

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

Introduction

SAMH is the Scottish Association for Mental Health. Around since 1923, SAMH operates over 60 services in communities across Scotland providing mental health social care support, homelessness, addictions and employment services, among others. These services together with our national programme work in See Me, respectme, suicide prevention, sport and physical activity inform our public affairs work to influence positive social change

SAMH welcomes the opportunity to respond to this consultation on 'Draft Regulations making provision in relation to Social Security Appeals'. Our response focus on proposals for the composition of the first tier tribunal and on proposals regarding referral for medical assessments.

Key Points

- SAMH welcomes the proposal for the Social Security Chamber to consider all aspects of a determination under review
- SAMH would like a guarantee that entitlement should never be reduced as a result of an appeal
- SAMH welcomes the reference to due regard to the Scottish Social Security Charter in the 'overriding objectives' of rules governing the first-tier and upper tribunals
- Clarity is needed from the Scottish Government over plans for appeals against determinations of reserved benefits once the Social Security and Child Support Tribunal (SSCST) is devolved
- SAMH agrees that sittings of the tribunal should be digitally recorded
- SAMH welcomes the proposal that where the tribunal refers the appellant for a medical examination this is undertaken by an independent medical practitioner
- SAMH believes draft regulations on medical assessment should be amended to stipulate that a medical assessment will only be carried out in exceptional circumstances and with the consent of the appellant
- Any medical assessment undertaken as part of an appeal should be undertaken by a medical practitioner with experience in mental health, where mental health is the primary condition of the appellant
- SAMH believes that the panel for first-tier Social Security tribunal chamber should include an Ordinary Member with lived experience of disability

- SAMH welcomes the draft regulations provision for ordinary members of the tribunal with experience of disability. We are concerned that the role as drafted is overly restrictive.

1. *Part 2: Consultation on Draft Regulations establishing a chamber of the First-tier Tribunal for Scotland dealing with entitlement to social security and setting out its functions*

Do you have any comments on the description of functions exercisable by the Social Security Chamber in considering entitlement to assistance under the Scottish social security system?

No

Do you have any comments on the power of the Social Security Chamber to consider all aspects of a determination which it is called upon to review?

In principle, SAMH welcomes the proposal for the Social Security Chamber to consider all aspects of a determination under review. We agree that all options open to original decision makers should be open to the tribunal. It is right that the tribunal has an ability to make its own determination of the individual's entitlement and is not restricted to assessing the grounds of appeal by the applicant.

As stated in our response to the consultation on the Social Security (Scotland) Bill, we would like to maximise confidence in the tribunal process.¹ Previous research with SAMH service users has highlighted high levels of anxiety associated with the appeals process.² Fear that an award will be reduced will be an added disincentive to challenge award decisions. So while we agree that the tribunal should be able to consider all parts of a determination we would like to see a guarantee in law that no award will be reduced following appeal. Currently tribunals have the power to reduce or remove entitlement to PIP. They must warn the appellant in advance if this is a possibility in their case and provide adequate time for the person to address the tribunal's concerns, or withdraw their appeal.³ We don't believe these safeguards are adequate.

Do you have any other comments you wish to make on the draft regulations?

SAMH would like further clarity on the devolution of Social Security and Child Support Tribunals (SSCST). As outlined in Part 1 of the consultation documentation, the timeline for devolution of the SSCST is yet to be finalised, but it is envisioned that it may be housed as a jurisdiction of the proposed Social Security Chamber. This would mean appeals against determination of reserved disability benefits (e.g. Employment Support Allowance) may be heard by the new Social Security Chamber. Clarity is required over what rules will apply for appeals against determinations for reserved benefits at the point

¹ SAMH [SAMH response to Social Security Committee consultation on Social Security Bill \(Scotland\)](#)

² SAMH Personal Independence Payment – What's the problem? 2016

³ CPAG [In the bag? Tribunals and less favourable decisions](#) 2015

of devolution. Any proposal to extend the rules to reserved benefits once the SSCST has been devolved must be fully consulted upon.

2. *Part 3: Consultation on Draft Regulations adding the name of the Social Security Chamber to the list of chambers into which the First-tier Tribunal for Scotland is divided*

Draft regulations

The draft regulations in Annex B add the name of the Social Security Chamber to the list in regulation 2 of the Chambers Regulations of chambers into which the First-tier Tribunal for Scotland is divided.

Do you have any comments you wish to make on the draft First-tier Tribunal for Scotland (Chambers) Amendment Regulations?

No

3. *Part 4: Consultation on Draft Regulations setting out rules of procedure for the First-tier Tribunal for Scotland Social Security Chamber*

Do you have any comments on:

(a) any of the elements of the draft rules of procedure described at paragraphs 27 – 38 above;

Social Security Charter (paragraph 27)

SAMH warmly welcomes the overriding objective of the rules set out in the draft Schedule to regulation 2 – Paragraph 2 (1):

“The overriding objective of these Rules is to enable the First-tier tribunal to deal with cases fairly and justly, and having regard to the Scottish Social Security Charter prepared and published in accordance with section 2 of the 2018 Act”

The Scottish Social Security Charter is intended to give practical application to the principles for the Scottish Social Security system set out in the Social Security (Scotland) Bill. The requirement for the tribunal to have due regard to the charter will consequently embed the Social Security System principles into the decision making and deliberations of the tribunal.

(b) any other aspect of the draft rules of procedure?

With reference to (a), do you have any comments, in particular, on:

- the proposal that hearings will be recorded as a matter of routine?

SAMH welcomes this proposal. Having a digital record of a hearing as default is one method to increase trust in the new social security and tribunal system. We would like

clarity of how this will operate in practice. To ensure transparency, dignity, and respect we believe appellants must be told in advance that the hearings will be recorded. Appellants should also be provided access to the digital recording of their hearing if they ask for it. The right to access their recording must be clearly communicated to the appellant. As drafted the regulation does not make it clear if the appellant will have access to the recording.

While we agree that the default position should be to record tribunal sittings we would like people to have the right to opt out of this. For example a small number of people with mental illnesses, including psychosis and schizophrenia, can experience distressing paranoia. This paranoia may be exacerbated by the presence and use of recording devices. For this group, the recording of the tribunal may increase their distress and be a barrier to justice.

- the possibility of referral for a medical examination, and the circumstances in which this may happen?

SAMH welcomes the proposal that where the tribunal refers the appellant for a medical examination this is undertaken by an independent medical practitioner. This is in contrast to the current reserved practice where a member of the first tier tribunal (the medical member) will undertake the assessment.⁴ We believe referral to an independent practitioner will increase confidence in the process. SAMH agrees with the Government that referral for a medical examination should only occur in exceptional cases and where an examination is thought necessary to enable a decision to be reached. We are concerned that as drafted paragraph 26 on Medical Examination in the schedule of regulation 2 may not achieve the Scottish Government's policy aim, as it does not include reference to exceptional circumstances. The regulation should be amended to stipulate a medical assessment will only be carried out in exceptional circumstances and with the consent of the appellant. A clear definition of what is meant by exceptional circumstances is required and should also be set out in regulations.

SAMH has long been concerned about the negative impact of face to face assessments for Personal Independence Payment (PIP) on people with mental health problems.^{5, 6} These include a lack of understanding of the impact of mental health by assessors; face to face assessments' inability to accurately assess the impact of fluctuating conditions; and stigmatising attitudes and behaviours by some assessors. During the ongoing parliamentary process for the Social Security (Scotland) Bill SAMH has supported amendments to ensure that where an applicant to Disability Assistance has a mental health condition, as their primary condition, any face to face assessment is undertaken by someone with professional experience of mental health. We believe the same principle should apply to the first-tier and upper tribunals. The draft schedule for regulations 2 and 3 should be amended accordingly.

⁴ UK Government [The Tribunal Procedure \(First-Tier Tribunal\) \(Social Entitlement Chamber\) Rules 2008 \(as amended\)](#) 2015

⁵ SAMH [Personal Independence Payment – What's the problem?](#) 2016

⁶ SAMH [Fit For Purpose](#) 2015

Would you welcome provision for supporters in cases before the Social Security Chamber to have the opportunity, with appropriate permission, to make representations during proceedings?

Yes. SAMH broadly welcome provision for supporters and representatives (sections 11 and 12 of Regulation 2 and 14 and 15 Regulation 3). The draft regulations provide for a supporter to provide moral support; help manage tribunal documents; take notes; and quietly advise on points of law, procedure and issues the person may wish to raise at tribunal. We agree with these provisions and feel they should be extended to allow supporters to make direct representations to the tribunal in support of the party's case.

If the regulations are amended to allow supporters to make representations on behalf of the appellate, these must clearly differentiate the role of a supporter from a representative. The supporter should be able to make representations on behalf of the party but not replace/represent the party in its entirety.

The presence or otherwise of a supporter should have no impact on an individual's access to independent advocacy. We believe all people engaging with the social security system, including the tribunal system should have a right to independent advocacy.⁷

Are there any other respects in which you would consider that the approach of the 2008 Rules should be departed from?

No

Do you have any other comments which you would wish to make on the draft procedure regulations?

No

4. Part 5: Consultation on Draft Regulations setting out the Composition of the First-tier Tribunal for Scotland Chamber and the Upper Tribunal for Scotland

(a) Do you have any comments on the proposed composition of the Social Security Chamber when dealing with an appeal against a determination of entitlement to assistance under the Scottish Social Security System?

SAMH supported amendment 127 of the Social Security (Scotland) Bill, lodged by Pauline McNeill MSP during stage 2. The amendment aimed to guarantee that an "ordinary member" – someone with lived experience of the social security system, or who supports someone with lived experience – would be included as a member in the first-tier tribunals. SAMH welcomed the acceptance by the government of that principle. We agree that the consultation on draft regulations making provision in relation to social security appeals is the correct means to make this a reality.

SAMH believes lived experience representation at the tribunal will help embed principles outlined in bill into the Scottish social security system. In particular the principle: "respect

⁷ SAMH [SAMH response to Social Security Committee consultation on Social Security Bill \(Scotland\) 2017](#)

for the dignity of individuals is to be at the heart of the Scottish social security system". We believe the Mental Health Tribunal for Scotland provides a positive model for involving people with lived experience in the tribunal process.⁸ Every sitting of the Mental Health Tribunal is presided over by three members: a legal member (who acts as Convener), a medical member and a general member. The general member is someone with lived experience of a mental health disorder, a carer or someone with qualifications in social care that include a mental health specialism (e.g. a mental health social worker).⁹ The role of the general member is invaluable, providing a lived experience perspective to the tribunal.

Research undertaken by SAMH with people currently receiving PIP has found distrust with the current appeals process and incidents of unacceptable and stigmatising behaviour.¹⁰ The experience was reported as onerous and stressful even where the final result was positive. One SAMH service user described her experience as:

"I never got enough points [when assessed for PIP] so I had to go to a tribunal. Sitting with the head doctors and all those scary folk. I had a CAB woman there but she couldn't say anything – I had to say it all myself. It was terrible"

The presence on the decision making panel of someone with lived experience of the social security system is a sensible step to improve the tribunal experience for applicants.

Draft regulation in **Annex D** of the consultation paper sets out rules for the composition of the first-tier tribunal. These broadly mirror existing arrangements at the UK level, outlined in Practice statements rather than regulations.¹¹ The draft regulations make provision for the appointment to the first-tier tribunal of an ordinary member with disability lived experience and a registered medical member in cases "involving assessment of medical issues in relation to entitlement to disability assistance".¹² In cases involving a medical assessment relating to entitlement to employment-injury assistance the ordinary member will be a registered medical practitioner. Additionally the draft regulations provide flexibility for the appointment of ordinary members for appeals brought against decisions on entitlement to assistance by the way of top up payments. All other cases will be dealt with by a legal member alone.

SAMH believes these rules go some way towards implementing a system based on dignity and respect, with lived experience at its heart. But we are concerned that the regulations may be overly restrictive. We are seeking clarity over:

1. **The scope of the use of ordinary members.** The Mental health Tribunal for Scotland has an ordinary member present in all cases¹³. We are concerned that the role of the ordinary member in the proposed social security first tier tribunal is

⁸ [The Mental Health Tribunal for Scotland](#)

⁹ [Mental Health Tribunal For Scotland: Panel Members](#) [accessed August 2017]

¹⁰ SAMH [Personal Independence Payment – What's the problem?](#) 2016

¹¹ Tribunals Judiciary. [Practice Statement: Composition of Tribunals in Social Security and Child Support Cases in the Social Entitlement chamber on or after 1 August 2013](#)

¹² Scottish Government [Tribunals \(Scotland\) Act 2014: Consultation on draft regulations making provision in relation to social security appeals](#) Annex D

¹³ [Mental Health Tribunal For Scotland: Panel Members](#) [accessed March 2018]

restricted to cases involving assessment of medical issues in relation to entitlement to disability assistance. We believe all sittings of the tribunal would benefit from the lived experience provided by the ordinary member.

2. **The appointment of ordinary members.** SAMH welcomes the definition of eligibility of an ordinary member in draft regulation The Scottish Tribunals (Eligibility for Appointment) Amendment Regulations 2018:¹⁴

A person is eligible for appointment as an ordinary member of the First-tier Tribunal for Scotland if the person—

- (a) is a registered medical practitioner; or*
- (b) is experienced in dealing with the needs of persons who have a disability within the meaning of section 6 of the Equality Act 2010(3) because they work with persons with a disability, in a professional or voluntary capacity, provide care to a friend or family member who has a disability, or themselves have a disability.”.*

Provision is required in the regulations or subsequent guidance for how ordinary members are appointed to specific cases. We believe appointments should be condition specific. For example, where the case involves someone whose primary disabling condition is a mental health problem, the ordinary member should be someone with lived experience of mental health.

(b) In particular, are you content with the default position that cases should be decided by only one member, namely the legal member, unless certain forms of assistance are under consideration?

SAMH is concerned about the use of one member panels. As stated above SAMH believes the Mental Health Tribunal for Scotland provides a model of good practice. The role of the general member is invaluable, providing a lived experience perspective to the tribunal at all of its sittings. As stated above we believe all sittings of the tribunal would benefit from the lived experience provided by the ordinary member.

Do you have any comments on the proposed composition of the Upper Tribunal for Scotland when deciding appeals from the Social Security Chamber to the Upper Tribunal?

No

Do you have any other comments you wish to make on the draft composition regulations?

¹⁴ Scottish Government [Tribunals \(Scotland\) Act 2014: Consultation on draft regulations making provision in relation to social security appeals](#) Annex E

No

5. *Part 6: Draft Regulations setting out eligibility criteria for appointment of Ordinary members of the First-Tier Tribunal for Scotland: Medical and Disability Experience*

Do you have any comments on the proposals regarding eligibility criteria for appointment of ordinary members of the First-tier Tribunal with medical and disability experience?

See answer to Part 5.

SAMH welcomes the provision for ordinary members. We also agree with the proposed eligibility criteria as drafted in Appendix E of the consultation. We particularly welcome the criteria's outlined in paragraph 3C (b) of the draft regulation which defines experience of a disability as:

"experienced in dealing with the needs of persons who have a disability within the meaning of section 6 of the Equality Act 2010(3) because they work with persons with a disability, in a professional or voluntary capacity, provide care to a friend or family member who has a disability, or themselves have a disability."

We believe this definition is comprehensive.

As stated above we would like clarity on how ordinary members will be appointed to specific cases. We believe appointments should be condition specific. For example, where the case involves someone whose primary disabling condition is a mental health problem, the ordinary member should be someone with lived experience of mental health.

Can you envisage a situation in which a person may have gained experience of the needs of people with disabilities, but which may not be covered by the criteria set out in the draft regulations?

No

Do you have any concerns about our proposed approach to identifying when a person will be considered to have a disability?

No

Do you have any other comments you wish to make on the draft eligibility for appointment regulations?

No

6. *Part 7: Consultation on Draft Regulations setting out rules of procedure to be applicable to the Upper Tribunal for Scotland when dealing with cases under the current Social Security (Scotland) Bill*

Do you have any comments on any of the elements of the draft rules of procedure described at paragraphs 54 – 61 in Part 7?

Our answers to part 4 of the consultation on the first-tier tribunal are also relevant to the upper tribunal. In particular we welcome reference to the Scottish Social Security Charter in the overriding objective of the rules governing the upper tribunal.

Do you have any comments on any other aspect of the draft rules of procedure?

Are there any other elements of the rules applicable to social security proceedings in the Upper Tribunal which you think should be replicated in the draft rules for the Upper Tribunal for Scotland, and have not been?

Conversely, are there any elements of the rules applicable to social security proceedings in the Upper Tribunal which have been replicated in the draft rules for the Upper Tribunal for Scotland, and which you do not think should be so replicated?

Do you have any other comments you wish to make on the draft procedure regulations for the Upper Tribunal?

Further information

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