

Scottish Women's Convention response to:

The Scottish Government Consultation

"Draft Regulations Making Provision in Relation to Social Security Appeals"

April 2018

The Consultation

Under the Heads of Agreement for further devolution of powers to the Scottish Parliament, as set out in the report of the Smith Commission, the operation and administration of 19 reserved tribunals will be devolved to Scotland, including the Social Security and Child Support Tribunal (SSCST). Discussions are on-going with the UK Government (UKG) regarding the timing of the transfer of SSCST to Scotland.

The 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 between Autumn 2018 and Summer 2019. It is therefore the intention of Scottish Ministers to set up a new Chamber in the First-tier of the Scottish Tribunals that will hear devolved assistance appeals when the first wave of social security assistances begin to be delivered by the Scottish social security agency, ahead of any potential devolution of SSCST.

The Scottish Government is now seeking views of any organisation or individual with an interest in these matters to ensure what is being proposed will meet the needs of the users in the Scottish social security system.

The Scottish Women's Convention (SWC)

The Scottish Women's Convention (SWC) is funded to engage with women throughout Scotland in order that their views might influence public policy. The SWC uses the views of women to respond to a variety of Parliamentary, Governmental and organisational consultation papers at both a Scottish and UK level.

The Scottish Women's Convention engages with women using numerous communication channels including Roadshow events, Thematic Conferences and regional contact groups. This submission provides the views of women and reflects their opinions and experiences in a number of key areas relevant to social security. In particular, around the devolution of a number of forms of assistance and appealing decisions for these at both a reassessment and tribunal level.

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?

At present, those who require additional support have voiced that they often feel failed by the system currently in place within the decision making process for social security. The one-size-fits-all solution is looked upon as a quick and hurried fix which often systematically ignores that different groups and individuals have unique support needs. Whilst recognising that regulations are in place to act as a cohesive framework for social security, a flexible and compassionate approach is required to be taken at every step of the process. It should be implied that this is done on an individualised case by case basis in which those in need of assistance are treated with respect and given what they are due. In no way should any woman for whatever reason asking for assistance be made to feel as if she is in the wrong. Trust is essential at all aspects of application for assistance, including tribunals, in order to put women who have experienced inequality through their gender and other forms of discrimination at ease in all aspects of proceedings.

It is hoped that these proposed regulations will be put into plain language terms and relayed to those carrying their case forward in such a way. Staff should be trained in an empathetic manner and looked upon as someone with whom women can ask questions relating to appeals, for instance, around the likes of what can and cannot be appealed. This is essential in that many may not have had access for some time to the likes of a representative that can sign post them in the right direction. This risks leading to time consuming sessions and attempting to appeal something that cannot, such as how assistance is physically administered, actually be appealed.

This should include access at point of view where determination is taking place to forms and other material that points to up to date guidance on appealing decisions. At present, many of these are only available from certain places or downloadable online at severe detriment to those with limited access or who may not be computer-literate.

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?

Analysing all aspects of a particular determination, rather than just a specific factor is seen as preferable for a number of reasons. For instance, it allows the claimant to take tribunal members back through the whole process, including the one through which they were assessed, and illustrate exactly how they were unsuccessful and why, including how they do apparently do not meet the necessary criteria.

The SWC has heard from multiple women, particularly around mental health issues, and how these are often not taken as seriously by assessors merely because there is no “physical” impairment that can be seen or on the grounds that they are not ill enough. Looking at the whole case is extremely important. There is not a one size fits all solution to social security and it is important that a quantitative tick box exercise is not borne out at severe damage to many women’s health and living standards.

It is hoped that in providing such when appealing, it will allow many who have been turned down for reasons often overlooked can successfully overcome the decision and receive what they are entitled to as a citizen.

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

Regulations should stipulate the manner in which recovery of overpayments is to be conducted, not only within the Social Security (Scotland) Bill, but also within draft regulations for such. Many of those who have received overpayments are unaware that this has occurred until they receive notification, resulting in a significant amount of stress and financial hardship when recovery takes place.

This is a similar problem in terms of the new form of short term assistance that is to be placed within the devolved system. Regulations do not address whether this is to be repaid if a tribunal appeal is unsuccessful or whether it is to come under some other arc of legislation. In accordance with the principles to be enshrined within the Scottish social security system, regulations should include the fair and human rights based approach as to how this will be done.

Many women have spoken about administrative or human errors that have unfairly cost them their assistance. This can have a serious impact on a person's health. Women are currently being treated as a statistic rather than a human being. It is crucial that time limits do not impinge upon basic rights to social security within Scotland.

Redeterminations

Replacing the current system of Mandatory Reconsideration in use by the DWP for the right to redetermination within the new Scottish social security system can be looked upon in a number of different ways. For instance, unlike the former, the fact that the latter proscribes a time limit for Minister's to re-determine is seen by women as a welcomed measure. This move to a more individualised system may have a beneficial impact in that at least many will know there is a time limit on having to find out if a decision has been successful, prepare to lodge appeals and consult options such as third sector representatives and advice agencies.

Furthermore, creation of re-determination as well as a time limit and onus on Minister's to comply with such, may allow many to carry their assistance through successfully without the need for dragged out appeals resulting in more financial hardship. Nonetheless, this can also raise many disadvantages that must be heeded within regulations at all stages.

Redetermination should be stressed as a second chance, completely different from the first assessment and promoted as such. At present, many view the current form as a hindrance to getting what they are duly entitled to. Furthermore, putting the onus on the applicant to apply for an appeal when it is the Agency's failure to carry out the redetermination timely is detrimental and should be moved automatically onto appeal.

Too many women have been made to feel that this process is an extra barrier for them to manoeuvre in order just to be given assistance. Worse, others may give up at this stage due to already having suffered financial, mental and physical hardship due to the toll of

assessments and worry. Lack of confidence is almost always cited as a significant problem. Too often, a woman's mind set and confidence is significantly altered throughout this entire process and made to feel they are a drain on the system.

Determination onto re-determination, and failing this, appeal, should be viewed as three separate entities. Women should know that they have the right at every stage to not only be given a full and informed statement of the decision making process and reasons for such, but also treated fairly and signposted towards organisations that can help in presenting the case and ensuring the appropriate documents and the likes are in order. Too often, whilst placing a duty to inform citizens of their right to appeal is enshrined within regulations, this can be verbalised to them in a discouraging manner which is often complex and off putting to many.

[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](#)

[Section 20 of the 2014 Act gives the power for the Scottish Ministers to make regulations providing for the organisation of the First-tier Tribunal for Scotland into chambers. This power has been exercised in making the First-tier Tribunal for Scotland \(Chambers\) Regulations 2016. The draft regulations 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?](#)

Women throughout Scotland have held extensive discussions with the SWC in relation to social security, namely around devolution of certain aspects as well as the ongoing reforms taking place at a UK level over the past few years. Women are suffering disproportionately as a result of cuts to social security in much larger numbers than men. This has not only led to severe issues of poverty taking place where this could be avoided, but also has meant that women continue to endure the assessment and appeals system in far larger numbers.

Any form of tribunal structure should reflect the new social security agency and its administration and operation. The stance that the social security benefits to be devolved to Scotland should reflect and uphold human rights and the basic requirement to social security should be put at the forefront, the creation of a social security chamber should be in line with these principles.

In relation, use of the FtT can often lead to stress, poverty and in some cases potentially be life threatening depending on the appellant's mental state and means. It is crucial that this is bore in mind when structuring such a service. Tribunals for appeal should be used as a last resort and women with the right to social security should be awarded it straight away in keeping with human rights protocol.

The new Social Security (Scotland) Bill emphasises that the assistance currently being devolved to Scotland should adequately reflect fundamental human rights and the basic

requirement to social security for all citizens. Any proposals reflected in the creation of a SSCST chamber should be in line with these principles in accordance with Article 22 of the UN's Universal Declaration of Human Rights. In order to relieve the stigma surrounding assistance, this approach is necessary. At present, social security is perceived as a negative instrument that should act as a disincentive by ensuring those entitled to it are only allowed nothing or the very minimum in order to survive.

DRAFT REGULATIONS SETTING OUT RULES OF PROCEDURE FOR THE FIRST-TIER TRIBUNAL FOR SCOTLAND SOCIAL SECURITY CHAMBER

The 2014 Act provides the power for the Scottish Ministers to make regulations setting out the procedural rules to be applicable to chambers of the First-tier Tribunal for Scotland and to the Upper Tribunal.

Do you have any comments on:

(a) any of the elements of the draft rules of procedure

The main consideration to be taken here is that women in their numbers are feeling locked out and judged from the system through no fault of their own. Welfare reforms have played their part in poverty, however, the way in which women have been negatively treated has resulted in cases being struck off, with many putting their own lives at risk due to this.

Due to inequality, these problems continue to plague women in ever larger numbers. Gender streaming in education and employment, lack of quality childcare and social perceptions of women all lead to a vicious cycle of poverty. Many have to rely on assistance that continues to be cut and degrading assessments.

It is essential that fears around intimidation and claimants not being able to accurately word their conditions is taken into account at this stage. The high decision of appeals in the current system is indicative of the shaping's of such procedures when applying for assistance and how much hardship this places women and families under.

The SWC welcomes the embedding within the regulations of restriction of proceeding materials to the public if appealed for by a party or by the tribunal member's own initiative. Clearly establishing that the tribunal must not disclose in reports any part referred to in private including identification of such persons if to do so would undermine purpose of holding said hearing in private is welcomed. Additionally, clearly stating that addresses where documentation may be sent other than the appellant's is laudable.

Many women applying for such assistance have been exposed to gender based violence and are all too often still living with the threat of that violence hanging over them as a threat. This can go some way to ensuring fears around being identified when on matters of public record are quelled.

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

Specific provisions should be laid out for use of interpreters. In terms of provision “due regard” should be given to the needs of those whose English is not advanced enough, in that they may feel uncomfortable dealing with a stranger. This is a significant issue. Not only are women impacted disproportionately by social security cuts and reforms, this becomes even more pertinent for the likes of women facing these barriers. Lack of language skills is a key problem and may be compounded when an interpreter is on hand that is a stranger. Whilst it is applicable that under law such a person may have to be independent of all parties, regulations should include provision according to gender in that a woman may feel more comfortable articulating to an interpreter who is female.

With reference to (a), do you have any comments, in particular, on:
- the proposal that hearings will be recorded as a matter of routine?

Whilst recording of proceedings is often looked at as a rather intimidating prospect and one which may be used to call out people, there are a number of potential benefits to recordings. For instance, if a case is referred onwards to the UT. Most notably in decisions where a case is revisited if assistance is still not the appropriate determination, recordings may allow members to rework and make corrections more efficiently.

However, as with all regulations, it should be communicated clearly that recordings are to occur and seen as a benefit to the process. At present, many women may feel intimidated about the idea of their testimony being recorded and then replayed in order to challenge them.

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

Whilst medical assessments are at times, of course, necessary, this is not something that all women have issue with, it is the degrading manner in which they can be conducted. This includes the like of cross checks and over-questioning which many feel are in place to trip up applicants. Medical assessments should be carried out in advance where possible by one's own GP whom they feel comfortable around and who can vouch for them and is the most humane way within the devolved system.

There is also a real fear that if a private contractor is used that this can be impersonal and stops many women from talking about their experiences with health issues the way they would with their own GP. This is a particular problem for those with mental health issues or when physical and mental maladies have been brought on by severe experiences in the past such as domestic abuse. If one's own GP was used, who has a thorough knowledge of the patient's history, this could be rectified. There is a reason so many cases are going to appeal and then overturned. The money spent on this could be used in the first place to those who rightly deserve it.

This not only makes economic sense, given the sheer cost of outsourcing medical examinations, but saves many women extra stress and issues knowing they will be vouched for by their own doctor who has a specialist knowledge of their personal medical history, rather than a stranger.

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. However, it should be laid out clearly what exact representations they can make. This may be beneficial for those with limited access to a representative and may allow many to feel more comfortable. Within the draft regulations, allowing supporters to quietly advise on points of law and issues is welcomed. However, it must make clear distinctions between supporters and representatives if this piece is not enacted.

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

The SWC, in consultation with women, has identified a number of major issues regarding appeals in relation to social security benefits that must be taken into account pertaining to the devolution of the SSCTS.

Whilst regulations do state that the FtT must give a record of its decision as well as notification of the right to appeal to the UT and how exactly to do so, it would be beneficial if this also included a caveat noting the appropriate referral to relevant organisations to assist with appeals. This should include being advised clearly on the merits of taking proceedings further.

There is a real shortage of suitable legal advice on hand for many, which has resulted in the need to bring further forms in to the appeal. This is a real worry for many women. The current requirements for what evidence is submitted is lengthy. It would be helpful if this was summarised and that more information is available if needed in order to avoid this. This could include different guides depending on what type of social security is being claimed.

There are times when evidence may not be available until after DWP decisions for a number of reasons. Therefore, it is crucial that allowing evidence to be produced on the day in order to bolster an individual's case is kept intact.

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

A fundamental question women have posed given the coverage surrounding the large number of decisions overturned at present when they reach appeal stage is why exactly this is not being sorted in the first place. Not only does this save time and money for the system but, much more importantly, upholds fundamental rights that citizens are entitled to. The Scottish Government, in making these procedures has a novel opportunity to ensure that all steps in the process are fairly enshrined within these regulatory requirements and to ensure severe obstacles such as the dismissal of real mental health issues are looked upon and treated in the manner in which they should be.

Recognition within the Social Security principles of according it the appropriate status as a basic human right in accordance with Article 22 of the UN's Universal Declaration of Human Rights is essential. In order to relieve the stigma surrounding assistance, taking this approach is necessary and must also flow to the tribunal legislature. This should also be the case that

those with lived experience should help design the system, at both the tribunal and appeal stage.

DRAFT REGULATIONS SETTING OUT THE COMPOSITION OF THE FIRST-TIER TRIBUNAL FOR SCOTLAND SOCIAL SECURITY CHAMBER AND THE UPPER TRIBUNAL FOR SCOTLAND

Sections 38 and 40 of the 2014 Act allow the Scottish Ministers, by regulations, to determine the composition of the First-tier and Upper Tribunals.

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?

Having one member alone to sit for legal proceedings is not beneficial or in keeping with other regulations to ensure the promotion of fairness. Allowing one member to make a decision based on a legal technicality does not hold due regard for women who may be experiencing the likes of mental illness suffered by forms of VAWG. Those that have experienced the social security system and navigated it themselves either as representatives or claimants should be considered.

In keeping with current progress within the remit of the Scottish Government, such as the Gender Representation on Public Boards Act and the continuing commitment to gender balance, this should also have a place within tribunals and the member composition. It not only improves female representation but also allows applicants to feel at ease, most especially when disclosing medical or personal experiences. This is also a pressing matter given the high proportion of women that apply for social security, and have been subject to sanctions, reforms and reassessments within the current system.

DRAFT REGULATIONS SETTING OUT ELIGIBILITY CRITERIA FOR APPOINTMENT OF ORDINARY MEMBERS OF THE FIRST-TIER TRIBUNAL FOR SCOTLAND: MEDICAL AND DISABILITY EXPERIENCE

The draft regulations prescribe eligibility criteria for appointment of ordinary members of the FtT with medical and disability experience. These members will be responsible for deciding cases before the Social Security Chamber.

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?

It is important when ruling on disability appeals that a panel member has experience of disability themselves. Women have commented that not only does this make them feel more at ease in such an intimidating situation but also that they can advise other panel members in an expert and emphatic manner. Disability living allowance, for example, makes up around half of the expenditure of those types of assistance being devolved to Scotland, with the vast majority of those in need being women. It is crucial that they do not suffer.

Do you have any concerns about our proposed approach to identifying when a person will be considered to have a disability? Do you have any other comments you wish to make on the draft eligibility for appointment regulations?

Definition of disability must ensure that it does not restrict those that may be characterised as disabled and eligible for some form of assistance that does not come under the terms of the 2010 Equality Act. For instance, the Equality Act focuses on day to day restrictions without taking into account other aspects such as promotion of dignity that is enshrined within UN legislation. This should also be used.

Article 1 of UN's Convention on The Rights of Persons with Disabilities includes to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms, and to promote respect for person's inherent dignity. It would therefore be beneficial to add to regulations surrounding the definition as surmised by the Equality Act to add from the Convention including right to accessibility and adequate standard of living in accordance with the social security principals to be brought forward.

[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](#)

[Schedule 9, paragraph 4\(2\) of the 2014 Act provides the power for the Scottish Ministers to make regulations setting out the procedural rules to be applicable to chambers of the First-tier Tribunal for Scotland and to the Upper Tribunal for Scotland.](#)

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

As above, having due regard within the UT for the Social Security Charter is welcomed. Of particular notice within the draft regulations is the reconsideration of a decision to be heard by different members. This is beneficial and allows independent scrutiny to be adhered to.

In addition, sitting members of the UT are not covered by the Gender Representation on Public Boards (Scotland) Act due to their role as executives, following this, regulations should include requests to be heard by a female member if a female appellant so wishes to do so, where possible.

[Conclusion](#)

The SWC welcomes the opportunity to comment on and have women's voices heard in relation to the devolution of social security assistance to Scotland. Women are disproportionately hit hard by welfare reforms to the current system and it is crucial that their voices are heard to further equality.

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The Scottish Women's Convention engages with women using numerous communication channels including Roadshow events, Thematic Conferences and regional contact groups. This submission paper provides the views of women and reflects their opinions and experiences in a number of key areas relevant to social security.

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