



Law Society
of Scotland

Consultation Response

Consultation on Draft Regulations making provision
in relation to Social Security Appeals

10 April 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Administrative Justice sub-committee welcomes the opportunity to consider and respond to the Scottish Government consultation on Draft Regulations making provision in relation to Social Security Appeals. The sub-committee has the following comments to put forward for consideration.

Annex A regulations - The First-tier Tribunal for Scotland Social Security Chamber (Establishment and Functions) Regulations 2018

Regarding Regulation 5, the Function of the First-tier Tribunal in relation to assistance provided for by regulations made under section 45 of the 2018 Act, it is assumed that this provision for a right of appeal is needed specifically when an individual is refused a top-up payment of a reserved benefit. This will, of course, only apply if a right of appeal against such a determination is provided for, which we envisage to be the case.

Annex C regulations - The First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018

Regarding regulation 3, Mediation, this is a novel provision when compared to the UK tribunal regulations and assumes that mediation will be available, which is not the case at present. Mediation has been trialed in other tribunal jurisdictions with limited success. It is difficult to see how mediation will operate in a system like social security, which is based on legal entitlement, with little room for manoeuvre between the parties. The availability of mediation may also vary geographically.

Regulation 4, Delegation to staff, provides for legal staff of Scottish Courts and Tribunals Service to undertake certain interlocutory functions but uses terms which are not entirely clear, including 'appropriate legal qualifications', 'functions of a judicial nature' and 'provided the functions are of a preliminary or an

incidental nature'. Clarity around the scope of this delegation would be helpful and, in particular, around the protections available to tribunal users in the event of complaint.

Regulation 9, Addition, substitution and removal of parties, contains a superfluous word, 'If', at regulation 9(4).

Regulation 10, Orders for expenses, is a significantly more generous provision when compared to analogous provisions in the UK tribunal regulations. Under current rules, appellants and their supporters can be reimbursed for their travel costs. This provision, however, provides for any party to be reimbursed for travel and other costs (including loss of earnings). The other party to a social security appeal is the government department who made the original decision. It would seem quite unusual for the tribunal to pay the costs of the department to attend a hearing. The provision for paying for loss of earnings may be problematic and could potentially lead to abuse. In addition, it may be helpful to clarify whether an award of expenses would also cover the costs of any representative that might be appointed under regulation 11.

Regulation 17, Evidence and submissions, provides the tribunal with broad powers to specify the evidence and submissions to be considered, including submissions either orally at the tribunal or in writing. With the advance of technology, it may be helpful to include that these submissions could be made using technology such as videoconferencing where it is considered appropriate to do so. Similarly at regulation 5, around case management powers, it may be helpful to include the ability to use telephone or videoconferencing as part of the specification of form of proceedings at regulation 5(3)(g).

Regulation 18, Citation of witnesses and orders to answer questions or produce documents, is an unusual provision in respect of social security appeals. It might indeed be helpful for the tribunal to have the power to compel a presenting officer to attend a hearing. But, the question is what sanction could realistically be applied in the event of a failure to attend on the part of the individual concerned? For example, the tribunal cannot simply allow an appeal if a presenting officer fails to attend as there still has to be a legal entitlement to benefit. This question also arises in respect of any other parties who may be cited to attend but fail to do so. It is perhaps slightly unrealistic to have such a provision in respect of social security appeals.

Regulation 20, Lead cases, may be more relevant to the Upper Tribunal. It is unlikely that this will occur often at the First-tier Tribunal, since no two cases will give rise to wholly common issues of fact. We believe, because of the role of the First-tier Tribunal, that the lead cases provisions could potentially deprive appellants from being able to present the circumstances of their individual case.

The recording of hearings, required by regulation 22, could prove intimidating for appellants. Clarification around the policy intention of this regulation would be helpful, particularly whether the parties will have routine access to these recordings, or whether they are intended primarily as a resource for the tribunal, and what format these will be held or provided in, either as video or audio recordings or transcribed if required. The recording of hearings could also be considered to conflict with the overriding objective articulated in regulation 2, particularly around formality.

Regulation 26, Medical examination, is a welcome provision but does call into question the role of the medical practitioner on the panel. However, it is noted from the explanatory notes that this would only be required in exceptional cases.

Regulation 32, Consent orders, appears to be a novel provision for social security appeals and it is unclear what the policy intention behind this change may be.

Annex D regulations - The First-tier Tribunal for Scotland Social Security Chamber and Upper Tribunal for Scotland (Composition) Regulations 2018

Regulation 2, Composition of the First-tier Tribunal when deciding an appeal against a determination of entitlement to assistance of a type provided for in Part 2 of the 2018 Act, prescribes the composition of the tribunal for deciding different types of cases, in this instance relating to disability assistance and employment injury assistance. This is usually a matter for the Chamber President by way of a Practice Direction. The default composition appears to be a legal member only, except in disability assistance and employment injury assistance cases. In regulation 2(a), the term 'disability experience', which is not a well understood term, is not defined.

Regulation 3, 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 otiose since all it does is provide that the composition of the tribunal to decide section 45 appeals shall be prescribed by regulations.

Annex F regulations - The Upper Tribunal for Scotland (Social Security Rules of Procedure) Regulations 2018

For regulation 13, Order for expenses, 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).



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