



## **Response to Call for Written Evidence by the Welfare Reform Committee Stage 1 consideration of the Welfare Funds (Scotland) Bill**

### **Introduction**

The Scottish Tribunals and Administrative Justice Advisory Committee (STAJAC) was established by Scottish Ministers in November 2013 (following the abolition of the Scottish Committee of the Administrative Justice and Tribunals Council) to provide external, expert scrutiny of the devolved administrative justice and tribunals system in Scotland. Its remit includes promoting the interests of system users and championing an administrative justice and tribunals system that is accessible, responsive and has users' needs at the centre.

We have focussed in our evidence on questions 6 and 7 (review of decisions) but also give some limited comment on other matters.

### **Q 6. What are your views on the proposed internal local authority review process?**

We note that regulations are subject to negative procedure. We believe that it is particularly important that the Government consult fully on the draft regulations and guidance, as is their stated intent.

#### *Internal review*

We offer comment on the proposed internal local authority review process on the basis of the (limited) detail available at this time in the draft Bill and draft Regulations:

- 1) We would comment generally that the primary purpose of both tiers of the review mechanism, as for any mechanism for review or appeal of individual decisions, should be to identify and correct decisions which are wrong. A secondary but very important purpose should be to encourage learning from mistakes so that fewer bad decisions are made in future.

- 2) Section 4(2) of the draft Bill provides that regulations can either make all decisions subject to (internal, first tier) review, or provide for the types of decisions that are subject to review. We believe that in principle and in the interests of natural justice, and ensuring that system users have confidence in the process, all first instance decisions should be subject to internal review.
- 3) Section 5(2) of the draft Bill provides that regulations can include provision on how an application for review by a local Authority is to be made, etc. We believe it should be possible to access the review mechanism by a number of differing routes that would maximise accessibility of review for users, and that this should be added in the regulations. Access mechanism should include, for example:
  - completing an online form;
  - completing a paper form and posting it to the LA;
  - attending an LA or community partner access point in person;
  - applying for a review by telephone.
  - signposting of applicants to appropriate independent sources of advice and assistance
- 4) Because of the time critical nature of a crisis grant decision, we believe that the regulations or the guidance should reflect the requirement to communicate review decisions to the applicant as quickly as possible, followed up formally in writing.
- 5) It is not entirely clear how the internal review process would work if an LA makes arrangements under section 3 for someone else to administer the fund on its behalf - do the internal review arrangements then also apply to that other person or body? It is surely logical and in the interests of fairness and natural justice (and we assume intended) that if the principle of review is accepted, and if administration of the fund is delegated, the decision of the person or body to whom it is delegated should also be subject to review. It would therefore be helpful to clarify whether all of the arrangements relating to internal review (in the Bill and the regulations) equally apply to the person to whom the local authority delegates the administration of the fund.
- 6) We are pleased that the regulations specify timescales both for initial decision on entitlement and for decisions on internal reviews, in order that decisions get made quickly.

#### *Permitted Extent of Local Discretion/Variation – impact on second tier review*

It is uncertain from the face of the Bill (Section 5(2)(c) and draft regulations as they exist at this time, just what will be the extent of local variation that will be permitted in the administration of the fund. We think it would be beneficial to clarify further the intended extent of permitted local variation under the Scottish Welfare Fund (SWF).

We noted in our response to the Draft Bill consultation<sup>1</sup> that the extent of permitted local variation has important implications for the second tier review system as this could result in different outcomes for broadly similar applications across LA boundaries. Examples could include assessment of priority, use of discretion and determination of delivery arrangements (goods vs. grants), for example. We, therefore, recommend that clear policy decisions are made and communicated to local authorities and to the general public on the purposes and intended extent of local variation in policy including the weight to be given to local prioritisation whether in Regulations or Guidance.

These matters need not necessarily be expressed in the Bill itself, but they should be clarified via regulations made under section 5. The Committee should ask Ministers to explain their views on the intended extent of permitted local variation and how they will use the regulation making power to determine the scope of local authority discretion.

#### **Q 7. Do you agree that the SPSO is the appropriate body to conduct secondary reviews?**

As indicated in our response to the draft Bill Consultation (footnote 1), we think that the SPSO can be an appropriate option for the second tier review, depending on the detail of implementation. Comments on particular issues are given below.

##### *Scope of review*

We agree, as the Bill provides, that the SPSO should be able to examine the merits of the case in determining SWF Reviews in the same way that statutory tribunals typically can when considering appeals. That means that there should be no restrictions on the ground of review. The SPSO would be able to substitute its view for that of the local authority on questions of fact, questions of law *and questions of discretion*. To put it another way, the SPSO would be empowered to substitute its view of the right decision. This will better ensure protection of applicants' interests, make applying for a review more straightforward and ensure more thorough scrutiny of decision-making.

##### *Binding decisions*

We are pleased that the Bill provides for the SPSO being able to make binding decisions rather than merely making a recommendation to the local authority. We are also pleased that the Bill gives the SPSO the option, where a defective decision has been made, of either directing the local authority to reconsider the application or substituting its own decision.

##### *Application to SPSO*

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[http://www.adminjusticescotland.com/documents/STAJAC%20Comments%20on%20the%20Draft%20Welfare%20Funds%20\(Scotland\)%20Bill%20Consultation.pdf](http://www.adminjusticescotland.com/documents/STAJAC%20Comments%20on%20the%20Draft%20Welfare%20Funds%20(Scotland)%20Bill%20Consultation.pdf)

We are pleased that the Bill provides for applications for second tier review to be made direct to the SPSO. We believe that, when the SPSO draws up its review processes (see comments below), it should ensure that it is made as easy as possible for applicants to ask for a review. Therefore, it should be possible to ask for a review by any of the following methods:

- completing an online form;
- completing a paper form and posting it to the SPSO;
- applying for a review by telephone.

#### *Detail of SPSO review process*

Whilst we recognise that the independence of the SPSO must not be compromised, and that no detailed provision should be made in regulations about how the SPSO carries out 2<sup>nd</sup> tier review (Bill section 5 (4)), nevertheless we do believe that the Bill, or regulations should require that the SPSO publish guidance on how it will undertake 2<sup>nd</sup> tier review and that SPSO consult with relevant parties before publishing or updating such guidance. This guidance will allow the opportunity for the SPSO to set out how it will ensure easy access to review, what the detailed process for application will be, what timescales it intends to operate to, and will provide applicants with clarity on the process.

#### *Annual Report*

We previously recommended (in our consultation response) that there should be specific provision in either the Bill or in the regulations for the SPSO to report on how it carries out its second tier review function, and the performance of that function (including for example numbers of and outcomes of decisions, adherence to timescales etc.) The purpose is to ensure (a) that the second tier review is providing an effective remedy for applicants aggrieved by local authority decisions, and (b) that the review procedure is encouraging improvement in initial decision-making. Such a report to the Scottish Parliament on the operation of the second tier reviews could be a distinct section of the annual report the SPSO makes under section 17 of Scottish Public Services Ombudsman Act (2002) rather than a separate report.

### **Other matters**

#### *Quality Improvement*

Both the internal and second tier review procedures should inform quality improvement in initial decision making. In relation to the internal review, this can be addressed in any guidance Scottish ministers may issue under section 6(1) of the draft regulations. The SPSO should be given direction also to promote and support such improvement.