

POLICY NOTE

THE SCOTTISH TRIBUNALS (ELIGIBILITY FOR APPOINTMENT) AMENDMENT REGULATIONS 2018

SSI 2018/276

The above instrument was made in exercise of the power conferred by paragraph 1(2) of schedule 3 of the Tribunals (Scotland) Act 2014 (the 2014 Act). The instrument is subject to the negative procedure.

The instrument amends the Scottish Tribunals (Eligibility for Appointment) Regulations 2015. Those Regulations set the criteria for legal members of the First-tier Tribunal for Scotland, legal members of the Upper Tribunal for Scotland and ordinary members of the First-tier Tribunal with tax experience, housing, property or surveying experience, health and education experience and charity regulatory experience.

Policy Objectives

Background

The Social Security (Scotland) Act 2018 (the 2018 Act) allows Scottish Ministers to deliver new, improved benefits, to replace the 11 Department for Work and Pensions benefits for which legislative competence has been transferred to the Scottish Parliament. The Scottish Ministers will deliver those benefits in a phased manner. The First Minister announced on 4 September in the Programme for Government that the first full benefit to be delivered by Social Security Scotland (the agency) will be the Best Start Grant (BSG). The agency will start making payments for BSG by this Christmas.

The Scottish Government has made clear its intention is to take a different approach that is rights-based and to build a social security system that is founded on the principles of fairness, dignity and respect ensuring those with lived experience of the current system co-design the new social security system in Scotland. These ambitions are at the heart of everything the new system will do, including how the tribunal system for social security appeals will operate.

The Scottish Government has always been clear that people will have a right to challenge if they believe that the agency has not made the right decision and that the process for challenging a decision is as simple and straight forward as possible.

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 transfer of responsibility for the management and operation of reserved tribunals, including the Social Security and Child Support Tribunal, in terms of the changes to the devolution settlement brought about by the Scotland Act 2016. The transfer will not take place prior to the first wave of social security benefits being delivered by the agency and it has therefore been necessary to set up a new chamber of the

First-tier Tribunal for Scotland and ensure necessary provisions are made for the Upper Tribunal for Scotland in relation to social security cases from First-tier Tribunal.

The 2014 Act specifies that the First-tier Tribunal may comprise ordinary, legal and judicial members. Ordinary members are appointed to the First-tier Tribunal and then assigned to a Chamber by the President of the Scottish Tribunals, based on their expertise.

These Regulations create the eligibility criteria for ordinary members of the First-tier Tribunal with medical experience and disability experience. Members with these areas of expertise will be assigned to the Social Security Chamber.

The criteria for eligibility for appointment as an ordinary member with medical experience is that the person is a registered medical practitioner. They do not, though, need to have a current licence to practise.

Consultation

These Regulations do not carry any consultation requirement. However, a consultation process was undertaken in relation to the draft Regulations between January and July 2018. This included a full public consultation and consultation with senior members of the judiciary that the 2014 Act requires. In addition, the Social Security Committee of the Scottish Parliament undertook an evidence gathering session with key stakeholders. The full public consultation lasted for 12 weeks and took place from 22 January to 16 April 2018. There were 25 responses to the full public consultation, 4 from individuals and 21 from representative organisations. The independent analysis of the responses was undertaken by KSO Research. Where permission was received, individual responses were published online on the Citizen Space website at:

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

The full Scottish Government response to the consultation is available at www.gov.scot/ISBN/9781787812123

In response to consultation, a broad approach is adopted to what gives rise to eligibility for appointment as an ordinary member with disability experience. It covers those who work with people with disabilities, in a professional or voluntary capacity. They may not necessarily hold a formal qualification. Care will, however, be taken to ensure that disability experience is classed as such only where there is evidence of direct practical experience of working with people with disabilities. As pointed out at consultation there may be roles which appear to involve this, but in practice do so only to a very limited extent such as fundraising work, for example.

Particular emphasis at consultation was placed, also, on ensuring that people with lived experience of having mental health problems would be potentially eligible for appointment as ordinary members with disability experience. This is also catered for. The meaning attributed to disability experience covers people who have experience of disability as a result of themselves having one. A broad definition of “disability” is relied upon, namely that the person has a physical disability or mental impairment, with this having a substantial effect, in the long term, on their ability to carry out day-to-day activities. This clearly captures people whose day-to-day functionality is affected by a mental health problem.

The approach taken to disability experience also captures people providing care, be that on a purely voluntary basis, to friends or family members with disabilities, or being paid to provide social care. Caring, in this context, is to be equated to lived experience of disability.

It was also stressed that Tribunal members who have experience of disability should have a good awareness and training on issues relating to other protected characteristics and how issues intersect. This is an operational matter for the Chamber President which will be taken forward as part of members' training requirements to ensure diversity and inclusion are given effect.

There is discussion above as to the way in which the outcome of consultation has been given effect to, so far as it is relevant to these Regulations.

Impact Assessments

The following impact assessments have been completed and are attached separately:

- The Equality Impact Assessment
- Islands Communities Screening Assessment
- Child Rights and Wellbeing Impact Assessment

Financial Effects

A partial Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. No impacts of this policy were found on business. The Scottish Courts and Tribunals Service will be expected to handle appeals related to social security, which it does not currently, and ensure sufficient members are available to deal with matters before the Tribunal. The impact of the new system on local organisations is that they would be expected to provide advice on the new system whereas the burden on such organisations having to lodge appeals on behalf of their clients will be undertaken by Social Security Scotland. The overall impact would therefore be neutral.

Scottish Government
Social Security Directorate

13 September 2018