly defined;
- there were mixed views around the use of independent medical examiners to provide reports to Tribunals. While some felt that the use of independent advisers would provide reassurance to appellants, some felt that professionals known to the individual may engender more trust. Some stressed the importance that examinations should be carried out by the most appropriate professional to ensure that they fully understand the condition being assessed. The main other view was that medical examinations should be ordered only in exceptional circumstances, rather than being used routinely;
- mixed views were also received in relation to proposals that, when dealing with cases, the FtT and Upper Tribunal may have due regard to the Social Security Charter. While many supported this as a fundamental principle a small number questioned its relevance in a set of procedural Rules;
- the other areas of the proposed Rules of procedure for the FtT for Scotland Social Security chamber, including proposals regarding venues for hearings, use of interpreters, expenses, dismissal of a party's case and review decisions, all attracted very little comment. There were no comments made in relation to who would be the chairing member.

Annex D - the type and number of members of the FtT who can consider cases before the Social Security chamber and, when cases are appealed from there, before the Upper Tribunal for Scotland:

- there was support for the proposed composition for the FtT and the Upper Tribunal, the main concern being that including lay members with lived experience for all appeals should be considered, and that employing members with specialisms relating to individual cases was required.

Annex E - the eligibility criteria for appointment to the FtT 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:

- there were mixed views around eligibility and, while most supported the appointment of people with lived experience of disability, others stressed that more independence may be found by employing those with professional or vicarious experience.

Annex F - specific Rules of procedure of the Upper Tribunal for Scotland where cases are appealed from the Social Security chamber to the Upper Tribunal:

- there may be a need for greater clarity/explanation for the proposed Rules of procedure for the Upper Tribunal, in line with those for the FtT, especially with regards to expenses, interested parties, withdrawal of cases and consent orders. Many of the concerns that relate to Annex C similarly applied here.

Acting on the Consultation Findings

The consultation contributes to an already ongoing process to clearly set out how the new Tribunal system for Social Security appeals will operate. This report, alongside the responses themselves, will be published and used to inform consideration of updating the regulations to ensure they are operationally deliverable. Going forward, as each devolved benefit is developed, the Scottish Government will continue to consult all stakeholders in line with its commitment to co-design Scotland's Social Security system.

Conclusions

On the whole, there was support for the establishment of the new chamber of the First-tier Tribunal, and for it to be added to the list of chambers into which the First-tier Tribunal for Scotland is divided. The main feelings expressed were that greater clarity on the description of functions exercisable by the Social Security chamber may be required, as well as greater clarity on the specific Rules of procedure for both the First-tier Tribunal and Upper Tribunal, where cases are appealed. Ensuring balanced representation of appointed members to both Tribunals was also seen as key. All respondents agreed that fairness, dignity and respect should be at the heart of any future change and were keen to see the engagement process continue beyond this consultation alone.

Introduction

Background

The Scotland Act 2016 transferred new powers to the Scottish Parliament relating to social security, including responsibility over certain benefits. It allows Scottish Ministers an opportunity to develop policies on social security appropriately suited to Scotland that will help tackle inequality and poverty in Scotland. Scottish Ministers have set out that the devolved social security system will be rights-based, and to be founded on the principles of fairness, dignity and respect.

The Scottish Government will deliver devolved social security assistance on a phased approach over the lifetime of the current Parliament following Royal Ascent of the Social Security (Scotland) Act 2018. The first wave of social security assistance is expected to be delivered between Autumn 2018 and Summer 2019.

Under the Heads of Agreement for further devolution of powers to the Scottish Parliament, the operation and administration of 22 reserved Tribunals will be devolved to Scotland, including the Social Security and Child Support Tribunal (SSCST). Discussions on the timing of the devolution of the SSCST are currently on-going between the UK and Scottish governments. Scottish Ministers therefore decided to set up a new chamber in the First-tier of the Scottish Tribunals[2] that will hear devolved assistance appeals when the first wave of social security assistances begin to be delivered by the Scottish social security agency, ahead of any potential devolution of SSCST. Necessary provision was also required for the Upper Tribunal (UT) for Scotland, where appeals against decisions of the First-tier Tribunal (FtT) are heard.

To ensure the effective operation of the devolved chamber and to ensure consistency with the reserved chamber, the existing procedural Rules for both the First-tier Tribunal for the Social Entitlement chamber in the reserved system and the Upper Tribunal for Scotland were used as a starting point in developing Draft Regulations for Social Security Appeals. However, those Rules were amended and further strengthened to ensure consistency with Scottish Ministers' aspirations for how the appeals in the devolved system would operate.

The Consultation Exercise

As part of its ongoing commitment to engage key stakeholders in the future development of social security in Scotland, the Scottish Government committed to lead and implement a series of social security related consultations.

The current consultation relates to the Draft Regulations making provision in relation to Social Security Appeals and sought views of organisations and individuals specifically in relation to:

[2] The Tribunals (Scotland) Act 2014 created two new tribunals, the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland, known collectively as the Scottish Tribunals.

- 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 its proposed functions;
- adding the Social Security chamber to the list of chambers into which the First-tier Tribunal for Scotland is divided;
- the proposed Rules of procedure for the new Social Security chamber;
- the type and number of members of the FtT who can consider cases before the Social Security chamber and, when cases are appealed from there, before the Upper Tribunal for Scotland;
- the eligibility criteria for appointment to the FtT 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
- specific Rules of procedure of the Upper Tribunal for Scotland when dealing with proceedings arising where cases are appealed from the Social Security chamber to the Upper Tribunal under the Social Security (Scotland) Act 2018.

Each of these six sets of draft Regulations were detailed in Annexes A - F of the main consultation document and explanatory notes were also provided.

More general comments on the devolved chamber were also welcomed to ensure that it met the needs of users of the Scottish social security system.

The consultation opened on 22 January 2018 and ran until 16 April 2018. This report explores the responses received and summarises the main observations from the consultation exercise.

Methodology

A total of 25 substantive responses were received - 12 via the Scottish Government's online portal Citizen Space, and 13 by email[3]. Of these, 4 were submitted by individuals and 21 came from organisations.

The consultation included a total of 7 closed and 22 open questions[4] and all questions were answered by at least one respondent.

All responses were read and logged into a database and all were screened to ensure that they were appropriate/valid. None were removed for analysis purposes.

Closed question responses were quantified and the number of respondents who agreed/disagreed with each proposal is reported below. Comments given at each

[3] One organisation submitted a response by both email and via Citizen Space but contained the same information and so was counted only once.

[4] Some of the open questions had two parts and contained an accompanying closed response option on the same topic.

open question were examined and, where questions elicited a positive or negative response, they were categorised as such. For most of the questions, respondents were also asked to state the reasons for their views, or to explain their answers. The main reasons presented by respondents both for and against the various specific proposals were reviewed, alongside specific examples or explanations, alternative suggestions, caveats to support and other related comments. Verbatim quotes were extracted in some cases to highlight the main themes that emerged. Only extracts where the respondent indicated that they were content for their response to be published were used - only one organisation asked that their response not be published and six approved publication without reference to their name/affiliation. Although some responses to individual questions were not appropriate/did not directly address certain questions, all feedback was analysed and is presented under the appropriate sections below.

Report Presentation and Research Caveats

Findings are presented as they relate to each question contained under the six core sections of the consultation document (described above). Where people provided no response, this is noted separately from cases where respondents indicated that they had no further comments.

Given the small number of individuals compared to organisations who responded, and the small numbers of responses overall, it was not possible to carry out any reliable disaggregate analysis to compare responses between 'types' of respondent. Instead, in any cases where individual respondents offered views that differed significantly from those submitted by organisations, this is picked up narratively in the report.

Appendix A shows the number and proportion of responses received for each question, although the nature of many responses submitted means it was not possible to classify them as either positive or negative in their totality (i.e. partial support was given for some proposals and not others within the same question response). As a guide, where reference is made in the report to 'few' respondents, this relates to three or less respondents. The term 'several' refers to more than three, but typically less than ten.

Finally, especially given the small number of responses received overall, it is worth stressing that the views presented here should not be taken as representative of the wide range of stakeholders invited to respond to this consultation, nor should they be generalised too broadly. They simply reflect the views of those individuals and organisations who responded.

Establishing a New chamber of the First-Tier Tribunal

The draft Regulations provided for the establishment of a new chamber of the FtT, to be known as the Social Security chamber as well as setting out what the functions of that chamber will be in considering entitlement to assistance under the Scottish social security system.

Functions included responsibility for dealing with appeals against determinations relating to entitlement to assistance (including those that relate to deductions to recover overpayments), determinations on entitlement to top-up[5] by recipients of reserved benefits, power to look at all aspects of a determination in relation to which an appeal is brought and, in disposing of an appeal, powers to either uphold the original determination or make its own.

The first part of the consultation sought views on these proposed functions.

Q1. Do you have any comments on the description of functions exercisable by the Social Security chamber in considering entitlement to assistance under the Scottish social security system?

Nine respondents did not answer this question and three said that they had no comment/nothing further to add.

Support and Information

Among the 13 respondents who provided a substantive response, the main concerns related to the need for appellants to have legal guidance or representation to ensure that they were able to defend their case in any appeal, as well as the need to ensure that communications coming from the new Social Security chamber were clear and accessible, especially for those with communication challenges. Accessible information and guidance on appealing decisions was also needed, it was suggested:

> *"This should include access at point of view where determination is taking place to forms and leaflets pointing to guidance on appealing decisions. At present, many of these are only available from certain places or downloadable online at severe detriment to those with limited access or who may not be computer-literate."*

One respondent suggested that an infographic map which clarifies responsibilities may be helpful for the public in understanding the new roles/responsibilities of the

[5] Top-up is essentially a mechanism by which the Scottish Ministers will be able to provide assistance to a person who is receiving, or is entitled to receive, a reserved benefit. This will be paid where it is concluded that the person is in need of assistance, over and above any reserved benefit paid, but to fulfil the same purpose as the reserved benefit. Depending on the terms of regulations made, if assistance by way of top-up is to be introduced, it may carry a right of appeal.

chamber, clearly differentiating between reserved and devolved responsibilities. Ensuring that appellants had resources to accurately represent themselves, and get third party support, if needed, was also seen as key.

Overpayments

Further clarity was also needed, it was suggested, around determinations relating to deductions to recover overpayments. At present, it was not clear exactly how this would work in practice nor if there would be a right of appeal to challenge the amount decided upon by the chamber:

> *"Regulations should stipulate the manner in which recovery of overpayments is to be conducted, not only within the Social Security 2018 Bill, but also within draft Regulations for such…Regulations do not address whether this is to be repaid if a Tribunal appeal is unsuccessful or whether it is to come under some other arc of legislation."*

One respondent suggested that, if appeals against a determination that an overpayment has occurred are proven and decisions are made that it is recoverable, but that the process for determination is not included in the Regulations, it may mean that Scottish claimants to assistance will have less rights than claimants of reserved benefits.

Overall, Annex A of the draft Regulations was considered to be insufficiently clear in setting out how this function would operate:

> *"…the Regulations are silent on this issue…It would be helpful if the Government clarified which part of the draft Regulations in Annex A relate to appeals against determinations to recover overpayments."*

Top-Up

Few comments were made in relation to top-up, but those that were seemed supportive and the draft Regulations in this regard were seen as clear. One respondent pointed out that the provision for a right of appeal is needed specifically when an individual is refused a top-up payment of a reserved benefit and that this would only apply if a right of appeal against such a determination is provided for, which they envisaged would be the case.

One respondent suggested that Regulation 3 (relating to composition of the First-tier Tribunal when deciding an appeal against a determination of entitlement to assistance provided for by Regulations made under section 45 of the 2018 Act), appears to be ineffective since all it does is provide that the composition of the Tribunal to decide section 45 appeals shall be prescribed by Regulations.

Other Comments

One issue raised by a small number of respondents included the need for guarantees that entitlement would never be reduced as a result of an appeal.

Some viewed that the creation of the FtT would present an opportunity to bring appeals against Council Tax Reduction decisions together with other devolved benefits and thus create a unified dispute resolution system.

A view was also put forward that the system, at present and as planned, may be overly prescriptive and inflexible and could be more individualised to account for individual differences between appellants (including differences in gender, support needs, resources, etc.) A more compassionate approach may be required, rather than one which is systematically driven, it was suggested.

A more general comment was also made that the consultation failed to address the implications of having two separate appeal systems relating to the devolved and reserved social security benefits (in the early days of operation) and how these would dovetail, especially given that each employ different operating timescales. The need for the new chamber to be appropriately staffed was also highlighted with a question raised around whether specific recruitment would be required or if existing Judiciary would be available/willing to take on the new roles:

> *"It still remains, in my view, essential that the draft Rules are considered in the light of both the reserved benefits as well as the devolved benefits to obviate the need for a radical revision at a later date."*

One comment was also received that there was insufficient explanation as to the need for the proposed changes, overall.

Q2. Do you have any comments on the power of the Social Security chamber to consider all aspects of a determination which it is called upon to review?

Ten respondents did not provide an answer to this question and a further three indicated that they had no comments/nothing to add.

Risks Associated with Appeals

The main theme among the twelve who did respond was ensuring that appellants were made aware of the possibility of full review, including aspects of a determination not being appealed. Specifically, people needed to be aware of the risk that previous awards may be removed if requesting a higher award or challenging earlier decisions:

> *"It is important to advise appellants of this approach well before the final stages as it may not be fully recognised that there is a risk to any appeal especially when requesting a higher award than that which is in place."*

Fear that an award may be reduced could be an added disincentive to challenge award decisions, and this should be avoided, where possible. One respondent again specifically requested guarantees in law that no award would be reduced following appeal and one comment was made that parts of an award that were previously approved as sound determinations should be disregarded as part of the appeals process (another said that to include them would be a waste of time/resources).

One response against the proposal expressed that if the procedure regarding this issue were applied differently to the devolved and reserved benefits, it may be confusing to users. The approach, if it allowed for removal of benefits already agreed and not under appeal, may go against the Scottish Government's aim of achieving dignity and respect for users, it was felt:

> *"Appellants who find that they have benefits removed as a result of addressing the whole decision may feel they have been 'ambushed' by the process and are seriously aggrieved."*

Overall, it was felt the potentially adverse implications of this proposal had not been adequately addressed or explained in the consultation and there may be a need for more guidance on when it would be appropriate to exercise this power, rather than using it as standard.

These concerns aside, there was support for all aspects of decisions to be considered and, overall, there was agreement that the Tribunal should be able to make its own determination of an individual's entitlement and not be restricted to assessing the grounds of appeal by the applicant:

> *"We agree that all options open to original decision makers should be open to the Tribunal. It is right that the Tribunal has an ability to make its own determination of the individual's entitlement and is not restricted to assessing the grounds of appeal by the applicant."*

The only other main issue raised was the need for discretion in whether it is always appropriate to consider all aspects of a determination (as, in some cases, to do so may not be a good use of time and resources). One organisation suggested that the words "but need not" after "may" in Regulation 6 be added to stress that it confers discretion rather than imposing a duty, i.e.:

> *"The First-tier Tribunal may, but need not, consider all aspects of a determination which it is called upon to review in accordance with Regulation 4 or 5, and not only the particular aspects(s) challenged by the individual appealing against the determination."*

Guidance on the use of this power for FtT members should be in place and might include examples of when it would be appropriate to exercise this power, for example, if there is new, compelling evidence that was not available when the original determination was made, it was suggested.

Q3. Do you have any other comments you wish to make on the draft Regulations?

Seven respondents did not answer this question and six stated that they had no further comments to make.

Twelve substantive responses were received and comments related mainly to the need for greater detail in the Regulations around how overpayments would be recovered, greater clarity on how appeals would be handled for reserved benefits, and the need for consistent and clearly specified timescales for determinations, redeterminations and, where necessary, appeals to ensure that all are dealt with in a timely manner which causes least disruption to the applicant's daily life/circumstances:

> *"Clarity is required over what Rules will apply for appeals against determinations for reserved benefits at the point of devolution. Any proposal to extend the Rules to reserved benefits once the SSCST has been devolved must be fully consulted upon."*

In respect of timescales, one respondent highlighted that the draft Regulations refer to a period of 31 days throughout and that legislation covering reserved benefits uses a period of one calendar month. This different approach could cause confusion to appellants, it was suggested. Using 'one calendar month' may be an easier period for people to remember and apply to their own cases.

All other comments either repeated or related to issues already raised in response to the earlier consultation questions, as summarised above.

Adding the Name of the Social Security chamber

Section 20 of the Tribunals (Scotland) Act 2014 gives the power for the Scottish Ministers to make Regulations providing for the organisation of the First-tier Tribunal for Scotland into chambers. This power has been exercised in making the First-tier Tribunal for Scotland (chambers) Regulations 2016. Regulation 2 lists the chambers into which the First-tier Tribunal for Scotland is divided and the draft Regulations add the name of the 'Social Security chamber' to the list.

The second part of the consultation sought views on this proposal.

Q4. Do you have any comments you wish to make on the draft First-tier Tribunal for Scotland (chambers) Amendment Regulations?

The majority of respondents either gave no response to this question (9) or indicated that they had no comments (10).

Of the 6 respondents who provided responses, one suggested that this was a necessary prerequisite in terms of the Tribunals (Scotland) Act 2014 and another simply indicated that they agreed with the name.

The small number of other comments were more generic in nature and pointed to the need to have a name that was destigmatising and accessible for those facing communication challenges (although no specific criticisms of the proposed name were made).

This part of the consultation attracted the least substantive feedback, overall.

Rules of Procedure for the First-Tier Tribunal for Scotland Social Security chamber

The Tribunals (Scotland) Act 2014 provides the power for the Scottish Ministers to make Regulations setting out the procedural Rules to be applicable to chambers of the First-tier Tribunal for Scotland and to the Upper Tribunal.

Part three of the consultation sought views in respect of each of the proposed changes to the Rules of procedure.

Q5. Do you have any comments on any of the elements of the draft Rules of procedure described at paragraphs 27 - 38 in Part 4?

This question generated a significant response, with all but one respondent providing a detailed answer.

Social Security Charter

Changes to the Rules of procedure include that, when dealing with cases, the FtT and Upper Tribunal may have regard to the Scottish Social Security Charter which is to be prepared and published in accordance with the Social Security (Scotland) Act 2018. One respondent explicitly stated that this requirement would embed the Social Security System principles into the decision making and deliberations of the Tribunal (which they welcomed). A view was also put forward that it was important that the FtT and the Upper Tribunal were 'empowered' to take the Charter into account when dealing with appeals. Another supporter of this Regulation suggested that further clarity might be given to assist Judges by the production of a 'bench book' similar to that which exists under the reserved system and that, for transparency, this publication should be made publicly available. One other respondent suggested that this Regulation could be strengthened further to state that the Tribunal must adhere to the Charter with some way of monitoring this. Another stressed that they would welcome the opportunity to view and comment on the Social Security Charter.

One response, submitted on behalf of an organisation, did not consider reference to the Charter as either necessary or appropriate, since the document has not yet been promulgated:

> *"We oppose the inclusion of a reference in both sets of Rules to the Social Security Charter. That document has not yet been promulgated. Its inclusion may compromise judicial independence as the Charter primarily relates to decision making by the Executive. Is the aim of the inclusion of the Charter not already met by the reference to "dignity and respect" in rule 2(2)(c), of the draft SSC Rules, which we note is not included in the UT Rules? We do not consider the reference to the Charter is either necessary or appropriate."*

Another suggested that it was not appropriate that the Charter be referenced in the Regulations as it was an aspirational provision rather than an enforceable procedure:

> *"I wholeheartedly support a hearing process which treats parties with proper consideration and respect but I query the inclusion, in a set of procedural Rules, an aspirational provision which cannot be enforced and is not consistently deliverable within a judicial hearing."*

Views were, therefore, mixed with regard to the suitability and need for referencing the Social Security Charter with some suggesting that its reference would make explicit what was required, whilst others perceived it was superfluous.

Dismissal of Cases

The Regulations proposed omitting provisions from the 2008 Rules that dismissed proceedings if a party failed to comply with an order or if there is no reasonable prospect of the appellant's case succeeding or barring an individual from taking part in proceedings where dismissal has been determined. Few comments were made about the reasonable prospect Rules but one respondent who did comment offered their support, especially in cases where the appellant has limited literacy or cognitive skills and may be unable to access appropriate support/assistance:

> *"We agree that the 'no reasonable prospect' Rules should be removed as an appeal which appears to assert a weak cause may have been submitted by an appellant who has limited literacy skills and has been unable to access support."*

Another commented that the omission of the power to strike out an appeal where a party has failed to comply with an order was welcomed because it is not appropriate for social security appeals, and particularly appeals by claimants with disabilities. One other individual suggested that the departure from the provisions of Rule 8 of the SEC Rules was not justified as they felt that the existing Rule had not historically given rise to any difficulties and another suggested that more consideration be given to its appropriateness[6]. Another respondent suggested that the omission of provisions allowing the FtT to bar respondents from taking part in proceedings was a concern, and that it may be appropriate for the FtT to have sanctions available to deal with repeated non-compliance.

Independent Medical Examinations

Several comments were made in relation to proposals for orders to be given by the Social Security chamber for an independent medical examination of the appellant, where appropriate (with the independent medical practitioner providing a report to the chamber). Views were expressed that, if an appellant could request the Tribunal to order an independent examination, this would give confidence to the appellant regarding the appeals process. Indeed, several comments were made

[6] One other respondent appeared to misunderstand the draft regulations and perceived that they would allow for cases to be dismissed unfairly.

that the independent nature of this examination would improve trust, credibility and confidence in the appeals process as a whole. Any reports produced from such examinations should also be made available to the appellant, it was stressed.

One respondent suggested that assurances were needed that requests for medical examinations would be routinely monitored to ensure that they were used exceptionally rather than routinely (and several others stressed the need for these to be used in exceptional circumstances only). There was also some concern that the Regulations, as currently stated, needed to be clearer in this regard:

> *"The Regulation should be amended to stipulate a medical assessment will only be carried out in exceptional circumstances and with the consent of the appellant. A clear definition of what is meant by exceptional circumstances is required and should also be set out in Regulations."*

It was suggested that examinations should be carried out in a timely fashion and more detail on timescales for completion may be required in the Rules:

> *"…we are concerned that this may prolong the Tribunal process or create delays in the process - the Rules do not specify when or where such an examination should take place or at what stage in the proceedings. We think the Rules should set out time limits within which the medical examination should take place, in order to keep any delay to a minimum."*

Similarly, Regulation 26 could be amended to explicitly state that no medical examination/assessment can be carried out at the hearing, it was suggested.

Another respondent specifically stated that they would prefer assessments to be carried out by the decision-making body, to maintain clear lines of accountability within the decision-making process.

A comment was made by one organisation that it was important to ensure that selected medical practitioners possessed appropriate training and skills in working with people who have communication barriers. Similarly, one organisation expressed concerns that not all practitioners are adequately trained in understanding mental health issues and this could be problematic (assessments could be unreliable due to fluctuations in a person's mental health, and some assessments may be biased by lack of understanding of mental health problems/presentations).

Suggestions were made that the medical evidence of practitioners already known to the appellant may be more reliable/credible, since they would be more familiar with the individual case (and their daily lives). For women, especially those who have experienced domestic violence or abuse histories, the importance of familiarity with a known medical practitioner was stressed (using independent medical examiners to 'cross-check' findings may be unduly intimidating in some cases).

One response questioned the move away from carrying out medical examinations at hearings on Industrial Injuries Disablement Benefit and the rationale/context of this proposal given that the existing process was seen as already fit for purpose.

The same respondent also sought clarification on how medical practitioners would be identified and appointed, specifically in relation to the Scottish Government's pledge that profit making organisations will not be involved in carrying out disability assessments in Scotland.

Overall, several disparate comments were made in relation to independent medical examinations. While most support this provision, in exceptional circumstances, some respondents would like to see reassurances built in around timeliness and appropriateness of the selected practitioner.

Mediation

More detail was requested regarding mediation and the support an appellant has access to when going through mediation (especially those with communication needs or learning disabilities) to ensure that the redetermination process is accessible. This included information about how service availability (and lack of availability) in different geographical areas might be overcome and who would pay for such support, as well as how abuse of charging for expenses by representatives may be avoided. Similarly, it was suggested that there needs to be mention in the Regulations around the right to access independent advocacy for anyone covered by the Mental Health (Care & Treatment) (Scotland) Act 2003.

Interpreters

One respondent indicated that the role of interpreters (specifically) should be extended even further to include communications with clerks both pre and post-hearing and another said that the Rules should extend to all communication assistants rather than interpreters alone.

Others simply stressed the importance of having third party supporters attend hearings, especially in cases where there is no formal representation and the appellant may not be able to accurately present their case (and especially in cases involving a young person under 18). Clarity may also be required around how decisions regarding the 'appropriateness' of extended support are determined, and by whom and caution needed to be exercised that interpreters were truly 'independent' (and not known to appellants, which may be difficult given the small community of qualified interpreters in Scotland, etc.)

Recordings

Feedback regarding recordings was generally positive, and was again seen as a step towards transparency, fairness and accuracy (i.e. to allow digital recording of hearings of the Social Security chamber as standard, with exceptions where circumstances dictate). One respondent indicated that the method of recording sessions needed to include accessible methods for British Sign Language users and deaf people and a call was also made for the recordings to be made available to appellants if requested, to ensure transparency. This includes providing written transcripts of recordings for hearing impaired adults.

The importance of consent for recordings was highlighted by one organisation i.e. consent must be being given by all those present for such recordings to take place, with a suggested 'opt out' process in place, especially for those experiencing mental health challenges such as psychosis or schizophrenia for whom the experience may be distressing or cause paranoia:

> *"We believe there may be very rare occasions where appellants may be disinhibited to attend an oral hearing where they know it will be recorded (e.g. because of a mental health condition) and we consider such appellants should have an opportunity to raise with the FtT their concerns."*

Some further clarity on how the recordings would operate may be required and issues around consent, access and appropriateness should all be more clearly set out:

> *"We think that the proposal that hearings will be recorded as a matter of routine is reasonable. All parties should be made aware of this and reminded of this before the hearing takes place; moreover, at the time of making an appeal to the Tribunal, an appellant should be made aware of this. At the time of making the appeal, the appellant should have the opportunity to make representations as to why they think this (routine recording) should not apply to their hearing. There should also be a clear process for appellants to request a copy of the recording."*

More detail around how recordings would be stored and how access would be managed may be required (including access to recordings by the appellant and others). A strong theme was that the right to access recordings must be clearly communicated to appellants. Finally, one individual stressed that there was a need to ensure robust hand-written notes/recordings of proceedings and that these be provided to all parties too, in those cases where there was an absence of a digital recording.

Venues

The draft Regulations set out that cases before the Social Security chamber may be heard at such a time and such location in Scotland as the President of Tribunals decides, ensuring accessibility for all parties. There were few comments specifically relating to venues except one respondent who noted that hearings at people's homes may be more appropriate in some cases, especially for those who may have difficulty travelling with dignity. Avoiding hearings in court building may be appropriate, as this was seen as too formal/intimidating, in some cases. Another respondent commented that the wording could be more specific in terms of stating that the Tribunal will be flexible about the location and date depending on the individual needs of the claimant. The same respondent also indicated that it was important that the appellant is given good notice of the Tribunal and provided with accessible information about it. One individual also indicated that the Rule as proposed may be too prescriptive limiting decision making to the President of Tribunals and another suggested that additional flexibility and rigour be explicitly built into the Rules to ensure that all venues are suitable on a case-by-case basis:

"We feel there should be additional Rules here requiring the President of Tribunals to have assessed any special needs of the parties prior to giving notice of the hearing time or venue…Rule 23 should explicitly refer to the need to take account of factors such as disability, lack of means to attend a hearing at a distant location and so forth in ensuring the hearing takes place at a suitable time and location."

Expenses

Regarding expenses, comments generally emphasised that there is a lack of detail, both in the provision itself and in the consultation document, as to the rationale behind the changes and how the provision would be applied. The draft Regulations set out that an award will be made for travel and other reasonable expenses incurred by those attending a hearing including, where appropriate, both parties to the case and any witnesses called by the parties or Tribunal itself:

"…in comparison with the existing FtT Rules, this new Rule would appear to be introducing a wider power to make an award of expenses…There is a lack of detail, both in the provision itself and in the consultation document, as to the rationale behind this and how it is envisaged that the provision will be applied."

This same respondent suggested that the new chamber adopt the existing position as per Rules 10 and 21 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement chamber) Rules 2008. Another suggested there was no justification for this Rule given that it may detract from the core business of the Tribunal to decide entitlement to benefit.

One other respondent explicitly commented that they disagreed that appellants may be ordered to pay expenses as this could act as a deterrent:

"Appellants in general and people with learning disabilities in particular will frequently have very limited financial resources and we are concerned that the potential for such an order could inhibit participation in the appeals process…such expenses should be an administrative function and not a matter for the Tribunal."

Similarly, there is a need to ensure that there is no disincentive to appeal due to the fear of being made to pay an order of expenses, it was felt.

One organisation indicated that they would like to see parties given an opportunity to make representations before the FtT before any award for expenses is made against them. Concerns were also raised in relation to cover of childcare costs and adults to accompany young people to hearings. One other comment was made that deadlines should be set for expenses to be paid, cash options should be available for payment and/or pre-paid travel options should be employed (e.g. pre-paid taxis to negate the need to claim back travel expenses). Overall, proposed Rule 10 was seen as being a radical departure from the present position which was not fully explained or justified.

Review Decisions

Very few comments were made regarding review decisions[7] (the proposal being that, unlike the 2008 Rules, a review of a decision made by the Social Security chamber can be undertaken at the request of a party to the case of the FtT deciding to revisit its own decision). The proposed changes were welcomed but it was suggested that additional clarification was required, specifically setting out the grounds on which review may be undertaken (and how this would be managed) to avoid over-use of this Rule. Similarly, one respondent suggested that, unless the grounds of review are in some way limited, there is a risk that the Upper Tribunal in Scotland may be called on to determine issues of fact which are more suitable for the SSC. One other organisation suggested that clarity was required around who undertake the review:

> *"… it should be made clear in the Rule that where a review decision is being made by one FtT member it should be the legally qualified member and where the decision is made by more than one FtT member that at least one of the members is the legally qualified member."*

One organisation suggested that Rule 39 should provide for the FtT to first consider whether to review the decision in accordance with Rule 40, when it receives an application for permission to appeal against its decision. The same organisation suggested that existing Rules around giving notice to parties for FtT reviews may be too prescriptive and have potential to cause delays. More general comments again related to the need to make sure that all interactions between appellants and the chamber employed accessible communication.

Q6. Do you have any comments on any other aspect of the draft Rules of procedure?

Just under half of respondents (10) offered comments on other aspects of the draft Rules of procedure for the Social Security chamber (six had no comments and nine gave no response).

Communication

For the most part, responses focused on accessibility and communications with suggestions that use should be made of Skype or other alternative communication tools to further enhance accessibility and reduce barriers presented by travel (and the cost of travel) to Tribunals. Similarly, domiciliary hearings may be appropriate in some cases and may be a fairer way of assessing someone's entitlement to disability-related assistance, it was felt. More consideration could be given to the needs of people for whom English is not their first language and preferences to have interpreters of a specific gender may also be appropriate in some cases, it was suggested. A more general comment was also made that reference to the

[7] Again, one respondent appeared to misunderstand the draft regulations and, although they offered opposition, it was not clear that this related to the proposal as stated.

Principles of Inclusive Communication be made in the Regulations, to ensure accessibility to those with learning difficulties.

Two respondents focused on the need for a party (and their representative) to receive/access a hard copy of all relevant documentation (instead of electronic communications alone), that a request for hard copy material can be made by a party and that the FtT give due consideration to whether the circumstances are such that a hard copy is required. One organisation suggested that the Rules around giving orders should include that written notice should also be given to "every other party affected by the order." This amendment would then permit a copy of an order, for instance seeking GP case notes, to be issued to the person from whom this information is sought. The same organisation queried if there would ever be justification to not send written notices of directions and asked for some indication of when it was envisaged that "a good reason not to do so" might apply.

One organisation indicated that Rules regarding notice of decisions were inadequate and suggested that there should be a definitive time limit within which the Tribunal must issue a final decision. The same organisation suggested that the Rules regarding decisions with or without a hearing should be amended such that "each party has consented", rather than "no party has objected" to the matter being decided without a hearing. The requirement for consent would ensure that each party has explicitly been asked whether or not they are happy for the matter to be decided without a hearing whereas a requirement for no objection may mean that, in some cases, a party might inadvertently (and perhaps without receiving notification) allow the decision to be made without a hearing.

One final respondent suggested that there was a lack of any rationale/context as to why publication of FtT decisions may be required and what the purpose of publication would be.

Appeals and Notice of Appeal

One organisation suggested that the requirement upon an appellant to provide a copy of the redetermination with their notice of appeal be reconsidered, as this may be a barrier to some people exercising their right of appeal (and copies could instead be requested from Social Security Scotland). Similarly, provision should be included to allow appellants more time to produce copies of items required with the notice of appeal, with assistance from the Tribunal staff, where necessary.

One comment was made that greater clarity is required around the right to withdraw an appeal at any time prior to a hearing and to do so with the Tribunal's consent. A comment was also made that the requirement for an appellant to state the outcome they are seeking in their appeal application be reconsidered, since this may be unduly challenging. It may, instead, be sufficient for a claimant to state the grounds on which the appeal rests, it was suggested.

Workloads

One organisation submitted additional comments that related to staffing and workloads in the First-Tier Tribunal. They suggested that that Rule 4(1) wrongly

restricts the delegation of judicial functions to staff with appropriate legal qualifications (since clerks and Tribunal Case workers could carry out duties under judicial supervision). The same respondent also noted that Rule 5 relating to case management powers was insufficiently clear in terms of who would carry out the designated functions. Workload volumes may be too great for the chamber President particularly when the Disability Assistance benefits are devolved, it was suggested.

Evidence, Submissions and Witnesses

One organisation presented a view that the that draft Rules relating to evidence and submissions replicated existing Social Entitlement chamber (SEC) Rules and were, therefore, largely irrelevant. The Rules relating to citation of witnesses were also equivalent to SEC Rules which are rarely applied and should be retained for any exceptional circumstances, it was suggested. The same respondent also questioned what would happen if a party was required to provide expert evidence under the new draft Rules but could not afford to appoint an expert.

Other Comments

Other more disparate comments raised by only one respondent each included that:

- the Regulations need to make reference to independent advocacy and people subject to the Mental Health Act having a legal right of access to independent advocacy;
- further qualification is required that the FtT should take into account the circumstances of the party and any reason given for failure to comply; and
- that a separate consultation may be required to specifically explore addition, substitution and removal of parties.

Q7. Would you welcome provision for supporters in cases before the Social Security chamber to have the opportunity, with appropriate permission, to make representations during proceedings?

A large majority of respondents (18) said that they would welcome this provision, and only one respondent explicitly said that they would not. The remaining six gave no response.

The main reasons given in support of this Rule were that supporters were more likely to know the detail of an appellant's case (and case history/lifestyle), that they would be more trusted by/give confidence to appellants and that it may be difficult for appellants to secure alternative representation. Employing known supporters in this role was seen as particularly valuable for vulnerable adults (including being able to have them physically sit alongside the appellant during hearings).

Using supporters to make representations during proceedings was also seen as supporting the principles of 'less formality' in the appeals process (and was seen as less adversarial), although flexibility was urged to allow the extended use of

supporters only where appropriate and with consent of appellants. The reserved system was seen as demonstrating best practice in this regard, with Tribunal Judges afforded flexibility in the way that they manage requests for support from appellants, and similar calls for discretion were made for the new FtT. It should also be laid out clearly what exact representations supporters can make (and how this differs from representatives *per se*).

Indeed, the one reason given for lack of support was the potential for confusion to arise as to who is representing an appellant at a hearing and the blurring or boundaries between the role of supporters and representatives:

> *"We consider that in spite of the clear statement at Rule 12(5) (i.e. that a supporter may not represent the party), the provision at Rule 12(2)(d) would appear to provide supporters with the opportunity to make such representations with the potential consequence of the role of supporter and representative becoming blurred."*

This contrasted strongly with the view of one individual who stressed that any overlap should not be seen as problematic:

> *"…there is no reason why a support should not act as a representative if there is no formal representative…I consider that this Rule should be removed and a reference should simply be made to the entitlement to attend with a supporter in Rule 28."*

The same individual also stressed that the requirement of both parties (including the FtT) to communicate the representative's name prior to the hearing may be administratively challenging to implement. This is because individual representatives often act on behalf of organisations, and their individual identities are not always known in advance. The draft Rules of Procedure were seen as 'unnecessarily inflexible' in this regard.

In responses given elsewhere in the consultation, concerns were raised about what would happen in cases where the supporter and representative held views that did not concur and that the presentation of conflicting views by both parties could be counter-productive and not be in the appellant's best interests. There may also be some blurring of boundaries/roles/expectations where a family member, friend or carer is appearing as a witness, as well as a supporter.

Importantly, while some supported the extended role of supporters, others expressed that their involvement should only be to endorse or corroborate statements of the appellant instead of offering information additional to what had been provided:

> *"Supporters may be allowed to contribute to the discussion, by agreement of all parties. However, their input should be to corroborate the statements of the appellant. As a supporter, they should not be acting as communication support, for example, and should not be asked to provide fresh evidence that has not already been sought from the appellant."*

Comments were also made in other responses that the role of supporters could be even further enhanced, that the individual should be able to decide what kind of support is required and that there should be a clear, more explicit reference to the appropriateness of a supporter for appellants with mental health concerns. In any case, the presence, or otherwise, of a supporter should have no impact on an individual's access to independent advocacy, it was stressed:

> *"We believe all people engaging with the social security system, including the Tribunal system should have a right to independent advocacy."*

Finally, one organisation noted that Rule 11 refers only to 'representative(s)' whereas the UK Rules refer to 'legal or lay representative(s)' and questioned if this divergence was deliberate.

In essence, the moral and social support that a supporter could provide was seen as valuable but only if it was complementary to, and never a substitute for, legal representation or independent advocacy.

Q8. Are there any other respects in which you would consider that the approach of the 2008 Rules should be departed from?

Most (14) said that there were no other respects in which they considered the designated approach should be departed from, and nine gave no response.

The main suggestion for change was more clearly setting out how time would be monitored with regards to the postage and receipt of documents by both the FtT and the appellant. It was suggested that it is currently not clear how the appellant is to know the precise date on which the respondent or FtT sends formal documents, although the date is crucial in determining when the appellant's time limit starts to run for response. A suggestion was made by this respondent to rely on section 7 of the Interpretation Act 1978, where if something is sent by post, properly addressed and with postage pre-paid, it is deemed to be received "at the time at which the letter would be delivered in the ordinary course of post".

One other specific comment was made around providing more support and signposting of support for women involved in FtT appeals, and ensuring individuals have access to independent advice throughout the process of making an appeal more generally.

Q9. Do you have any other comments you wish to make on the draft procedure Regulations?

Again, a large number of respondents either said that they had no further comments (8) or did not provide a response to this question (11). Of the six who did provide further comments, these related mainly to strengthening the Regulations by:

- making reference to independent advocacy and people subject to the Mental Health (Care & Treatment) (Scotland) Act 2003 having a legal right of access to independent advocacy;

- recognition within the Social Security principles of according it the appropriate status as a basic human right in accordance with Article 22 of the UN's Universal Declaration of Human Rights;
- providing more notice to support organisations ahead of Tribunals in which their clients are engaged;
- considering accessibility of venues, including the suitability and comfort of the spaces and provision of suitable communication supports throughout; and
- the enabling ethos of the Tribunal being stressed and unnecessarily prescriptive Rules being removed.

Overall, a number of changes were suggested in relation to draft procedure Rules, mostly to the wording of the draft Regulations to add clarity/accuracy.

Composition of the First-Tier Tribunal and Upper Tribunal for Scotland

Sections 38 and 40 of the Tribunals (Scotland) Act 2014 allow the Scottish Ministers, by Regulations, to determine the composition of the First-tier and Upper Tribunals.

The draft Regulations propose that First-tier Tribunals shall always comprise at least one legal member, but that ordinary members can assist in decisions where particular specialisms are required (e.g. disability experience or medical expertise). Flexibility is to be built in to ensure that the all cases dealt with by the Social Security chamber are handled on their own merit and by members best suited to consider the case.

The draft Regulations also propose that cases appealed from the Social Security chamber to the Upper Tribunal for Scotland should be decided by a legal member of the Upper Tribunal, the chamber President of the Social Security chamber (as long as they were not involved in the case prior to its being appealed), the President of Tribunals, the Lord President, or a judicial member of the Upper Tribunal.

Part four of the consultation sought views on the proposed composition for the SSC and the Upper Tribunal for Social Security appeals.

Q10. Do you have any comments on the proposed composition of the Social Security chamber when dealing with an appeal against a determination of entitlement as described in the Social Security (Scotland) Bill?

This question was wrongly labelled on the Citizen Space platform and so created some mixed responses, some of which addressed an earlier question in the consultation.

Among those who did directly address the question (5), there were mixed views. One organisation supported the proposed composition but suggested that additional clarity was needed around when an appeal in relation to disability assistance may be heard by a legal member sitting alone. Another organisation indicated that it was not fair, beneficial or in keeping with other Regulations to have a sole member making decisions and this same organisation also urged consideration to be given to the gender composition of those conducting hearings, with female only members being used if appropriate (i.e. in cases where the use of male members may be off-putting or lead to anxiety for a female claimant).

A third organisation supported the draft Regulations overall, and especially welcomed the use of a legal member plus one ordinary member of the FtT who had lived experience of disability in relevant cases, as well as the presence of a registered medical professional. Another suggested that clarity was required, however, around the term ‘disability experience’ (Regulation 2 (a)).

A detailed response was submitted by one organisation which stressed the need for people with lived experience to be present at Tribunals to help embed the principles outlined in the Social Security (Scotland) Bill, specifically respect for the dignity of individuals to be at the heart of the Scottish social security system. With this in mind, clarity was sought around:

- the scope of the use of ordinary members - concern was raised that the role of the ordinary member in the proposed social security First-tier Tribunal is restricted to cases involving assessment of medical issues in relation to entitlement to disability assistance. All sittings of the Tribunal would benefit from the lived experience provided by the ordinary member, it was felt; and
- the appointment of ordinary members - a view was put forward that appointments should be condition specific (e.g. where the case involves someone whose primary disabling condition is a mental health problem, the ordinary member should be someone with lived experience of mental health).

A final organisational response was received which stressed that the proposed composition failed to recognise the judicial role and status of those appointed to hear appeals in the Upper Tribunal and risked, therefore, undermining the status and diminishing the specialism of those hearing cases in the Upper Tribunal. The same response indicated that proposed Regulation 4 was inflexible in that it allowed for two judge panels but not three judge panels (i.e. it is not possible for a judicial member and a legal member to sit together or for two judicial members or two legal members to sit together) and this was seen as undesirable since the legal members are likely to be the most experienced in social security matters.

Q11. In particular, are you content with the default position that cases should be decided by only one member, namely the legal member, unless certain forms of assistance are under consideration?

Almost half of respondents (11) said that they were content with this proposal and a further nine gave no response. Among the five who were not content the main reasons given were that one member may not be impartial (and thus there should always be three members present), that there may be an argument for including a lay member with lived experience in all appeals (especially those relating to overpayments) since this would afford additional insight, that having three members was consistent with the approach taken at Mental Health Tribunal Hearings (and this represented good practice), and that there may be other cases where 'specialist' knowledge is required, which was not accounted for in the draft Regulations:

> *"We think that there is value in involving lay members with lived experience in determining the outcome of appeals…."*

Most others simply offered support that the proposal maintained the status quo and felt that legal members would be most suitably qualified to make decisions acting alone in the majority of standard appeal cases.

Q12. Do you have any comments on the proposed composition of the Upper Tribunal for Scotland when deciding appeals from the Social Security chamber to the Upper Tribunal?

Ten respondents indicated that they had no further comments/were content with the proposal, and ten gave no response. Among the five who gave substantive responses, the need for the Upper Tribunal to comprise a legal person, a lay person and a medical specialist was stressed and two others urged a mix of skills, experience and lived experience of relevant matters on the Upper Tribunal.

One individual put forward the view that they did not consider that the chamber President of the Social Security chamber should be part of the Upper Tribunal as they perceived that the role was entirely different and that the First-tier and Upper-tier should remain distinct.

Q13. Do you have any other comments you wish to make on the draft composition Regulations?

Only three respondents provided additional comments, and these related mostly to the need for flexibility in composition for different cases, the need for those who sit on the Upper Tribunal to be expert in their particular area of law (to avoid the need to convene a panel of Upper Tribunal judges to resolve inconsistency/uncertainty) and the value of employing lay members:

> *"…it is imperative that those who sit on the Upper Tribunal are able to be expert in that particular area of law and are not seen simply as generic judges in order to ensure the development of the jurisprudence of this jurisdiction."*

Eligibility Criteria for Appointments

The draft Regulations prescribe eligibility criteria for appointment of ordinary members of the FtT with medical and disability experience.

Views on the eligibility criteria for ordinary members were sought as part of the consultation.

Q14. Do you have any comments on the proposals regarding eligibility criteria for appointment of ordinary members of the First-tier Tribunal with medical and disability experience?

Four respondents said that they had no comments to make and seven gave no answer. Fourteen substantive responses were received and the main views expressed were supportive of the need for ordinary members to have lived experience of disability and be knowledgeable about the specific disabilities being considered. One respondent explicitly stated that non-medical ordinary members without lived experience would lack the requisite skills/qualifications to provide fair hearings:

> *"[We] would object to people who do not have lived experience of disability being eligible to make decisions on disabled people's right to be provided with disability assistance."*

Several respondents expressed a view that recruitment and selection needed to be robust and represent all sectors of the community. Appointment to specific cases should also be mindful of the specific condition of the claimant, ensuring that sitting members were sufficiently familiar with issues related to the applicant's condition (e.g. have a good knowledge or understanding of mental health conditions, physical disabilities or other needs, as appropriate). One organisation said that appointments should also be gender sensitive and extensive training must also be received by all members, prior to sitting on any panel. Provisions could also be made to allow the ordinary member with lived experience to 'brief' the Tribunal ahead of the hearing taking place, it was suggested. This could include making the members aware of the nuances of the disability at hand.

One respondent suggested that unpaid carers should also be considered as eligible to be ordinary members, although others felt that having at least one member with direct lived experience was key, since vicarious experience was not the same:

> *"…it will be important to strike a balance between members who have professional experience of disability and those who have genuine lived experience of disability by virtue of having a disability or being a carer for someone with a disability."*

One other organisation questioned if Regulation 3C(a) should specify which registered medical practitioners are eligible (e.g. if they require to be registered with the General Medical Council).

Q15. Can you envisage a situation in which a person may have gained experience of the needs of people with disabilities, but which may not be covered by the criteria set out in the draft Regulations?

This question attracted an even split in responses, with eight respondents saying that they could and eight saying that they could not. Nine provided no response.

Among those who said 'yes', the main situations described included paid and unpaid carers working in people's homes. One respondent said that having experience in working with a broad range of disabilities was more important than having personal experience of being disabled. Conversely, one respondent stressed again that there were no situations in which the experience of a third party would be an adequate replacement for the lived experience of disabled people themselves. Another raised concern that some people may be employed in roles which appear *prima facie* to involve work with disabled people and disability issues, but have little direct experience or interaction with disabled people, meaning that they were not adequately qualified for the position of ordinary member.

Given the low number of responses to this question and the mix in views that were expressed, it is difficult to provide overall conclusions regarding criteria not covered in the draft Regulations.

Q16. Do you have any concerns about our proposed approach to identifying when a person will be considered to have a disability?

Four respondent raised concerns about the proposed approach to identifying when a person will be considered to have a disability. The remaining respondents either said no (9) or gave no response (12).

Most said that the definition of disability under Section 6 of the Equality Act 2010 was widely recognised and would be appropriate to the SSC, however, one respondent urged caution that the definition of disability does not restrict those that may be characterised as disabled and eligible for some form of assistance that does not come under the terms of the 2010 Equality Act. The same respondent suggested that it may be beneficial to add to the Regulations Article 1 of the UN's Convention on The Rights of Persons with Disabilities to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms, and to promote respect for a person's inherent dignity.

One final comment was made that, while the definition was not problematic, learning disability was still widely misunderstood and often invisible and the experience of inaccessibility experienced by people with learning disabilities may go unrecognised.

Q17. Do you have any other comments you wish to make on the draft eligibility for appointment Regulations?

Very few additional comments were made in relation to the draft Regulations for eligibility for appointment (5). One respondent suggested that consideration should be given to those currently undertaking roles of medically qualified or disability

qualified members of the FtT. The changes to a devolved arrangement should not impinge on the status of those currently in place, it was suggested. Another stressed that it is important that any medical professionals or ordinary members appointed to Tribunals are truly independent (and not conducting examinations on behalf of Social Security Scotland or the Department for Work and Pensions).

Another respondent suggested that it is important that Tribunal members who have experience of disability should have a good awareness and training on issues relating to other protected characteristics and how issues intersect. A view was also put forward that ordinary members have sufficient expertise especially around complex and low incidence disabilities. One final view was that criteria be applied by the Judicial Appointments Board for Scotland.

Rules of Procedure for the Upper Tribunal for Scotland

The draft Regulations for the Upper Tribunal closely mirror the generic Rules of procedure already set out in the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, but have been modified in a number of ways. The final part of the consultation sought views on these changes.

Q18. Do you have any comments on any of the elements of the draft Rules of procedure described at paragraphs 54 - 61 in Part 7?

Six respondents indicated that they had no further comments to make and seven gave no response.

Interested Parties

The remaining twelve raised concerns that related mostly to the removal of reference to interested parties (defined in the generic Rules of procedure for the Upper Tribunal for Scotland to mean parties other than the appellant and respondent to whom notice of the various stages of proceedings before the Tribunal is to be given). Reference to interested parties would be removed from Rules relating to social security proceedings. Several commented that supporters and representatives of appellants should be classified as such and included in the giving of notice at various stages of proceedings. Others commented that the same concerns regarding supporters that were raised in relation to the FtT similarly applied to the Upper Tribunal Rules.

Expenses

Concerns regarding orders for expenses were also raised, the same as for the FtT draft Regulations. A suggestion was made that there is a lack of detail, both in the provision itself and in the consultation document, as to the rationale behind this and how it is envisaged that the provision will be applied (similar sentiments were raised as before around covering childcare costs and covering expenses for adults to accompany young people to Tribunal hearings):

> *"…our view is the same as for Regulation 10 of the Annex C Regulations. In addition, as a matter of policy, it would be helpful to clarify whether a Tribunal would reduce any prospective award of expenses to nil in such situations in which a representative had been appointed through the legal aid scheme in Scotland (as provided in Regulation 35)."*

Orders for expenses may also inhibit participation in the appeals process and it was suggested that expenses should be an administrative function and not a matter for the Upper Tribunal:

> *"The Regulations provide for the Upper Tribunal for Scotland to make an order for expenses for matters such as travel, sustenance and loss of remunerative*

time against either party. We are concerned that the potential for such an order could inhibit participation in the appeals process. In our view such expenses should be an administrative function and not a matter for the Upper Tribunal."

Another respondent questioned the need for orders in relation to expenses since these do not currently apply in the Administrative Appeals chamber and this has not given rise to difficulties in the past. The same respondent questioned the rationale for consent orders and indicated that the rationale for this change was not explained in the consultation.

Withdrawal of Cases

One organisation set out a view that an individual's right to withdraw a case should not be contingent upon the Upper Tribunal's agreement and the same organisation also suggested that the decision on whether a case should be allowed to proceed to the Upper Tribunal should always be made by an independent First-tier Tribunal judge, rather than by the judge who presided over the original First-tier Tribunal.

Other more general comments were made that human rights and the embedding of the Charter were as important in the Upper-tier as the First-tier draft Rules for proceedings (and this may be an omission in the Upper Tribunal draft Rules of procedure). Another organisation noted that sitting members of the Upper Tribunal are not covered by the Gender Representation on Public Boards (Scotland) Act due to their role as executives and that the Regulations should, therefore, include requests to be heard by a female member, if appropriate.

One organisation provided a strong view against many of the proposed revisions on the basis that they duplicated or muddied existing Rules for the Upper Tribunal for Scotland and would be administratively burdensome to implement. Comments were made that the rules, as drafted, may lack clarity and have potential to cause delays to procedures as a result. More thought also needed to be given to how support staff could assist in implementing the proposed changes. The existing two-stage process for making applications for permission to appeal were seen as preferable to the proposed new approach and reference to the Charter was again not seen as appropriate for procedural rules.

Q19. Do you have any comments on any other aspect of the draft Rules of procedure?

Most respondents answered 'no' (11) or gave no response to this question (12). The two who did comment requested further consultation around the use of orders for expenses, queried the rationale/need to introduce new Rules for dismissal of a party's case and queried why there was no provision in the draft Rules to allow for an application to judicial review proceedings before the Upper Tribunal to be made in certain circumstances (as is the case in the existing Tribunal Procedure (Upper Tribunal) Rules 2008). One noted that Rule 15 of the draft provisions introduce the same provisions in relation to supporters as per Rule 12 of the draft FtT Rules and again raised the potential of blurring of the roles of supporters and representatives under the proposed Upper Tribunal Rules.

Q20. Are there any other elements of the Rules applicable to social security proceedings in the Upper Tribunal which you think should be replicated in the draft Rules for the Upper Tribunal for Scotland, and have not been?

There were no substantive responses to this question - all either indicated 'no' (10) or gave no response (15).

Q21. Conversely, are there any elements of the Rules applicable to social security proceedings in the Upper Tribunal which have been replicated in the draft Rules for the Upper Tribunal for Scotland, and which you do not think should be so replicated?

Again, there were no substantive responses to this question - all either indicated 'no' (10) or gave no response (15).

Q22. Do you have any other comments you wish to make on the draft procedure Regulations for the Upper Tribunal?

Only three substantive comments were made in response to this question. One stressed again that the process should be as simplified and consistent as possible to aid understanding and compliance. One stressed that clarity is required on whether decisions relating to devolved benefits can or should be taken into account for a reserved benefit and vice versa. The final response stressed that many of the concerns relevant to the proposed Rules for the FtT were also applicable to the Upper Tribunal draft Rules and also noted that Rule 28 (Hearings in a party's absence) may be difficult to implement given the challenges of proving whether or not notification of hearings had been received by the party concerned (and which might account for their absence).

Continuous Improvement

There were few additional comments made on the consultation *per se*. One respondent suggested that appeal panel members should be able to provide feedback on the quality of the decision process presented to them and that improvement targets should be set to limit poor performance going forward. Another suggested that it would be prudent to have a situation where the President of the Social Security chamber in Scotland was also a judge in the Social Entitlement chamber in order to ensure that there is a smooth transition when the devolved and reserved jurisdictions both become part of the Scottish Courts and Tribunals Service (meaning that they would therefore have existing experience of the current Tribunal Rules).

Equality Considerations

A cross-cutting theme presented by one organisation across the consultation was that the social security system and any changes to it would disproportionately affect women compared to men, since they are over-represented in the system from the start. Similarly, comments were made that any changes to the system would be harder to navigate for those with learning disabilities, physical disabilities and

mental health problems and that the unique challenges faced by these groups needed to be considered at all stages of any development plans:

> *"That all communications meet the accessible information standards and inclusive communication principles. That a person-centered, rights-based approach provides suitable flexibility to meet circumstances, not one size fits all approach."*

Consultation Process

One of the main other comments that was received was around the inaccessibility of the consultation document itself. The complexity of the document language was seen as a possible barrier to participation in the consultation exercise and was seen, therefore, to go against the principles of including all stakeholders in the design of the new social security system. One organisation outlined that, in its view, previous submissions to the Scottish Government in regards to the development of the new social security system had perhaps been overlooked and that the nuances previously discussed were not necessarily reflected in the consultation document although no justification was provided for the opinions expressed.

In contrast, some respondents reiterated in their overall response that they were pleased by the Scottish Government's ambition to adopt a rights-based approach and to build a social security system founded on the principles of fairness, dignity and respect and welcomed that this ambition was reflected in the new draft Rules.

Conclusion

On the whole, it seems that there is support for the establishment of the new chamber of the First-tier Tribunal, and for it to be added to the list of chambers into which the First-tier Tribunal for Scotland is divided. The main feelings expressed were that greater clarity on the description of functions exercisable by the Social Security chamber may be required, as well as greater clarity on the specific Rules of procedure for both the First-tier Tribunal and Upper Tribunal where cases are appealed. Ensuring balanced representation of appointed members to both Tribunals was also seen as key.

The findings point mostly to the need for more detail to be provided on the rationale for some of the proposed Regulations as well as clarity around how Rules would be implemented. They also point towards a need for more clarity around the implications of having two separate appeal systems relating to the devolved and reserved social security benefits and how these might operate in parallel during the early days of transition.

In more general terms, the consultation responses stressed the need for accessible information and guidance on the functions of the devolved Tribunals, and to ensure that the system is user-led and incorporates the expertise of those with lived experience to achieve trust and legitimacy. Removing barriers to appeal for the most vulnerable groups is key, it seems, and this can be facilitated by additional communication around operational procedures, as well as even more flexibility being built into the system.

All respondents agreed that fairness, dignity and respect should be at the heart of any future changes and were keen to see the engagement process continue beyond this consultation alone.

Appendix A Summary of Responses

Q1. Do you have any comments on the description of functions exercisable by the Social Security chamber in considering entitlement to assistance under the Scottish social security system?

	Number	Percentage
Yes	13	52%
No comments	3	12%
No response	9	36%
Total	25	100%

Q2. Do you have any comments on the power of the Social Security chamber to consider all aspects of a determination which it is called upon to review?

	Number	Percentage
Yes	12	48%
No comments	3	12%
No response	10	40%
Total	25	100%

Q3. Do you have any other comments you wish to make on the draft Regulations?

	Number	Percentage
Yes	12	48%
No comments	6	24%
No response	7	28%
Total	25	100%

Q4. Do you have any comments you wish to make on the draft First-tier Tribunal for Scotland (chambers) Amendment Regulations?

	Number	Percentage
Yes	6	24%
No comments	10	40%
No response	9	36%
Total	25	100%

Q5. Do you have any comments on any of the elements of the draft Rules of procedure described at paragraphs 27 - 38 in Part 4?

	Number	Percentage
Yes	24	96%
No comments	0	0%
No response	1	4%
Total	25	100%

Q6. Do you have any comments on any other aspect of the draft Rules of procedure?

	Number	Percentage
Yes	10	40%
No comments	6	24%
No response	9	36%
Total	25	100%

Q7. Would you welcome provision for supporters in cases before the Social Security chamber to have the opportunity, with appropriate permission, to make representations during proceedings?

	Number	Percentage
Yes	18	72%
No	1	4%
No response	6	24%
Total	25	100%

Q8. Are there any other respects in which you would consider that the approach of the 2008 Rules should be departed from?

	Number	Percentage
Yes	2	8%
No	14	56%
No response	9	36%
Total	25	100%

Q9. Do you have any other comments you wish to make on the draft procedure Regulations?

	Number	Percentage
Yes	6	24%
No comments	8	32%
No response	11	44%
Total	25	100%

Q10. Do you have any comments on the proposed composition of the Social Security chamber when dealing with an appeal against a determination of entitlement as described in the Social Security (Scotland) Bill?

	Number	Percentage
Yes	5	20%
No comments	10	40%
No response	10	40%
Total	25	100%

Q11. In particular, are you content with the default position that cases should be decided by only one member, namely the legal member, unless certain forms of assistance are under consideration?

	Number	Percentage
Yes	11	44%
No	5	20%
No response	9	36%
Total	25	100%

Q12. Do you have any comments on the proposed composition of the Upper Tribunal for Scotland when deciding appeals from the Social Security chamber to the Upper Tribunal?

	Number	Percentage
Yes	5	20%
No comments	10	40%
No response	10	40%
Total	25	100%

Q13. Do you have any other comments you wish to make on the draft composition Regulations?

	Number	Percentage
Yes	3	12%
No comments	10	40%
No response	12	48%
Total	25	100%

Q14. Do you have any comments on the proposals regarding eligibility criteria for appointment of ordinary members of the First-tier Tribunal with medical and disability experience?

	Number	Percentage
Yes	14	56%
No comments	4	16%
No response	7	28%
Total	25	100%

Q15. Can you envisage a situation in which a person may have gained experience of the needs of people with disabilities, but which may not be covered by the criteria set out in the draft Regulations?

	Number	Percentage
Yes	8	32%
No comments	8	32%
No response	9	36%
Total	25	100%

Q16. Do you have any concerns about our proposed approach to identifying when a person will be considered to have a disability?

	Number	Percentage
Yes	4	16%
No	9	36%
No response	12	48%
Total	25	100%

Q17. Do you have any other comments you wish to make on the draft eligibility for appointment Regulations?

	Number	Percentage
Yes	5	20%
No	9	36%
No response	11	44%
Total	25	100%

Q18. Do you have any comments on any of the elements of the draft Rules of procedure described at paragraphs 54 - 61 in Part 7?

	Number	Percentage
Yes	12	48%
No comments	6	24%
No response	7	28%
Total	25	100%

Q19. Do you have any comments on any other aspect of the draft Rules of procedure?

	Number	Percentage
Yes	2	8%
No comments	11	44%
No response	12	48%
Total	25	100%

Q20. Are there any other elements of the Rules applicable to social security proceedings in the Upper Tribunal which you think should be replicated in the draft Rules for the Upper Tribunal for Scotland, and have not been?

	Number	Percentage
Yes	0	0%
No	10	40%
No response	15	60%
Total	25	100%

Q21. Conversely, are there any elements of the Rules applicable to social security proceedings in the Upper Tribunal which have been replicated in the draft Rules for the Upper Tribunal for Scotland, and which you do not think should be so replicated?

	Number	Percentage
Yes	0	0%
No	10	40%
No response	15	60%
Total	25	100%

Q22. Do you have any other comments you wish to make on the draft procedure Regulations for the Upper Tribunal?

	Number	Percentage
Yes	3	12%
No comment	10	40%
No response	12	48%
Total	25	100%

social research

The views expressed in this report are those of the researcher and do not necessarily represent those of the Scottish Government or Scottish Ministers.

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