

EQUALITY IMPACT ASSESSMENT - RESULTS

Title of Policy	<p>Regulations:</p> <ul style="list-style-type: none"> - The First-tier Tribunal for Scotland (Allocation of Functions to the Social Security Chamber) Regulations 2018 - The First-tier Tribunal for Scotland (Chambers) Amendment Regulations 2018 - The First-tier Tribunal Social Security Chamber (Procedure) Regulations 2018 - The First-tier Tribunal Social Security Chamber Expenses and Allowances Regulations 2018 - The Scottish Tribunals (Eligibility for Appointment) Amendment Regulations 2018 - The First-tier Tribunal for Scotland Social Security Chamber and Upper Tribunal for Scotland (Composition) Regulations 2018 - The Upper Tribunal for Scotland (Social Security Rules of Procedure) Regulations 2018
Summary of aims and desired outcomes of Policy	To define and standardise the rules for the First-tier Tribunal for Scotland Social Security Chamber and Upper Tribunal for Scotland which will apply to all appeals regarding devolved benefits.
Directorate: Division: team	Social Security Directorate, Policy Division, Legislation and Operational Policy Unit

Executive summary

1. The public sector equality duty within the Equality Act 2010 requires the Scottish Government to assess the impact of applying a proposed new or revised policy or practice. Equality legislation covers the protected characteristics of: age, disability, gender reassignment, marriage or civil partnership, pregnancy or maternity, race, sex, sexual orientation and religion and belief.

2. The Equality Act 2010 harmonised existing equality legislation and includes a public sector duty ('the Duty') which requires public authorities to pay due regard to the need to:

- Eliminate discrimination, harassment, victimisation or any other prohibited conduct;
- Advance equality of opportunity; and
- Foster good relations between different groups - by tackling prejudice and promoting understanding

3. The Social Security (Scotland) Act 2018 (the 2018 Act) provides an individual with the right to challenge a determination of entitlement, if they disagree with it. It is therefore the intention of Scottish Ministers to set up a new chamber of the First-tier Tribunal for Scotland, with responsibility for dealing with appeals against determinations of entitlement to assistance delivered under the Scottish social security system. The new chamber is being created under the Tribunals (Scotland) Act 2014 (the 2014 Act) . Bespoke provision will have to be made, also, for the Upper Tribunal for Scotland, when dealing with appeals against determinations of the Social Security Chamber

4. The 2014 Act created two new Tribunals, the First-tier Tribunal for Scotland (FtT) (that hears cases at first instance) and the Upper Tribunal for Scotland (UT) (to deal with appeals, on points of law, from the FtT). These are collectively known as the Scottish Tribunals.

5. This Equality Impact Assessment (EQIA) relates to the six sets of regulations made under the 2014 Act and one under the 2018 Act. All of these are connected to the establishment of a new Chamber of the First-tier Tribunal for Scotland that will hear appeals in relation to devolved social security cases. The cases will involve decisions about and determinations made under the 2018 Act, and potentially under regulations made using its powers. The EQIA has considered the potential impacts of the suite of regulations on each of the protected characteristics. The provisions and how they impact on people across the protected characteristics are set out under **Key Findings**.

6. The policy is largely administrative and the aim is to ensure an individual's entitlement to assistance has been correctly determined when they bring an appeal to the tribunal. It does not have direct or indirect, positive or negative impacts upon the elimination of unlawful protected characteristic based discrimination. However, the practical operation of the Tribunals implementing the policy may have an impact which this EQIA will address.

7. Although the majority of the appellants are likely to identify as having some form of disability, it is very likely that many will have multiple protected characteristics. However, an individual's protected characteristics will not be a factor in whether they receive assistance or not – it will be whether they meet the eligibility criteria for the particular type of assistance that matters. The Scottish Government recognises that there will be some individuals who may not fully follow-through the process and the Regulations for procedural rules are intended to remove barriers to appealing, whether real or perceived through specific provisions such as the right to be accompanied by a supporter, the availability of interpreters, disability accessible locations or locations out with the usual tribunal venues and ensuring people are treated with dignity and respect to ensure their full participation in the hearing.

8. Further, all members of the tribunal are expected to adhere to the Judicial Ethical Standards and the Scottish Courts and Tribunal Service (SCTS) customer charter.

9. SCTS has published an Equality and Diversity policy, which sets out its commitments: <https://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform/equality-and-diversity>

10. Compliance with the Equality Act 2010 is a key requirement in order to give effect to the overriding objective of ensuring an appellant is able to participate fully as far as possible in their hearing.

Background

11. This EQIA is very much a work in progress. This is because a new chamber is in the process of being created for the delivery of social security powers that are being devolved to Scotland. As such, data on how people will be impacted is not yet available.

12. The EQIA will be updated as we learn more about how the Scottish appeals system is operating in practice. As part of our commitment to continuous improvement with the clients of the system, steps will be taken to collect data in conjunction with the SCTS as further rollouts of devolved benefits continue.

13. This EQIA also builds on the previous partial EQIA which was completed and published alongside the Consultation on Social Security in Scotland that ran from the 29 July 2016 until the 30 October 2016

https://consult.gov.scot/social-security/social-security-in-scotland/supporting_documents/Download%20the%20Partial%20Equality%20Impact%20Assessment%20EQIA.pdf

and the full EQIA for the Social Security (Scotland) Bill 2018, published 20 June 2017.

https://consult.gov.scot/social-security/social-security-in-scotland/supporting_documents/Download%20the%20Partial%20Equality%20Impact%20Assessment%20EQIA.pdf

14. The then Cabinet Secretary for Communities, Social Security and Equalities statement to Parliament on 30 May 2017 set out that the Scottish Government will begin to deliver the first wave of benefits Best Start Grant and Funeral Expense Assistance by summer 2019. The First Minister announced on 4 September in the Programme for Government that the first benefit to be delivered by Social Security Scotland (the agency) will be Best Start Grant (BSG). The agency will start making payments for BSG by this Christmas.

15. The Scottish Government is introducing a different approach to decision making and appeals, one which aims to get decisions right first time. It is taking a rights based approach that respects the dignity of the individual. The Scottish Government has always been clear that people will have a right to challenge if they believe that the new agency, Social Security Scotland, has not made the right decision and that the process for challenging a decision is as simple and straight forward as possible.

16. To ensure an individual is able to challenge the decision of the agency through an independent institution, Scottish Ministers decided that a new chamber of the First-tier Tribunal for Scotland will be created to hear appeals in relation to social security cases in the Scottish system. This was decided against the background of discussions that are currently taking place with the UK Government on the devolution of the reserved tribunals, including the Social Security and Child Support Tribunal, under the Scotland Act 2016. The transfer will not take place prior to the first wave of social security benefits being delivered and it has therefore been necessary to set up a Chamber within the First-tier Tribunal for Scotland.

17. In embarking upon the process of drafting the necessary regulations for consultation, the starting point (particularly in the context of the rules of procedure for the Social Security Chamber) was to look at the approach of the rules of procedure of the existing chambers of the First-tier Tribunal for Scotland. A key consideration was ensuring so far as appropriate the aim of having broad uniformity of approach, across the chambers in Scotland. These were considered alongside the rules of the Social Entitlement Chamber (the 2008 Rules) which currently deal with social security appeals for the reserved benefits in Scotland. The regulations as consulted upon were framed with the overall principles of the Scottish social security system in mind, to establish what adjustments might be needed.

18. For the Upper Tribunal for Scotland, a similar exercise was carried out. The generic rules of procedure of the Upper Tribunal for Scotland were looked at, alongside the rules of procedure for the Upper Tribunal, as they apply to social security cases.

19. Scottish Ministers are working in conjunction with SCTS to set up the new chamber. This will be known as the First-tier Tribunal for Scotland Social Security Chamber (FtT); appeals from the Chamber will be heard in the first instance by the Upper Tribunal (UT) for Scotland. Six sets of regulations require to be in force. The regulations are being made under the 2014 Act.

20. Connected with the regulations being made under the 2014 Act, there will also be a short set of regulations made under ancillary powers in the 2018 Act. These will enable a scheme to be set up for payment of travel and subsistence (T&S) expenses, and, where appropriate, payment of allowances towards loss of remunerative time. SCTS will administer the scheme, with the underlying policy being the responsibility of the Scottish Ministers. Claims for expenses of attendance will be open to parties (other than representatives of the Scottish Ministers) and witnesses required to attend hearings related to social security appeals. The scheme will cover both the FtT and UT.

21. A consultation process was undertaken in relation to the draft Regulations between January and July 2018. This included a full public consultation¹ which ran from 22 January 2018 to 16 April 2018 and consultation with senior members of the judiciary that the 2014 Act requires. The Scottish Parliament's Social Security Committee also undertook an evidence gathering session during the full public consultation period. The consultation with the judiciary took place after the conclusion of the full public consultation.

22. A total of 25 written responses to the full public consultation were received, 4 from individuals and 21 from organisations. The independent analysis of the responses was undertaken by KSO Research. Respondents represented a range of individuals and organisations with knowledge and experience of, or an interest in, social security matters, including organisations representing island interests.

23. Respondent organisations included Inclusion Scotland; SAMH; Enable Scotland; Age Scotland; CAS; CPAG; National Deaf Children's Society; Low Income Tax Reform Group (LITRG); People First Scotland; Royal National Institute for the Blind (RNIB); Scottish Commission for Learning Disability; Scottish Council on Deafness and Scottish Woman's Convention.

The Scope of the EQIA

24. The scope of this EQIA is the impact of the legislation on those appealing to the FtT or UT who have one or more protected characteristics.

25. The EQIA therefore seeks to identify barriers by protected characteristic that reduce the ability of the individual to access their right to appeal through the tribunal service.

Key Findings

26. Although the key findings are presented under each of the protected characteristics, an issue identified for one group may be relevant for other protected characteristics.

Age:

27. Data from the 2011 Census shows that, in the general population in Scotland, 16% are aged 0-14; 13% are aged 15-24; 13% are aged 25-34; 14% were aged 35-44; 15% were aged 45-54; 13% were aged 55 to 64; and 17% were aged 65 or above. The census also showed that 48.5% of the Scottish population were male and 51.5% were female.

28. The policy is largely administrative. It does not have direct or indirect, positive or negative impacts upon the elimination of unlawful age based discrimination, harassment and victimisation.

¹https://consult.gov.scot/social-security/provision-for-social-security-appeals/consultation/published_select_respondent

29. There were no age related concerns expressed in the consultations.

Disability:

30. A number of bodies representing disabled people expressed concern about the location and suitability of tribunal venues. The tribunal regulations do not cover venue locations or type as the determination of venues is to be left as an administrative function of SCTS. SCTS will offer or try to offer a venue that is as close to the appellant as possible, albeit, particularly in the more remote parts of Scotland, that is not always feasible. Changes of venue can occur through discussion between SCTS and the appellant about matters of logistics. If in rare circumstances an agreement cannot be reached between SCTS, as administrators, and the appellant on the suitability of the venue then the decision will be examined by a legal member who can apply their judicial discretion to come to a suitable decision. It should be recognised that a range of factors would need to be considered to ensure the welfare of all the participants including the tribunal members, the appellant and witnesses.

31. There were also some concerns expressed over the accessibility of documentation. The 2018 Act places a duty on the agency to ensure its communication meets the needs of the clients and as such it will ensure information it provides is in accessible formats. In addition SCTS is also bound to consider the accessibility of their communications through the relevant Acts. The 2014 Act and the 2018 Act both place a duty on Scottish Ministers/tribunals to give effect to an overriding principle of accessibility and fairness.

32. Similarly there were some concerns that the recording of hearings may have a negative impact on individuals with a mental health condition. But, there was also strong support for this provision from other interested parties in the interests of transparency. On balance, it was decided that establishing transparency should have a positive impact on appellants.

33. User research undertaken during the Disability Benefits Discovery to learn about the experiences of appellants in the current Department for Work and Pensions appeals process highlighted multiple barriers to appeal for people with disabilities.

34. Participants highlighted instances where they were not able to access supporters or representatives or were insufficiently informed or confused and intimidated by the process. The 2018 Act places a duty on the social security agency to do all it can to assist an appellant. This will include advising on the appeal process, supplying the necessary form required to initiate an appeal as well as sign-posting to organisations that may be able to support an individual. It is the intention of Scottish Ministers to ensure the process is both timely and transparent. Guidance will be published and made available to the appellant clearly stating the timescales involved and the process in general. However these are not matters that require to be addressed in the regulations.

35. The rules of procedure for both the FtT and the UT contain express provision that an appellant may be represented in any proceedings by a representative and be accompanied by a supporter at their hearing. They also seek to give clarity as to what the role of the supporter is envisaged to be. These measures are intended to support appellants who would ordinarily face challenges both physically and psychologically in engaging with the process and to support all appellants in general equally. There is also a requirement, in certain circumstances, for the consent of the Tribunal to be given if a party seeks to withdraw its case. This seeks to provide some protection to appellants in a state of vulnerability, that may be related to a protected characteristic, who may be inclined to make heat-of-the-moment withdrawals. Where a proper case for doing so can be advanced, there is provision, also, to apply for reinstatement of a case which has been withdrawn or dismissed.

36. The Composition Regulations make express provision for a panel to comprise a legal member, a medical member and a member with disability experience where matters related to entitlement to disability assistance are under consideration. This ensures that the tribunal is appropriately convened and is able to take evidence based judgements that are informed by relevant considerations for those who have a disability. It will be an operational matter for SCTS but where possible, it will try to ensure gender balance of the panel and if a specific request is made that the panel comprise members of a particular gender when interacting with an appellant that will be taken into consideration.

37. The Eligibility for Appointment Regulations of the Scottish Tribunals are amended to set out the eligibility criteria for appointment of members on account of disability experience and medical experience. These members will be assigned to the Social Security Chamber. A broad approach is taken to what amounts to disability experience. In particular, this includes people who have lived experience of mental health problems. The importance of this was emphasised at consultation.

38. The policy is largely administrative. It does not have direct or indirect, positive or negative impacts upon the elimination of unlawful disability based discrimination, harassment and victimisation.

Sex:

39. There is limited anecdotal evidence from the consultation, provided by Scottish Women's Council, of gender imbalance with women being less willing to make an appeal to tribunal. The tribunal regulations themselves are neutral with regard to sex. The 2018 Act places a duty on the agency to do all it can to help people. This applies regardless of the gender of prospective appellants and it would extend, where appropriate, to promoting exercise of the right to appeal where an individual disagrees with the determination made by the agency for their claim to assistance.

40. The policy is largely administrative. It does not have direct or indirect, positive or negative impacts upon the elimination of unlawful sex based discrimination, harassment and victimisation.

Gender Reassignment:

41. The tribunal regulations are neutral with regard to gender reassignment. The 2018 Act places a duty on the agency to do all it can to help people. The procedural rules contain specific provision in the overriding objective that in order to determine cases efficiently and ensure justice is served by allowing the appellant an opportunity to participate fully, parties must be treated with dignity and respect. Therefore any appellant who is undergoing gender reassignment or has undergone it will be treated and addressed in a manner that is appropriate to their circumstances.

42. The policy is largely administrative. It does not have direct or indirect, positive or negative impacts upon the elimination of unlawful gender based discrimination, harassment and victimisation.

Race:

43. Data from the 2011 Census relating to ethnicity in the Scottish population shows the proportion of the population identifying with various ethnicity as: All people 5,295,403 of which White 96.0%; Mixed or multiple ethnic groups 0.4%; Asian, Asian Scottish or Asian British 2.7%; African 0.6%; Caribbean or Black 0.1%; Other ethnic groups 0.3%

44. The tribunal regulations are neutral with regard to race. However, it is recognised that appellants whose primary language is not English, may experience barriers to accessing the appeals process. To facilitate the proceedings an interpreter can be appointed to assist the tribunal. The rules of procedure of the FtT make express provision that where an interpreter is appointed, they must be independent of all parties to the case and any representatives or supporters of the parties. In practice an appointment will be made by SCTS. The independence requirement may not only safeguard the impartiality of the proceedings, it may act as a quality control mechanism. Given the complexity of the points typically involved, use of interpreters in proceedings of the UT is understood to be uncommon in practice. Against that background, it is not considered necessary to make express provision there in relation to independence of interpreters. Were an interpreter, exceptionally, is to be appointed, the overriding objective of the rules of procedure for the UT would cover the need for independence, as a matter of good practice in allowing parties to participate fully in the proceedings.

45. As well as issues of language, another consideration for people from Minority Ethnic backgrounds may be discrimination, whether real or perceived. When an individual feels they have been discriminated based on their ethnicity, or for any other protected characteristic, then they will be able to raise a complaint that will be investigated by the Chamber President. Furthermore, as hearings will be digitally recorded, unless equipment failure occurs, then that facility should provide further assurance that any complaints will be fully and fairly investigated.

46. The policy is largely administrative. It does not have direct or indirect, positive or negative impacts upon the elimination of unlawful race based discrimination, harassment or victimisation.

Sexual Orientation:

47. There is limited data available from the Scottish Surveys Core Questions (SSCQ) 2016 which was published in April 2018 showing the self-identified sexual orientation percentages to be: Heterosexual 98%; LGB & other 2% from a sample of 99,900 out of a adult population of 4,277,700. It is felt that the figures are likely to under-report the percentage of lesbian, gay or bisexual (LGB) people within society.

48. Scottish Government nor the SCTS hold data regarding the sexual orientation of appellants to tribunals.

49. As the policy is largely administrative, the Scottish Government does not believe there is any direct or indirect, positive or negative impacts upon the elimination of unlawful discrimination against lesbian, gay and bisexual people. The procedural rules contain specific provision in the overriding objective that in order to determine cases efficiently and ensure justice is served by allowing the appellant an opportunity to participate fully, parties must be treated with dignity and respect.

Religion and Belief:

50. The analysis of religion in the 2011 Census shows the proportion of the population identifying with various religions as: 32.4% Church of Scotland; 15.9% Roman Catholic; 5.5% Other Christian; 0.2% Buddhist; 0.3% Hindu; 0.1% Jewish; 1.4% Muslim; 0.2% Sikh; 0.3% Another Religion; 36.7% No Religion; 7.0% Not Answered.

51. The policy is largely administrative. It does not have direct or indirect, positive or negative impacts upon the elimination of unlawful religion and belief based discrimination.

52. There were no religious or faith related concerns expressed in the consultations. The objective of allowing full participation would be expected to cover any scenario where particular timing of hearings was requested on account of religious attendance.

Recommendations and Conclusion

53. The EQIA process has evidenced that the group of regulations and procedures encompassed within this EQIA have been subject to scrutiny by public consultation, together with members of the judiciary and the Scottish Government Legal Directorate. This reflects Scottish Ministers' aim of designing a system centred on dignity and respect, with a rights based approach at its core.

54. By tailoring the regulations for both the Social Security Chamber, and the Upper Tribunal for Scotland, to the social security context, and the welfare, wellbeing and interests of the appellant and other persons involved, the few areas of issue identified during the consultation period have been addressed with measures taken to mitigate any potential adverse impact.

55. The overall conclusion of the EQIA, at this stage, is that there is little or no significant impact on people with a protected characteristic in the regulations themselves. A number of procedural adjustments were made during the course of drafting the regulations to ensure that individuals who may currently face disadvantage are able to benefit fully from the aims of the regulations.

56. The process of continuous improvement and co-design will continue once the new chamber has been established. The stated aim of the Scottish Government is to ensure the system remains fit for purpose and as part of its duty to report to Parliament how well the system for appeals is operating and whether any changes are required, it will collect and monitor data in partnership with SCTS in order to make evidenced based decisions and changes to policy should those be required.

September 2018