Paper 2.4.1.

Welfare Funds (Scotland) Bill – Consultation on options for challenging decisions

Background
The Draft Welfare Funds (Scotland) Bill consultation seeks views in particular on the options for challenging decisions made by local authorities on applications to the Scottish Welfare Fund.

The Consultation gives rise to a number of fundamental questions in relation to administrative justice. However, the consultation timescale is such that the Committee will not have had much opportunity to develop its thinking or its approach to the wider questions it raises.

Forming a Committee view
Attached is a paper, prepared by Tom Mullen, in the form of a draft response to the consultation, which will form the starting point for discussion of the Committee's response on 29 January.

In reviewing the attached paper, it may be helpful to consider

- how the proposed response in this paper aligns with the Principles of Administrative Justice (as set out by AJTC), and whether we should /could usefully refer to them
- how the Committee assesses the proposals to fit with the Proportionate Dispute Resolution mapping factors of AJTC's 'Putting it Right'
- how best to represent the perspective and needs of the user in our response
- what, if anything, we may want to add about alternative means to resolving disputes in this area of administrative justice

Proposed timeline
Written responses should be submitted by Friday 7 February. Proposed actions can be:

- Discuss/agree position, where possible, 29 January
- Exchange Drafting changes /revisions by 1 February
- Circulate redraft 3 February
- Comments 5 February
- Submit 7 February

Comments on the Social Welfare Fund Consultation

The Scottish Welfare Fund replaces aspects of the discretionary Social Fund which were abolished with effect from April 2013. The SWF became operational from April

2013 on an interim basis. The Scottish Government now wishes to put it on a statutory footing.

1 The Social Fund

The Social Fund was originally created to meet special needs primarily of claimants of means-tested benefits. Some types of payment were a matter of entitlement and were governed by regulations (maternity grants, funeral payments and cold weather payments**);** others were paid at the discretion of the DWP in terms of directions and guidance issued by the Secretary of State (community care grants, budgeting loans and crisis loans). Discretionary payments were subject to cash limits. The discretionary payments were abolished with effect from 1 April 2013 and replaced by a new scheme under which payments were to be made by local authorities. The UK government transferred funding from the DWP budget to the Scottish block to enable the making of such payments in Scotland after abolition of the discretionary Social Fund and made an order under the Scotland Act 1998 extended devolved powers to enable the Scottish Parliament to legislate on what would otherwise be a devolved matter.

The discretionary Social Fund had a two stage review process. The first stage was an internal review by Jobcentre Plus of the decision challenged. The second stage was an independent review by a social fund inspector employed by the Independent Review Service (IRS). This proved to be a highly successful model of review over a period of 25 years.

2 The Scottish Welfare Fund

The Scottish Welfare has been the vehicle through which local authorities have been making two types of payment formerly made under the discretionary social fund, crisis loans and community care grants. There is no provision for making budgeting loans. The similarities between the interim scheme and the proposed statutory scheme for the SWF and the discretionary social fund are:

- the purposes of payments are similar;
- payments are discretionary rather than entitlements;
- payments are made subject to cash limits.

The key dissimilarity is that payments are and will be administered by local authorities rather than by a central government department.

3 A Preliminary Question

There are several references to local authority discretion in the consultation. Thus, at p. 9 it states that:

> "SWF is a discretionary Fund which gives LAs a great deal of flexibility to integrate delivery arrangements with local services and policies. This will have implications for any review process which operates at a national level. We need to make sure that arrangements for review support and do not cut across local arrangements for decision making and delivery."

At p. 18 it states:

> "Local variation in delivery arrangements and discretionary powers would make it difficult for a national tribunal to make informed decisions on cases."

We suggest further clarification is required of the intended extent of permitted local variation under the SWF. We assume that the principal reason for permitting local variation in the making of payments from the fund is the need for local authorities to be able to manage their individual budgets. The current guidance states (para. 4.6) that local authorities are expected to make a monthly decision on whether it is possible to make awards for high priority applications only, for high and medium applications or for high, medium and low applications. It also states that the priority can be set at different levels for Community Care Grants and Crisis Grants, and "We would not expect Local Authorities to reject any application which has been judged to match the priority level applying at the time the application is considered if funds remain in either the Community Care Grant or the Crisis Grant budget headings."

It is not clear if local variation might go beyond that, for example, if one local authority were to rank a particular need as high priority, but others were to rank the same need as medium or low priority. This should be clarified.

The implications of local variation for the review system are obvious. The more local discretion there is to vary policy on SWF payments, the greater the risk that a uniform national approach to reviews might undercut local authority policy-making. If there is to be substantial scope for local variation, then allowance for that needs to be built into the review system. However, to do that does require that the purposes and intended extent of local variation in policy are clarified.

We now proceed to answer the consultation questions, but state at this point that our preferred option for Second tier Review is the fourth option: a review closely modelled on the review arrangements for the discretionary Social Fund operated by the IRS.

4 Consultation Questions

Q1 – Does the Bill as drafted contain the elements you would expect it to contain?

The Bill contains most of the elements we would expect to see but there are additional elements we would like to see included.

Are there any elements you would add to the Bill?

First and Second Tier Review

The entitlement of claimants to both a first and second tier review should, as suggested at p. 5 of the consultation, be included in the Bill.

Consultation on regulations and guidance

The consultation obligations in the Bill are too narrow in two respects:

(i) the obligation to consult on guidance placed on Ministers by section 6(3) is too narrowly expressed as it gives only local authorities the right to be consulted. Consultation should be extended to relevant interest groups. We recommend adding a new paragraph to s. 6(3) as follows:

> "(c) such organisations as appear to the Scottish Ministers to be representative of, or to have knowledge or experience of, the difficulties faced by persons on low incomes."

(ii) There is not an express obligation to consult before issuing regulations under s. 5 of the Bill. Clearly, there ought to be.

Are there any elements you would take out of the Bill?

No.

Q2 – Our starting point is that the following elements of the scheme should be included in regulations. The actual wording of the regulations is still to be discussed but we anticipate that they would cover these areas:

Do you agree with the proposed list of topics to include in regulations?

We agree that topics in the proposed list are appropriate for inclusion in the regulations. However, we think it essential that full consultation be carried out on draft regulations.

If no, what would you like to see added to the list?

n/a

If no, what would you like to see taken away from the list?

n/a

Q3 – Do you agree that characteristics of the review process and the purpose of second tier review should be the same under the permanent SWF as they are under the interim SWF?

The primary purpose of both tiers of the review mechanism, as for any mechanism for review or appeal of individualised decisions, should be to identify and correct decisions which are wrong. A secondary but important purpose should be to encourage learning from mistakes so that fewer bad decisions are made in future.

We agree with the list of suggested characteristics (p. 11) that will be common to the First and Second Tier Reviews. We think that the suggested purposes for the second-tier review should be redrafted as follows:

"Purpose of Second Tier Review

- To ensure that the decisions made are consistent with the legislation and guidance for the Fund and that discretion has been reasonably exercised.
- To identify any deficiencies in local authority decision-making and give feedback to local authorities on the quality of their decision-making;
- To give confidence to applicants for review that the arrangements for second tier review are independent and impartial and that there is an effective remedy for defective decisions by local authorities."

We think that two of the stated purposes require further thought, namely:

- To identify whether the SWF guidance and local policy is being consistently applied and feed back to LAs where it is not.
- To identify where the SWF guidance is having unintended consequences so that these can be rectified.

Both these relate to the point discussed above, namely the intended extent of permitted local variation under the SWF. Once that is clarified, the drafting of these purposes can be finalised.

Q4 – What do you think are the most likely issues to present at second tier review under the interim SWF i.e. what are the most common reasons that people will ask for a review?

<u>Numbers of applications and requests for review</u>

The best source of guidance on this is probably the annual reports to the UK Parliament of the Secretary of State and the Social Fund Commissioner (SRC). The report of the Secretary of State for 2012/13 shows that the total number of applications received for community care grants and crisis loans in that year was 2,898,000. The consultation paper states that a survey carried out in August 2013 identified a total of 35,427 applications to the SWF. If we assume that the figure of 35.427 represents a five month total. That suggests an annual total in the region of

85,000 applications. That figure is only 2.93% of the UK total for 2012/13 which in turn suggest that the early figures are artificially depressed and the level of claims may well rise much higher in the near future.

The consultation paper also states that 827 cases had gone to first tier review and 66 to second tier review, of total applications 2.36% and 0.19% of total applications respectively. By contrast, in 2012/123 there were 165,000 applications for initial review received in respect of community care grants and crisis loans and 42,940 applications for further review to the IRS. These figures represent 5.7% and 1.48% of total applications for 2012/13 respectively. It is clear that rates of seeking review in the first few months of the SWF are very much lower, particularly for second tier review than rates have been for the discretionary social fund. It is, therefore, likely that the number of applications for review will rise significantly as the SWF and the review arrangements become better known and understood.

Subject matter of review

We note that the applicant's reason for challenging the guidance could potentially relate to any aspect of the regulations or guidance, e.g. whether an asset is correctly regarded as capital available to him/her. The experience of the IRS will be relevant here. We recommend that the Scottish Government seeks detailed information on the subject matter of reviews from former members of the IRS and the former Social Fund Commissioner if it has not already done so.

The reasons for seeking review can also be classified analytically as follows:

- the decision was mistaken on the facts;
- the decision was mistaken in law;
- any discretion that the decision-maker had was exercised inappropriately.

The review process should be able to review initial decisions and substitute a fresh decision if the original decision is defective in any of these ways. The application of the third principle will be affected by the position that is taken on the permitted extent of local variation in policy (discussed above). We recommend that the Second Tier Review body be able to engage in full merits review of original decisions, in other words it should be able to engage in full merits review in the same way as tribunals hearing social security can. This applies to all aspects of the decision except the exercise of local policy choice to the extent that this exists. In relation to permitted local policy choice, the Second Tier Review body should apply the judicial review standard.

Options for review

The consultation presents three options for the Second Tier Review:

- A local authority panel with independent representatives;
- The SPSO;
- A tribunal.

A fourth option – a bespoke service like the Independent Review Service – was considered at an earlier stage but not included in the consultation. However, for the reasons given below, we consider that it is the best option.

A local authority panel with independent representatives

This option would not be appropriate for the reasons given as disadvantages at p. 13 of the consultation.

The SPSO

This option would not be appropriate either. Although the SPSO meets a number of the criteria specified at p. 11, there is a substantial difficulty. As noted above, the Second Tier Review should be able to review discretionary decisions of local authorities on the merits and to substitute a fresh decision of its own for a defective decision. Both would require a change in the role of the SPSO. The SPSO is not in general permitted to question the merits of a local authority decision taken without maladministration. Also, in common with many other Ombudsmen, the SPSO only has the power to make recommendations and not to make binding decisions. It is generally accepted that Ombudsmen should not have the power to make binding decisions. There has been no suggestion that there should be such a change in the role of the SPSO and it would make no sense to introduce this role change in relation to one specific decision-making function but not others.

A Tribunal

A tribunal would meet many of the criteria specified at p. 11 of the consultation. A tribunal ought to be:

- transparent, fair and accessible;
- high quality, impartial, free to use and independent, and
- make sound and accurate decisions.

Most existing tribunals have these virtues.

It is less certain that a tribunal would be:

- quick to operate;
- proportionate and cost effective; and
- effective at communicating with local authorities.

These are not inherent characteristics of tribunals, but neither are they inherent characteristics of ombudsmen or of other independent dispute resolution mechanisms. Whether such aims are realised depends upon the details of design of institutions. A tribunal could be *designed* in such a way as to be speedy, proportionate, cost-effective and perhaps also good at communicating with local authorities. It is worth recalling that the standard reasons for preferring tribunals to courts include that they are speedier, cheaper and more proportionate.

The consultation states that a tribunal would have certain disadvantages. We do not agree with some items in that list and review them below:

- Tribunals can be resource intensive in case preparation and representation for applicants and local authorities.

There is no particular reason why preparing for a tribunal should be more resource intensive for applicants and local authorities. Whatever, the forum that is chosen for independent review, both parties will have the burden of preparing and presenting their case. In most tribunals, the procedure is relatively simple and strict rule of evidence do not apply, so presenting a case to a tribunal should not be more onerous than presenting a case to the SPSO or a local authority panel with independent representation.

- The costs of a tribunal may be disproportionate to the value of awards being made under the SWF/overall value of the SWF.

This worry is exaggerated. Given the sums of money likely to be involved in most awards, the cost of any form of independent review is likely to high in relation to the size of awards. It should not be assumed that the cost of tribunal reviews will be higher than those of the other options. Thus, in recent years the unit cost of social security appeals has compared favourably with that of ombudsmen investigations. In any event if independent review can be achieved at as low a cost as is compatible with being *effective*, them that review is proportionate even if the unit cost is high in absolute terms when compared to the level of awards.

- Tribunals are usually chaired by legal members. Our early judgement is that review decisions are mainly likely to be as a result of maladministration or error and not likely to require judgements on complex matters of law/legal expertise.

This objection is misconceived. It is probably true that most cases will not raise complex questions of law. However, some cases will raise questions of law and the review mechanism should be able to deal with these. It is also a mistake to assume that in tribunals, most appeals turn on questions of law. Most successful appeals are upheld because of errors in the assessment of facts or because new evidence is produced which was not available at the time of the original decision. It is quite likely that mistakes in the assessment of applications will occur and that there will be exercises of discretion that can be contested.

We are not sure what is meant by maladministration. In the context of ombudsmen, the term clearly includes administrative failings that do not relate to the correctness of the decision such as delay in decision-making and rudeness in dealing with applicants. We doubt that most reviews will raise complaints of that type. Most reviews are likely to be attempts to get the decision changed based on a perception that refusal to make an award was unfair

- There isn't an obvious fit with the new structure created by the Tribunals Bill, particularly the Upper Tribunal which will hear cases only on points of law.

This objection does not make sense. This tribunal would be analogous to the First tier tribunal and not to the Upper Tribunal. Applications for review would be made on any ground to this tribunal, with a subsequent appeal on a point of law only to the Upper Tribunal.

- There is little potential for driving service improvement and training within LAs. Hearings may result in an adversarial relationship with LAs.

There is not necessarily less potential for driving service improvement and training within local authorities. If this is desired it can be built into the system.

- The tribunal would need to be in session very frequently to meet the turnaround times for crisis grants.

This is true whatever option is chosen for independent review.

- This option has a poor fit with the AJTC mapping factors set out above.

We disagree.

- Local variation in delivery arrangements and discretionary powers would make it difficult for a national tribunal to make informed decisions on cases.

As noted above, it is essential to clarify the purposes and intended extent of local variation in policy. Subject to that, this objection would apply to any nationally organised Second Tier Review, e.g. the SPSO. A locally based review would be better able to take account of local variation but it is not clear that this is a good thing. A locally based review would be less well equipped to achieve some of the stated purposes of Second Tier Review, namely to identify whether the SWF guidance and local policy is being consistently applied and feed back to LAs where it is not, and to identify where the SWF guidance is having unintended consequences so that these can be rectified.

Q5 – If the SPSO is the chosen option, should this be with additional powers to:

review discretionary decisions on the merits of the case?

make an alternative decision which would be binding on the Local Authority?

As noted above, the combination of these two changes would be an inappropriate change in the role of the SPSO. If instead the SPSO were to have the power to review discretionary decisions on the merits but not the power to substitute its own decision this would be less problematic from the SPSO's perspective but would not provide a fully adequate remedy. There needs to be an independent remedy with power to change a defective decision.

*Q6 – Please rank the 3 options for second tier reviews in order of preference - where **1** is the option you would **most** like to see implemented and **3** is the option you would **least** like to see implemented*:

Option	**Priority you would give the option:**
Local Authority Panel	none
Scottish Public Service Ombudsman	3rd
A Tribunal	2nd
An Independent Review Service	1st

An Independent Review Service

We think that it was wrong to omit this model from the options. A Second Tier Review similar to the IRS meets most of the criteria stated at p. 11. It would be:

- transparent, fair and accessible;
- timely, and would recognising the circumstances of the applicant;
- high quality, impartial, free to use and independent;
- quick to operate, making sound and accurate decisions;
- effective at communicating;
- proportionate and cost effective.

It would also satisfy the purposes of Second Tier Review. It would:

- ensure that the correct decisions are being made and that the guidance for the Fund is being followed;
- identify whether the SWF guidance and local policy is being consistently applied and feed back to LAs where it is not
- identify where the SWF guidance is having unintended consequences so that these can be rectified;
- give confidence to the applicant that the SWF is subject to impartial scrutiny and add credibility to the Fund as a whole.

A Second Tier Review service would be easy to set up as the model already exists. The experience of operating the IRS could be used to create the service. We consider that it meets all of the relevant criteria at least as well as and in some cases better than the other options. In particular, it may well be the cheapest (the IRS unit cost was £73 per review in 2012-13) and the easiest structure in which to feed back information and advice on improving decision quality to original decision-makers (again, the IRS developed a model for this).

We now evaluate the arguments against this fourth option. The reasons given in the consultation paper for excluding this option are all completely unrelated to the positive criteria for choosing a review method stated at p. 11. This immediately suggests that the case for excluding this option was weak. The reasons themselves

are also not independently compelling. It is said that to set up a new body would be against the direction of travel for complaints processes. This is irrelevant as the grievances in question are not merely complaints; they are challenges to decisions concerning state benefits made on the basis that they are wrong. Therefore, the decision should not be governed by the complaints criteria set out in the Crerar Report. In any event the IRS model would in fact meet some of those criteria contrary to what is said in the consultation.

Much emphasis is given to the desire to simplify the administrative justice landscape. This laudable aim has been given too much weight and is allied to a claim which is simply not true, namely that "a new body would … make it more difficult for members of the public to understand where to go when they need help." If a new body were correctly designed this would not happen. There is a very simply – tried and tested way – of ensuring that citizens know where to go for help. Every decision letter on a claim to the SWF should include a cleat statement of the citizen's right to review and should signpost the key advice agencies. Better still, the letter should be accompanied by a simple form which could be used to seek a review.

FPCSAG said that: "Government and/or Parliament should not establish any new complaints handling bodies without first considering if the SPSO could take on the function or, only where that would be inappropriate, whether an existing body could expand its role to take on the new function."

As we have indicated, the SPSO is not the appropriate option. The other existing bodies are devolved tribunals, and the courts. Neither of these would be appropriate, leaving a new tribunal or a Second Tier Review modelled on the IRS as the best options.