



# Social Security Administration and Tribunal Membership (Scotland) Bill – stage 3 briefing

The Law Society of Scotland is the professional body for almost 12,000 Scottish solicitors. We seek to influence the creation of a fairer and more just society and are strongly committed to our statutory duty to work in the public interest and to both protect and promote the rule of law.

The Bill makes several important changes to the way in which devolved social security arrangements will operate, and also steps to ensure that there is sufficient judicial capacity to ensure effective decision-making in the event of disputes. We had responded to the Social Security committee call for views on the Bill<sup>1</sup> and raised concern, in particular, around the appointment provisions. Changes to the Bill at stage 2 have addressed a number of these concerns and we are keen to assist in the development of statutory guidance.

## Appointment

Sections 1A and 1B of the Bill insert new parts to section 85 of the Social Security (Scotland) Act 2018. Amendments were made to the Bill at stage 2, and the commitment to a set of safeguarding principles, including principles that are drawn from the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)<sup>2</sup>. We welcome this commitment, and at a stage that the Scottish Parliament considering legislation to incorporate the UN Convention on the Rights of the Child into domestic law through the UNCRC (Incorporation) Bill, endorse the same approach for the UNCRPD.

We do not believe that section 85B(1) is ECHR-compliant. The appointeeship arrangement amounts to a financial guardianship in fact, if not in name. Often, it will confer complete power over an individual's income and savings. The European Court of Human Rights has ruled that the Article 6 requirements for such a guardianship should be the same as for a deprivation of liberty<sup>3</sup>. To be ECHR compliant, the appointment must be by an independent court or tribunal, which as a very minimum must be required to act in accordance with the same principles as appear in section 1 of the Adults with Incapacity (Scotland) Act 2000 (the 2000 Act).

We believe that the references to “have” an interest in proposed new section 85A(5A)(b)(iii) and proposed section 85B(12)(b) may be inappropriate. The 2000 Act has the two concepts of “claiming an interest” and “having an interest”. This covers a very narrow range of persons. The reference in these proposed provisions should be to “claiming a relevant interest”, just as in equivalent provisions of the 2000 Act. If it was nevertheless thought to be necessary to narrow this, we believe that the furthest that would be appropriate would be “having a relevant interest”. It is crucially important that if any person believes that there is abuse taking place within the appointeeship system, then they should be able, and indeed encouraged, to blow a whistle, whoever they are.

We believe that, regarding proposed section 85B(7)(b), the reference to a guardian should be to a guardian with relevant powers (as worded, it could include a guardian with other financial powers, or a guardian with only welfare powers and no financial powers at all, which would make nonsense of the



provision). Second, appointees under intervention orders with relevant powers, and continuing attorneys with relevant powers, should also be included.

In proposed section 85A(5C) and section 85B(16), in order to achieve ECHR compliance, “insofar as practicable” should be disapplied to the views of the child in the former provision, and the wishes and feelings of the adult, in the latter.

To achieve compliance with ECHR, as interpreted in the light of UNCRPD, the references to “not incapable” and “incapable” mentioned above should incorporate the element of provision of all necessary support to establish capability, and a provision that the relevant incapability applies only if it can be demonstrated notwithstanding the provision of all relevant support. The requirement for procedure by a judicial court or tribunal, acting in accordance with principles similar to the 2000 Act, also applies to proposed section 85B(11).

We also have concerns around the drafting of the provisions around “relevant individual”. Subsection (10) defines “relevant individual” in relation to subsections (3)(a), (6) and (7), but the phrase “relevant individual” does not appear in those provisions. It is unclear whether “the individual” is the person in respect of whom an appointee is proposed, or the proposed appointee. It seems that apart from the sections quoted above, “individual” means the former, but presumably in the particular sections quoted above “individual” should be read as “relevant individual” with the meanings given in subsection (10). We believe that there should be quite different terms for the two persons when they are to be on opposite sides of the quasi-guardianship relationship.

## **Tribunal membership**

We believe that the provisions around tribunal membership are important and we support their introduction. We have previously advocated for a unified tribunal model. In the meantime, some sheriffs have developed very considerable expertise in handling adults with incapacity (AWI) matters; a prospective solution may be that, if as with the Mental Health Tribunal for Scotland, experienced sheriffs could hear appropriate AWI cases.

We highlighted in our response to the call for views that the devolving of social security under the 2018 Act would see a large volume of additional cases before the First-tier Tribunal Social Security Chamber and the Upper Tribunal. It is crucial that there is sufficient judicial capacity to manage and resolve these cases, and the provisions of the Bill allow for temporary authorisation to ensure this capacity. There is also the benefit of being able to maintain existing expertise, by drawing on the pool of current judiciary involved in reserved social security matters.

We had raised previously the need for these measures to be temporary, in so far as practicable, particularly because of the different and principles-based approach introduced by the 2018 Act. The impact of Covid-19 raises wider issues around court and tribunal capacity, and the need to ensure that there is sufficient judicial capacity to manage and resolve cases, often through new ways of working, such as audio and videoconference. This may require wider consideration around the use of temporary authorisations, additional judicial recruitment or other measures, to ensure the effective administration of justice through these challenging circumstances and beyond.



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<sup>1</sup> [https://www.parliament.scot/S5\\_Social\\_Security/Inquiries/SSCS520ATM14\\_Law\\_Society\\_of\\_Scotland.pdf](https://www.parliament.scot/S5_Social_Security/Inquiries/SSCS520ATM14_Law_Society_of_Scotland.pdf)

<sup>2</sup> <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12813&mode=pdf> (at page 3)

<sup>3</sup> *AN v Lithuania* [2016] ECHR 462