STAJAC
Scottish Tribunals & Administrative Justice Advisory Committee

Comments on the Draft Welfare Funds (Scotland) Bill Consultation

This is the response of the Scottish Tribunals & Administrative Justice Advisory Committee to the Scottish Government's consultation on the draft Welfare Funds (Scotland) Bill.

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 extending devolved powers to enable the Scottish Parliament to legislate on what would otherwise be a devolved matter.

The discretionary Social Fund (prior to abolition) 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 an effective model of review over a period of 25 years.

2 The Scottish Welfare Fund

Since April 2013 the Scottish Welfare Fund 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 proposed statutory scheme for the SWF and the former discretionary Social Fund are:

- the purposes of payments are similar;
- payments are discretionary rather than entitlements;

- payments are made subject to cash limits.

One of the key distinctions between the SWF and the predecessor Social Fund is that payments are and will be administered by local authorities rather than by a central government department.

3 A Preliminary Question: Local Discretion

There are several references to local authority discretion in the consultation. Thus, at p. 9 of the consultation document 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. The implications of local variation for the review system are significant. 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, or vice versa. 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.

In relation to local discretion, the view of the Committee is that a high degree of local variation could lead to significantly different decisions being made in relation to similar applications. This would be of some concern, as for applicants (users) it will be important to be able to expect consistent (and so predictable) decision-making.

We now proceed to answer the consultation questions. We have answered these in the following sequence: Qu 1; Qu 2; Qu 4; Qus 3, 5, and 6.

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 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 and their representative bodies 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 (for example):

> "(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. We believe that, in particular as it is proposed that the substance of the review regime will be contained in regulations subject to the negative procedure, there should be an explicit obligation on Scottish Ministers to consult on the regulations (with the same groups as set out in s. 6(3), including the addition as set out above under (i)).

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 the topics in the proposed list are appropriate for inclusion in the regulations, and suggest below some points that should be added with respect to the review arrangements.

However, as indicated above, we think it essential that consultation be carried out on draft regulations

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

Under the arrangements for review matters to be included are:

- how applicants can ask for a review
- timelimits for asking for a review

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

n/a

Q3 – We deal with Q3 later in this response, along with Q5 and Q6.

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?

Numbers of applications and requests for review

Possible sources of guidance on the issues most likely to be presented at second tier review include 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 under the discretionary Social Fund in that year was 2,898,000 for the UK. It also provides statistical information on the numbers and proportions of community care grant applications granted for different reasons, the numbers and proportions of community care grant applications refused for different reasons, and the numbers and proportions of crisis loan applications refused for different reasons.

We can compare these figures to those given in the consultation paper in relation to the SWF which were based on a survey carried out in August 2013. The survey identified a total of 35,427 applications to the SWF. However, it recently reported a total of 79,000 grants made to the end of December 2013. If we assume that the figure of 35,427 represents five months' applications, it 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 could suggest that the early applications are depressed and the level of applications to the SWF may well rise higher in the near future. Direct comparison with the December figure is not possible as it relates to awards made and not to applications. However, if we did treat the 79,000 figure as relating to applications, it could suggest an annual total of applications in the region of 135,500, indicating that the rate of claiming is accelerating fast.

The consultation paper also states that, in the first 5 months, 827 cases had gone to first tier review and 66 to second tier review, 2.36% and 0.19% of total applications respectively. By contrast, for the discretionary Social Fund in 2012/13 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. We acknowledge and commend the efforts made by Scottish Government and stakeholders in designing the fund and the review process to keep the volume of reviews down by good initial decision making and effective communication. Nevertheless, we believe it should be expected (also as the number of applications are likely to rise) that the number of requests for review will rise 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 decisions could potentially relate to any aspect of the regulations or guidance, e.g. whether a family is under exceptional pressure or whether an asset is correctly regarded as capital available to the applicant. As noted above, some information about the reasons for adverse decisions under the Social Fund is given in the annual reports of the Secretary of State but this is rather limited. 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.

As well as being classified according to the specific reason given for refusing an award (e.g. excess capital) the reasons for seeking review can also be classified analytically as follows:

- the decision was mistaken as to the facts;
- the decision was mistaken as to law;
- any discretion that the decision-maker had was exercised wrongly.

A process for reviewing initial decisions could be designed so that it is limited to correcting decisions which are mistaken as to the facts or the law.

If the process is designed also to allow some degree of review of the discretionary element in decisions, there are options as to how far this might go. Review of discretion might be limited to the judicial review standard under which a decision may be overturned if (i) based on irrelevant factors or failure to take into account a relevant factor or (ii) unreasonable in the narrow sense of being outside the range of reasonable disposals in the circumstances of the case. Alternatively, review may be based on the normal appeal standard under which the reviewer may substitute his/her judgment for that of the original decision-maker on all aspects of the decision. For simplicity, we can call this the 'rightness' standard.

The implications of this for the second tier review are discussed below.

Q3 and Q5

We will now consider 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?')* and Q5 *('If the SPSO is the chosen option, should this be with additional powers to: (a) review discretionary decisions on the merits of the case?; (b) make an alternative decision which would be binding on the Local Authority?')* together, and discuss:

- purposes and desirable characteristics of a review process
- the implication of including the review of discretion in the review process
- the options for second tier review put forward in the consultation document.

Our comments are informed by the 7 Principles for Administrative Justice as developed by the Administrative Justice and Tribunals Council and published in 2010:

"A good administrative justice system should -

1) make users and their needs central, treating them with fairness and respect at all times
2) enable people to challenge decisions and seek redress, using procedures that are independent, open and appropriate for the matter involved
3) keep people fully informed and empower them to resolve problems as quickly and comprehensively as possible
4) lead to well-reasoned, lawful and timely outcomes
5) be coherent and consistent
6) work proportionately and efficiently
7) adopt the highest standards of behaviour, seek to learn from experience and continuously improve"

<u>Purposes and characteristics of reviews</u>

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. The characteristics of review mechanisms ought to be such that these purposes are achieved.

We, therefore, agree with the list of suggested characteristics of First and Second Tier Review stated at p. 11 of the consultation, namely:

- Transparency, fairness and accessibility
- Timeliness, recognising the circumstances of the applicant
- High quality, impartial, free to use and independent

- Quick to operate, making sound and accurate decisions
- Effective communication
- Proportionate and cost effective.

However, we think that the suggested purposes for the second-tier review should be redrafted as follows:

"Purpose of Second Tier Review
- To ensure that both initial decisions and decisions on First Tier Review 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 and to the wider public 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 purposes stated in the consultation require further thought, namely:

- To identify whether the SWF guidance and local policy is being consistently applied and fed 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.

It will be important to ensure that both the first and second tier review mechanisms are designed in such a way as to enable learning by first instance decision makers as well as policy makers.

For the benefit of the users, getting it 'Right First Time' should be the overarching aim of the administration of the SWF - high quality decisions at application and first tier review level must be the aim. Learning from local first tier reviews by Local Authorities is as – if not more – important than learning from second tier reviews, given the higher numbers which will be seen at first tier review, together with the possibility that some applicants will give up at the first review stage. It will be important to give further thought to how the statutory guidance and the regulations may direct Local Authorities to incorporate appropriate feedback mechanisms into the first tier review arrangements.

In this context, and in the interests of public confidence in the system, transparency of performance in handling of reviews is important (for example publishing timescales; percentage granted/upheld/not upheld etc.; summary of when applicant

signposted/linked to other social services or benefits/grants; published summary of learning for each local authority). Transparently monitoring performance on these matters would all help drive up quality and performance, and thought should be given to including this in the statutory guidance.

Review of discretion

As noted above, applicants may wish to challenge decisions even where they appear to be based on a correct determination of the facts and a correct understanding of the law, on the basis that the discretion that the decision-maker had was exercised wrongly. We also noted two possible standards of review of the discretionary element in decisions; the judicial review standard and the rightness standard. Under the latter, the reviewer can substitute his/her view of the merits. We consider that, in general, Second Tier Reviewers should be able to substitute their decision on the merits no matter where the Second Tier Review is located.

There are several arguments in favour of this position. First, there is ample precedent for this approach in the field of social security. Payments of the type made under the Social Fund were previously made under the Supplementary Benefit scheme and before that under the National Assistance scheme. Adverse decisions could be appealed to Supplementary Benefit Appeal Tribunals and before that the National Assistance Tribunals. Both were able to substitute their view of what was the right decision on the merits. More generally, although most benefits are statutory entitlements rather than being paid at the discretion of the DWP, there are substantial areas of official discretion within the statutes governing benefits. Social security tribunals have always had the power to substitute their decisions on the merits. Therefore, the fact that a decision is discretionary has not historically been regarded as a reason not to have a full merits review. To allow the Second Tier Review to substitute a decision on the merits would merely bring the Scottish Welfare Fund into line with other social security benefits.

Second, the availability of review on the merits would be likely to give confidence to applicants for review, as well as those making applications to the SWF and the wider public, that there is an effective remedy for defective decisions by local authorities.

Third, the greater engagement which decisions on the merits reviews require of the reviewer might well enhance the ability of the Second Tier Review to identify any deficiencies in local authority decision-making and give effective feedback and also to identify whether the SWF guidance and local policy is being consistently applied.

Our general position is, therefore, that the Second Tier Review should be able to substitute its own decision on the merits. However, we realise that that principle will need to be qualified if the Scottish Government is keen to leave substantial scope for the development of local policies which may differ amongst local authorities. Clearly, a system of ‘central’ full merits review might undermine the development of local policy, although as we have already pointed out, consistency of decision-making is important from an applicant’s perspective .

It is, therefore, important that the Scottish Government takes a clear view on the permitted extent of local variation in policy (discussed above) so that it can be decided what the role of the Second Tier Review in relation to local policy choice is.

To summarise, and referring back to the 7 Principles of Administrative Justice stated above, our view is that the Second Tier Review should:

- have the general purposes stated above;
- have full power to review decisions on fact law and merits;
- be such that its decisions are binding on local authorities;
- be impartial and independent of local authorities (the first instance decision makers);
- be accessible to applicants;
- dispose of cases as speedily as is compatible with fair decision-making;
- be as cost-efficient as is compatible with fair decision-making;
- give feedback to local authorities on the quality of their decision-making.

Options for review

The next question is where the Second Tier Review function should be located. We note that the Scottish Government is reluctant to create new public bodies and wishes to simplify the landscape of administrative justice. We do not, therefore, want to suggest the creation of a new body. The consultation suggests 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, there are useful lessons to be learned from the experience of the IRS which can inform the detailed design of the Second Tier Review. In particular, we believe it is important that some of the proactive work that was undertaken by the IRS under predecessor arrangements should be replicated in the second tier review arrangements for the SWF. This could involve sharing of best practice, the explanation of decisions for both decision makers and advice and advocacy groups, helping to focus meaningful challenges to assist the ongoing development of guidance and improve first instance decision making.

The option of a local authority panel with independent representatives would not be appropriate for the reasons given as disadvantages at p. 13 of the consultation document, most importantly the lack of independence from the initial decision-making. Furthermore, we think this option would be less effective at identifying

whether the SWF guidance and local policy is being consistently applied across the country or having unintended consequences, and less effective at disseminating good practice because there would be no central point for comparison of what was occurring in different local authorities.

The other two options, the SPSO or a tribunal, each meet many of the characteristics specified at p. 11 of the consultation, in particular:

- transparency, fairness and accessibility;
- high quality, impartial, free to use and independent, and
- making sound and accurate decisions.

Most existing tribunals have these virtues, as does the SPSO. The SPSO also has the ability to compare the performance of different local authorities and has long experience in disseminating good practice.

There are, however, also potential challenges in locating the review function within the SPSO. The first raises a general matter of principle going beyond the issue of the Scottish Welfare Fund. As noted above, we believe 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. The exception to this rule is that in relation to NHS complaints, the SPSO is able to question the exercise of clinical judgment (although not to insist on a remedy). This is not a conclusive argument as it may be suggested that the standard model of the Ombudsman should be revised. However, precisely because this does represent a role change, we suggest that it needs very careful consideration. There is also potential that such a role change could lead to confusion among both the public and public authorities as to the role of the SPSO, if it were to have this additional function in relation to the SWF, but not in other areas.

Looking at the further characteristics of the Second Tier Review specified on p. 11 of the consultation document, it is less certain that a tribunal, or the SPSO, in the context of the urgency of SWF applications, would be:

- quick to operate (of critical importance for users in this particular context) ;
- proportionate and cost effective (compared to the relatively low value of SWF grants); and
- effective at communicating with and giving feedback to local authorities.

These are not inherent characteristics of tribunals, but neither are they incompatible with a tribunal model. Whether a particular tribunal has these three characteristics depends upon the details of design of the tribunal and the procedures adopted by it. 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.
It was always the intention that the SPSO communicate with public sector bodies and give feedback to assist them to improve their performance, and the SPSO does indeed devote considerable attention to these functions including by producing monthly commentaries of learning, publishing all decisions and reports, producing an annual report for each sector summarising cases dealt with, numbers and performance, and undertaking outreach and complaints standards work.

On the other hand, the SPSO's current operating methods, as well as the operating methods of existing tribunals, are not adapted to produce the swift turnaround of decisions that Second Tier Review is expected to deliver for the SWF. Current processes could of course be changed, but it is important to note that both the SPSO and any new tribunal would have to invest significant time and financial resources in making itself ready to take on this additional function, which differs from current operations.

The consultation document lists a number of disadvantages in relation to tribunals, some of which we want to give specific comment on:

- *'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 than preparing for reviews in another forum, and as stated above, much depends on the design of rules and procedures. 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 rules 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.

We believe that it would be beneficial to seek specific user input on this aspect, and ask recent users of the interim second tier review arrangements what their experience has been, and what the relevant experience of SPSO and tribunal users (in comparable cases) has been.

It will be important that people applying for SWF, and in particular those seeking to challenge a decision, should be able to access appropriate support to do so: independent advice and advocacy (in particular in preparation and prior to any hearing or written proceedings) can help people voice their needs, access services and uphold their rights. Staff administering the SWF should be required to inform applicants about the availability of such services in the local area and how to access

them, and information about how to challenge a decision (at first or second tier) must include details of how to access support services.

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

This concern may be overstated in relation to tribunals (and perhaps understated in relation to the SPSO, where set up costs are not included in the anticipated costs). Given the sums of money likely to be involved in most awards, the cost of any form of independent review is likely be high in relation to the size of award, and the importance of (the perception of) independence of the second tier review is critical. It should not be assumed that the cost of tribunal reviews will be higher than those of the other options (for example it should not assumed that a tribunal always needs to have 3 members, it could be one legal chair sitting alone). In any event, if independent review can be achieved at as low a cost as is compatible with being *effective*, then 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 disadvantage 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 refer to our discussion of review of discretion above.

- *'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 perceived disadvantage does not make sense. A tribunal dealing with Second Tier Reviews under the SWF would be analogous to the First Tier tribunal (indeed, it could be part of it) 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.

- *'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 as well as a tribunal. 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 fed back to LAs where it is not, and to identify where the SWF guidance is having unintended consequences so that these can be rectified.

Conclusion

We conclude that the local authority panel option should be rejected and the Scottish Government should confer the Second Tier Review function either on the SPSO or on a Tribunal supported by Scottish Tribunal Service. If the tribunal reforms are enacted as proposed the Second Tier Review function would be performed by a chamber of the First Tier Tribunal. This need not be a separate chamber but could be included along with cognate areas of public administration.

It is important to be clear that the methods of working need not be the same as existing tribunals or the current working arrangements in the SPSO, e.g. oral hearings might be the exception rather than the rule and could be adapted to achieve the aims set out in the consultation paper. Thus, the system could be designed in such a way as to ensure that there would be a greater emphasis on giving feedback to initial decision-makers and first tier reviewers.

The additional concluding comment we want to make is to urge the Scottish Government to seek the input from recent users of the SWF directly (especially those who have sought a second tier review under the interim SWF arrangements), and test their experience against the proposals.

*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 – we consider this not appropriate
Scottish Public Service Ombudsman	can be appropriate, depending on detail of implementation
A Tribunal	can be appropriate, depending on detail of design