

POLICY NOTE

THE FIRST-TIER TRIBUNAL FOR SCOTLAND SOCIAL SECURITY CHAMBER (PROCEDURE AND ALLOCATION OF FUNCTIONS) AMENDMENT REGULATIONS 2020

SSI 2020/xxx

The above instrument will, if approved by the Scottish Parliament, be made in exercise of the powers conferred by section 20(2) and paragraph 4(2) of schedule 9 of the Tribunals (Scotland) Act 2014 (“the 2014 Act”). Regulations made under section 20(2) attract the affirmative procedure, whilst regulations made under paragraph 4(2) of schedule 9 are subject to the negative procedure. Applying section 33(3) of the Interpretation and Legislative Reform (Scotland) Act 2010, the combined use of these powers means that the instrument is subject to the affirmative procedure.

The combined use of powers means, also, that the regulations are subject to approval of the Lord President, as well as consultation with the President of the Scottish Tribunals and such other persons as the Scottish Ministers consider appropriate. The necessary consultation has taken place and the approval of the Lord President has been obtained.

Purpose of the instrument

These Regulations make an adjustment to the First-tier Tribunal for Scotland (Allocation of Functions to the Social Security Chamber) Regulations 2018 (S.S.I. 2018/350), relating to the assignment of the temporary chamber president.

They also make amendments to the First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018 (S.S.I. 2018/273), partly in order to clarify the intent of the original drafting, and partly to address more substantive points.

Policy Objectives

The 2014 Act allows rules to be made to regulate the practice and procedure of both the First-tier and Upper Tribunals for Scotland. Paragraph 4(2) of schedule 9 of the 2014 Act allows rules to be made by the Scottish Ministers until such time as responsibility for rule making passes to the Court of Session.

It is considered appropriate to extend the period of assignment for the acting Social Security Chamber President beyond the cut-off point contained in regulation 5 of The First-tier Tribunal for Scotland (Allocation of Functions to the Social Security Chamber) Regulations 2018. This will be competent until 1 April 2021, rather than coming to an end automatically when a form of ongoing assistance starts to be delivered under the Social Security (Scotland) Act 2018 (“the 2018 Act”). This is to ensure appropriate judicial training arrangements are in place for members who are recruited to the First-tier Tribunal for Scotland to deal first and foremost with social security appeals. And to promote the effective disposal of social security appeals arising as ongoing forms of assistance start to be delivered, through allowing experience gained so far to be brought to bear in the early stages.

Some changes are also made to the rules of procedure governing the operation of the Social Security Chamber. As described below, some of these clarify the intention of the original drafting, while others make more substantive adjustment.

- Regulation 3(3) and (4) contains, in part, for-the-avoidance-of-doubt provisions. Where there has been an application for assistance under the 2018 Act a copy of the application should always be submitted to the First-tier Tribunal along with any notice of appeal (regardless of whether the appeal is against the original determination, arising from the application, or a subsequent determination). And where we talk in the Rules of Procedure about ‘a notice’, we mean a notice of appeal. More substantively, the Regulations make the following changes:
- Regulation 3(2) clarifies that where a case has been dismissed, as a result of a failure to comply with an order, the only basis to ask for reinstatement is that there is a good reason for the non-compliance that led to the dismissal.
- Regulation 3(3) removes the requirement for an appellant to give views on whether an oral hearing should be held at the time of completing a notice of appeal against a substantive determination of entitlement. The same approach is taken in relation to process decisions (see regulation 3(4)). This enables the appellant to give views at a more opportune time, namely after the response of the decision-maker is known, when they are likely to be able to give a more informed view on proceeding with or without an oral hearing.
- Regulation 3(5) removes the option for a decision of the Social Security Chamber to be published. Regulation 3(6) makes a consequential change in light of that. Recent case law (*MH v Mental Health Tribunal for Scotland* (2019 CSIH 14)) indicates that only in limited circumstances will it be competent to anonymise appellants when publishing decisions. Further, in remote areas, appellants may still be identifiable and sensitive information could be linked to them. This would be inconsistent with dignity, fairness and respect. Sufficient transparency is maintained through the publication of summaries on the Chamber website which capture the application of law in the main types of cases arising.
- Regulation 3(7) provides that it is the legal member who is usually to undertake a review of a decision, rather than this being a free choice between a legal member and an ordinary member. This reflects the view that the legal member will, in general, be in a stronger position to undertake a review.
- Regulation 3(8) amends the duty to treat a request for a review as also being an application for permission to appeal. It puts beyond doubt that the duty applies to review requests by the decision-maker, in addition to review requests by the person who is seeking assistance. This promotes equality between the parties.

Consultation

In accordance with section 11(1)(b) and paragraph 4(3) of schedule 9 of the Tribunals (Scotland) Act 2014 the Scottish Government has consulted the President of the Scottish Tribunals and such other persons as they considered appropriate on the making of these

Regulations. Those persons include members of the Judicial Reference Group, which provides advice and guidance on the operation of the Social Security Chamber.

Impact Assessments

The following impact assessments were completed in respect of the package of instruments of which the First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018 and the First-tier Tribunal for Scotland (Allocation of Functions to the Social Security Chamber) Regulations 2018 formed part:

- Equality impact assessment
- Islands Communities Screening Assessment
- Child Rights and Wellbeing Impact Assessment.

Nothing in these Regulations alters the outcome of those assessments. Accordingly, no further impact assessments are required in these areas.

Financial Effects

A Partial Business and Regulatory Impact Assessment was also prepared in respect of the package of instruments of which the First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018 and the First-tier Tribunal for Scotland (Allocation of Functions to the Social Security Chamber) Regulations 2018 formed part. These Regulations do not alter the outcome of that assessment. Accordingly, no further assessment is required.

Scottish Government
Social Security Directorate

29 January 2020