

**TRIBUNALS (SCOTLAND) ACT 2014:  
CONSULTATION ON  
DRAFT REGULATIONS MAKING PROVISION IN  
RELATION TO SOCIAL SECURITY APPEALS**



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Are you responding as an individual or an organisation?

- ☐ Individual  
☒ Organisation

Full name or organisation's name

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We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- ☒ Yes  
☐ No

## **Tribunals (Scotland) Act 2014: Consultation on Draft Regulations Making Provision in Relation to Social Security Appeals**

The Scottish Commission for Learning Disability (SCLD) welcomes the opportunity to respond to the consultation on draft regulations making provision in relation to social security appeals. SCLD is an independent charitable organisation and strategic partner to the Scottish Government in the delivery of Scotland's learning disability strategy, The keys to life (2013). The strategy defines a learning disability as a significant, lifelong, condition that started before adulthood, which affects development and means individuals need help to understand information, learn skills, and cope independently. SCLD is committed to finding new and better ways to improve the lives of people with learning disabilities and is focused on sharing innovation and good practice so that those providing services and interventions can learn from each other. SCLD also aims to be a knowledge hub and to build an evidence base, sharing how policy is being implemented and building on an understanding of what really works.

### **Part 2: Establishment and Functions**

#### **Re-determination**

We recognise the differences between “re-determination” and the current “mandatory reconsideration” process in the reserved benefit system in that:

- a determination decision will be re-made from scratch
- there will be a time-limit for considering a re-determination request and
- a right of appeal if the time-limit is not met.

We also welcome the amendment to require the agency to provide an appeal form to the claimant alongside the notice of redetermination and the subsequent requirement on the agency to hand over to the tribunal all the materials that it used to make its determination. However, we remain concerned about the requirement for claimants to request a re-determination before being able to lodge an appeal to the Tribunal. The social security committee has heard evidence, supported by recent DWP statistics, indicating that the existence of an additional tier of adjudication acts as a deterrent which discourages people from exercising their right to appeal<sup>1</sup>. We believe that if the process for requesting a re-determination and then an appeal is too laborious, people with learning disabilities may drop out of the system as a consequence. In our view, therefore, there is a danger that redetermination presents a barrier to accessing justice in the new social security system. We propose that where a decision remains unchanged by redetermination, the case should automatically be passed directly to the Tribunal Service unless the claimant chooses to withdraw their appeal.

### **Part 4: Rules of Procedure**

#### **Overriding objective**

SCLD fully supports the overriding objective of the regulation’s procedural rules to treat the appellant fairly and justly and to provide all the necessary support in bringing their

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<sup>1</sup> [Scottish Social Security Committee Report Session 5, March 2018](#)

case to tribunal. In a previous consultation on the Social Security Bill we cited accounts from people with learning disabilities who had found the tribunal process to be a daunting, stressful even humiliating experience<sup>2</sup>. We therefore welcome the emphasis in the regulations on transparency and the objectives of avoiding unnecessary formality, seeking flexibility in proceedings and ensuring that parties are able to participate fully in proceedings with dignity and respect.

#### Social Security Charter

We welcome the inclusion within the regulations that both First-tier Tribunals and the Upper Tribunals should have regard to the social security charter when dealing with appeals. In setting out the standards of service that users of the social security system will have a right to expect the Charter is likely to have greater impact on appellants' experience of tribunals rather than the decisions made in individual cases. At previous consultation events on social security people with learning disabilities reported very limited understanding of the appeals process, and cited a lack of accessible information and frustration that communication especially written communication was not inclusive<sup>3</sup>. Article 9 of the United Nations Convention on the Rights of Disabled People (UNCRPD) places an obligation on state parties to ensure people with disabilities can access, on an equal basis with others, information and communications and to promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information<sup>4</sup>. It is essential, therefore, that Tribunals ensure that people with learning disabilities understand their rights and that accessible information, guidance and communication, appropriate to an individual's needs, is available throughout process. In this regard, SCLD recommends reference to the Principles of Inclusive Communication<sup>5</sup>.

#### Dismissal of a party's case

We fully support the omission of the current rule whereby an appellant's case can be dismissed because the Tribunal considers that there is no reasonable prospect of the appellant's case succeeding. We agree that such a decision cannot reasonably be reached at first sight of proceedings in the Social Security Chamber.

#### Orders for expenses

We have reservations about the provisions within the regulations for a Tribunal to make an order for expenses against either party. Appellants in general and people with learning disabilities in particular will frequently have very limited financial resources and we are concerned that the potential for such an order could inhibit participation in the appeals process. In our view such expenses should be an administrative function and not a matter for the Tribunal.

#### Supporters

People with learning disabilities can struggle to communicate their difficulties clearly and effectively, may underplay difficulties or may not fully understand questions.

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<sup>2</sup> [SCLD Response to the Scottish Government Consultation on Social Security \(2016\)](#)

<sup>3</sup> [SCLD Response to the Scottish Government Consultation on Social Security \(2016\)](#)

<sup>4</sup> [UN Convention on the Rights of Persons with Disabilities](#)

<sup>5</sup> [Principles of Inclusive Communication: An information and self-assessment tool for public authorities \(2011\)](#)

Additionally, some individuals may need to have developed a trusting relationship with someone in order to feel comfortable relating personal information and experiences. People have also told us that the unfamiliar process and formal setting of a tribunal process can be intimidating and upsetting and they can be afraid of saying ‘the wrong thing’<sup>6</sup>. We, therefore, support the provision within the regulations for supporters who can provide moral support, help to manage documents, and advise on points of law, procedure and issues a person might wish to raise. We would also welcome provision, however, for supporters to have the opportunity to make representations during proceedings.

The needs of each person being supported at an appeal will vary from person to person and depend on a wide range of factors. Some people may require moral support for example but others may benefit from a friend or family member to speak on their behalf where it is likely that they would be unable to give the tribunal a full account of their experiences. Article 21 of the UNCRPD places an obligation on state parties to ensure that persons with disabilities can exercise the right to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice<sup>7</sup>. Tribunals, therefore, have an obligation to enable the person to give an accurate representation of themselves and their situation. In our view in some circumstances allowing supporters to make representations during proceedings will help facilitate this. While we do not wish the distinction between a supporter and a representative to become blurred, where there is no mandated representative a supporter should not be specifically excluded from making a representation. We would like to see tribunals have the appropriate discretion and flexibility to allow supporters to give evidence on behalf of an appellant judged on the merits of each particular case.

#### Recording of hearings

We are supportive of the provision for hearings to be digitally recorded.

#### Medical examination

The regulations state that “The First-tier Tribunal may give an order that an appellant be referred to a registered medical practitioner who is independent of all parties to the case, for examination and report, where it considers that is necessary to enable a decision to be reached in the particular case.” We agree with the accompanying notes that explain that a medical examination should be ordered only in exceptional circumstances, where such an examination is thought necessary to enable a decision to be reached. Wherever possible we would like to see assessments carried out by the decision making body in order to maintain clear lines of accountability within the decision making process. Additionally, where possible the appeals process should make use of existing medical and other reports by people who know the appellant e.g. evidence from GPs, community psychiatric nurses, consultants, social workers,

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<sup>6</sup> [SCLD Response to the Scottish Government Consultation on Social Security \(2016\)](#)

<sup>7</sup> [UN Convention on the Rights of Persons with Disabilities](#)

occupational therapists, physiotherapists, and support workers. In our view, by making best use of this existing evidence there is scope to substantially reduce the number of medical assessments that currently take place under the reserved system<sup>8</sup>.

#### Notice of appeal

The regulations allow a 31 day period in which to appeal after which the permission of the First-tier Tribunal must be sought. We welcome the amendments to the Bill to ensure the availability of short-term assistance for late appeals, both while the request for permission is being considered and, if permission is granted, until the First-tier Tribunal reaches a decision on the appeal.

### **Part 5: Composition of the First-tier Tribunal**

We support the policy intention in the draft regulations that cases involving assessment of medical issues in relation to entitlement to disability assistance should follow the good practice established by the Mental Health Tribunal for Scotland and be decided a legal member, plus one ordinary member of the First-tier Tribunal who has disability experience and one ordinary member who is a registered medical practitioner. We believe the role of the general member will be important in providing a lived experience perspective to the tribunal.

### **Part 6: Eligibility Criteria for Appointment of Ordinary Members**

The regulations provide eligibility criteria that members should either be registered medical practitioners or should have experience of the needs of persons who have a disability. The accompanying notes further explain that such experience may be gained as a result of the member having a disability, or through their working in a professional or a voluntary capacity with people who have a disability. Additionally, disability experience may be gained as a result of providing care to a person who has a disability, outside a work context. We would welcome further details regarding in what capacity someone would be considered to have worked with someone with a disability and greater clarity on any skills and experience that would be considered relevant. We also think it will be important to strike a balance between members who have professional experience of disability and those who have genuine lived experience of disability by virtue of having a disability or being a carer for someone with a disability.

### **Part 7: Upper Tribunal**

#### Orders for expenses

The regulations provide for the Upper Tribunal for Scotland to make an order for expenses for matter such as travel, sustenance and loss of remunerative time against either party. We are concerned that the potential for such an order could inhibit

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<sup>8</sup> [SCLD Response to the Scottish Government Consultation on Social Security \(2016\)](#)

participation in the appeals process. In our view such expenses should be an administrative function and not a matter for the Upper Tribunal.

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