

## **SWF Permanent Fund Second Tier Review: Basis of Advice to Ministers**

### **Further Comments by Scottish Tribunals and Administrative Justice Advisory Committee**

We are grateful for the opportunity to comment on the draft document setting out the basis of advice to Ministers. Here are our further comments.

#### **1 The Preferred Option - the SPSO**

As we said in our in our response to the draft Bill consultation, we think that the SPSO is a suitable option for the second tier review. Comments on particular issues are given below.

#### **2 Preliminary Questions: Permitted Extent of Local Variation & Review of the SWF**

##### *Permitted Extent of Local Variation*

We think it would be beneficial to clarify further the intended extent of permitted local variation under the Scottish Welfare Fund (SWF). As we said in our response to the Bill consultation, 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 SWF 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, would that be considered acceptable.

The extent of permitted local variation has important implications for the second tier review system. 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 it is intended that there be substantial scope for local variation, then allowance for that needs to be built into the review system. On the other hand, if the scope for local variation is intended to be more limited, that too should be made clear.

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.

The legal form that should take is a separate question. Section 2 of the draft Bill gives local authorities considerable discretion in deciding whether to make payments in specific cases. The Scottish Ministers will be issuing guidance to local authorities under section 6 as to how to exercise their discretion under the SWF, but this is only guidance and is not binding on local authorities. They must take it into account but need not follow it in all cases. Ministers may also make regulations under section 5 and these can lay down binding rules. It is important that the legal framework is compatible with the policy intentions on the extent of permitted local variation. Put simply, if there are matters on which Ministers do not wish local authorities to have discretion, they need to be expressed in regulations under section 5 rather than guidance under section 6.

### *Review of the SWF*

We recommend that there should be a full review of the policy and administration of the SWF (including arrangements for review) after two years of operation.

## **3 Scope and Binding Nature of Review**

### *Scope of review*

We agree 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*

The SPSO should be able to make binding decisions rather than merely making a recommendation to the local authority. In the great majority of cases, the SPSO should substitute a fresh decision on entitlement where it considers the original decision was wrong. There may be some cases in which it would be preferable to remit the case to the local authority in order for it to make fresh decision, so the SPSO should have this power.

## 4 Reviews and Complaints

It is important to distinguish between reviews and complaints of maladministration. Applicants to the SWF may have one or both of two types of grievance: (i) they may consider that an adverse decision is wrong and wish to challenge it, or (ii) they may wish to complain about other aspects of their treatment not bearing on the correctness of the decision, e.g. delay, rudeness, insensitivity, poor advice. The latter type of complaint falls within the definition of ‘maladministration’ in section 5 of the Scottish Public Services Ombudsman Act 2002 (SPSOA). These types of grievance require different processes for investigation. The SPSO’s existing complaints processes should be adequate for dealing with complaints as there is less urgency than in the case of decisions on entitlement. However, it will be necessary for the SPSO to develop different and speedier procedures for second tier reviews. We recommend that the SPSO engages in consultation with stakeholders in the development of such procedures, insofar as they are not prescribed within regulations (see below) and publishes the procedures.

## 5 Application for Review and Review Procedure

### *Application to SPSO*

Applications for review should be made direct to the SPSO rather than to the local authority whose decision is being challenged. It should be made as easy as possible 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.

In the case of a telephone application, an SPSO official could take the key details over the phone, transfer them to a form and then send a copy of the form to the applicant to sign to ensure correct recording of the applicant’s claim.

### *Time scales and procedure*

The regulations to be made under section 5 should specify time scales both for initial decisions on entitlement and for decisions on review in order to guarantee that decisions are made quickly. Time scales should be set separately for crisis loans and community care grants.

The regulations should not specify the details of review procedures exhaustively but should set out the basic framework leaving the SPSO some discretion to develop the most effective and timely procedures. Procedures should be reviewed after the

second tier review has been operating for two years and at that stage the extent to which regulations define the procedure can be reconsidered.

## **6 Quality Improvement**

Whether specifically referred to in the regulations or not, the review procedures should inform quality improvement in decision making. The SPSO should be given direction to promote and support such improvement. The role of the SWF Quality Improvement Officer within Scottish Government should be similarly directed.

## **7 Annual Report**

We consider that there should be specific provision in 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.

The SPSO should lay before the Scottish Parliament an annual report on the operation of the second tier reviews. This could be a distinct section of the annual report the SPSO makes under section 17 of SPSOA rather than a separate report. The report should also include comment on both initial decision-making and the operation of first tier reviews by local authorities.

## **8 Some further comments on Tribunals**

The draft advice document contains a number of negative comments about tribunals with which we do not agree. This does not matter for the purposes of introducing the SWF second tier review as the tribunal option has been rejected. However, we are concerned to avoid unduly negative views about tribunals becoming embedded in the policy system and, in particular, Ministers acquiring unduly negative views of tribunals. This could have an adverse effect on future policy discussions in other areas leading to tribunals being rejected as a redress mechanism where a tribunal may be the best option in the circumstances.. Accordingly, this section explains our concerns about the draft advice document's analysis of tribunals.

### *A Tribunal is a suitable option*

The draft advice document states that both the local government panel and the SPSO are viable options, whereas the tribunal is not. We disagree with the categorisation of a tribunal as unsuitable in general especially as the local government panel has been categorised as suitable. In our view, a tribunal is a more suitable option than a local government panel as it fits the stated criteria better. The local government panel fails the independence test which in our view is particularly

important and it is not clear that the panel would perform better than a tribunal against any of the other criteria.

### *Complexity, cost and improving decision-making*

Moving on to other points, we disagree with the advice received from the Scottish Tribunal Service (STS) that a tribunal would be disproportionate financially and administratively and that a tribunal would be slow and overly complex for SWF cases. We suspect this reflects the experience of the Scottish Tribunal Service which currently does not deal with appeals from any comparable administrative function, e.g. mental health decision-making is completely different. A far better comparison would be the Social Entitlement Chamber of the GB First-tier Tribunal which hears appeals relating to social security benefits and it would have been useful to seek advice from the senior chairs and officials of that tribunal.

We suspect that the advice reflects the existing operating methods of those tribunals covered by the STS. However, as we said in our consultation response, there is no one-size-fits-all model valid for all tribunals. It is perfectly possible to adapt the tribunal model to the features of the administrative system from which it hears appeals. Whether a tribunal could achieve the required turnaround times would depend upon the procedures and working methods chosen. A streamlined version of the tribunal model with swift operating procedures could be created for the SWF and, more generally, any new tribunal could be set up in the manner appropriate to its function. Similarly, complexity is a function of procedure; if simplicity is required, a simple procedure can be designed.

Similarly, tribunal costs vary according to subject matter. We doubt that the newly established Council Tax Reduction Review Panels are the best comparator. The Social Entitlement Chamber of the GB First-tier Tribunal would be a better comparator in view of the subject matter with which it deals. We are not aware of the current unit cost of social security appeals but suspect it is substantially less than the estimate of £413 given for an SWF tribunal. We also consider that it is not clear that a tribunal is least likely to result in a good flow of improvement information to decision makers. Again, a tribunal could be designed to create a good flow of improvement information.

For the avoidance of doubt, the purpose of these comments is **not** to question the SPSO option for the SWF, merely to ensure that unduly negative views of tribunals do not become embedded in the policy system.

**STAJAC**  
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