

Scottish Welfare Fund – briefing note on developing a potential function for review of decisions by the Scottish Public Services Ombudsman (SPSO)

1. Introduction

The Scottish Government have confirmed their intended policy that the SPSO take on a new role in reviewing decisions of the Scottish Welfare Funds (SWF). This follows consultation and inclusion of this proposal in the Welfare Funds (Scotland) Bill.

As throughout the consultation on this policy proposal, we do not intend to express a view on whether this role should or should not come to us. We are a Parliamentary body and this is a decision the Parliament will consider when reflecting on the new bill. We are issuing this note to assist that process by helping to inform consultation and debate on the functions the Scottish Government propose as part of the bill.

As the final stage for complaints about local authorities, the SPSO has been the external review body for complaints about the interim fund since April 2013. What is proposed in the Bill will not change this role but introduce an additional one. The proposed new role represents an unusual extension of our jurisdiction to include the ability to review and change Welfare Funds decisions. This means it is more difficult for those who wish to comment on this Bill to rely on SPSO's current remit, processes and procedures when responding, given that these will need to be added to if SPSO take on this role.

Whilst it is essential that the Ombudsman's operational independence of Government and Parliament is protected, we set out here how SPSO would intend to approach taking on this new role and the practical and legislative issues that may need to be considered. We hope this helps to inform Parliamentary consideration of this potential new role. We will provide further detailed written evidence to Parliament as part of that process.

In this note we set out:

- How we propose to meet customer needs.
- Reporting on reviews to both ensure transparency and share learning.
- How we intend to make sure the two roles will work together for the benefit of users.
- The changes we may need to make to our structures, staffing and processes.
- Key risks and challenges for the review process.

Following Parliamentary considerations and their decision on the Bill, SPSO will work closely with all relevant stakeholders, including the third sector, Scottish Parliamentary Corporate Body (SPCB), Scottish Government and local authorities to help prepare for any new functions.

2. Meeting customer needs – developing SPSO’s approach to reviews

2.1. Ensuring access to our service

The driving principle for developing our approach will be to ensure that the SPSO process for review is appropriate for and focused on service users.

We already have a great deal of experience in dealing with 32 individual local authorities, and of making decisions in areas where there are 32 different locally-made policies. As noted below, we already have some limited experience of investigating matters relating to the interim Scottish Welfare Fund and aspects of the role are already within our jurisdiction.

We appreciate that there will be a need to make decisions quickly and to be fully accessible to people who are more likely to be vulnerable and to have complex and multiple needs than the majority of our current complainants.

- It is essential that we ensure our process is understandable and that people know what to expect when they come to us. We will provide simple, accessible information to the public about how to apply for a review and how SPSO would consider and respond to that review.
- We will provide clear advice for groups and individuals advising and supporting applicants.
- We will provide simple, accessible and multiple routes for people to bring a decision to us for review, including the ability to do so online and orally rather than in writing. Our staff have a strong customer service focus and the ability to deal tactfully and sensitively with people who may be in difficult circumstances. We contact people in the way most appropriate to them and anticipate that, for many service users of the SWF, direct contact may best be by phone, followed up by information in writing.
- In line with our existing approach to complaints, we will provide a single point of contact.
- We will ensure flexibility in how we investigate, allowing us to go beyond the paperwork and to interview, visit or hold a hearing where that is required to come to a decision.¹
- We will ensure that our targets are appropriate and meet the needs of vulnerable people. This will be particularly important for Crisis Grants where decisions will need to be made very quickly. In this context, we have looked closely at the work of the Independent Review Service (IRS) who had a similar role under a previous scheme in Scotland and continue to operate in Northern Ireland. They achieved an impressively high percentage of decisions within very challenging targets. We would hope to learn from their experience to emulate that as far and as quickly as possible and set out in section 4 the practical steps we will take to do so. We accept the transition to new processes and ways of working (including possible recruitment of new staff) may mean that it may take time to achieve turnaround comparable with those the IRS achieved after years of experience. We will prioritise those in crisis.

¹ There was some discussion in response to the consultation about the need to ensure any process was or could be compatible with article 6 of the ECHR. Advice we have had is this could be achieved within our current legislative structure. We are currently taking advice on the specific legal requirements and implications of this new role and anticipate providing more detail on this to the Parliament.

- We also need to consider how we report against those targets. When the IRS reported, their targets were set from the day of receipt of the information from DWP and they reported separately on the average time taken for the DWP to provide them with information². At present, this is not how we set our targets. We log from date of receipt from the user to reflect the full customer experience. We will need to consider which method is the most appropriate for this new role and the target timescales will reflect whether we are tracking from date of receipt from the user or of information from the local authority.
- We will ensure access to our own complaints process for individuals and bodies who have issues about our delivery of the service. We have a Service Delivery Complaints process for dealing with complaints about how we have met our service standards.

2.2. Reporting, learning

We have always considered that learning from the experience of individuals is one of the best and most direct ways to improve services and given this we will:

- Communicate decisions appropriately and quickly.
- Publicly report anonymised versions of individual decisions to ensure learning is shared.³
- report annually on trends and themes identified from our handling of SWF reviews across Scotland, in line with our current approach.

3. Complaint vs review

3.1. What we already do and what won't change

As a function carried out by local authorities, the current scheme is already under our existing jurisdiction to investigate complaints. This will not change and the way local authorities run the scheme and their handling of individual cases and the review process can be the subject of complaints to us, made on the basis that there has been maladministration or service failure. Since the scheme began in 2013, we have been able to take complaints after the current review process has ended. In response to complaints received so far we have:

- Upheld a complaint that the council had not given clear reasons for their refusal. We also found in that case that the council was interpreting the guidance too narrowly. <http://www.spsso.org.uk/decision-reports/2013/november/decision-report-201301468-201301468>
- In a second case, the complainant was unhappy about the priority that had been awarded to certain goods. We found that, while the explanations could have been

² The IRS reported they received 68% of the papers within 4 working days but they did not include this time in their target.

³ This would be on a discretionary basis. We publish reports on almost all of our decisions at present but some, even anonymised, run too great a risk of identification of vulnerable people, often children, for them to be put in the public domain. We have clear criteria to ensure that this is done consistently.

clearer, there was no evidence of error in the decision-making process. <http://www.spsso.org.uk/decision-reports/2014/january/decision-report-201300769-201300769>

- In a third, we identified a number of failings in the way a review process had been carried out. We also found that the reason given for refusal was not in line with the guidance. <http://www.spsso.org.uk/decision-reports/2014/january/decision-report-201302081-201302081>
- In an unpublished decision, we also found the decision was not in line with the guidance and recommended the council urgently review their decision. (In the previous cases, the position had already changed before we concluded our investigation.)
- And, finally, in the most recent decision, we identified no failings in the decision-making process but were concerned about the impact of poor customer service and recommended a payment be made to recognise this. We made it clear that this payment should not come from the SWF budget. <http://www.spsso.org.uk/decision-reports/2014/june/decision-report-201302099-201302099>

Nothing in the proposed legislation prevents us from continuing to consider complaints using our current powers. It does, however, give us a significant new role.

3.2. The proposed extension of powers

The Scottish Government is proposing we should have two new powers additional to those we currently have. These are that we should be able to consider whether the decision is one that should have been made, and to direct the council to put in place an alternative decision or reconsider their decision if we consider a different one should have been made.

3.3. Complaints and reviews working together

To provide a flexible and seamless service to users, it is important that our existing legal powers and obligations apply as far as possible to the review process and also that we can, where appropriate, look at the issue from both jurisdictions at the same time.

We had discussions with both the Birmingham-based IRS prior to its abolition and the on-going IRS (based in Belfast), where the old scheme is still in operation while the Assembly develops an alternative. In discussions with them, it was clear that there is considerable overlap between the work we already do looking at complaints and the work they did reviewing the decisions. As part of reviewing whether the correct decision had been made, they would:

- check to see if there were any errors whether of fact or in terms of the legislation or guidance;
- look to see if there was new information available; and
- if the decision had not been changed by either of the above, consider whether, in their view, the decision was the one that should have been made.

People can currently complain to us that there has been an error in the process or that the guidance was not properly taken into account. That will remain the case.

This is important because we will have two separate processes with two possible outcomes relating to one user experience dealt with by one organisation. We need to make sure these work together. At present, we can make recommendations. If this bill were to be approved we could direct a new decision (if reviewing a decision) but could still also make recommendations (if considering it as a complaint).

Recommendations can go beyond changing the decision and we can recommend apologies, other redress and changes to benefit future users by correcting processes and procedural failings. We follow up on our recommendations and, if they are not implemented, have the power to draw that failing direct to Parliament's attention. We do not want users to have to engage two processes to get the full outcome. If we only look at these decisions under our review powers, that means no one would be looking at the other issues.

We are currently in discussions with the Scottish Government to ensure that, if this is approved, the appropriate legal framework is in place to allow us enough flexibility to respond to individual cases using the full breadth of our powers both proposed and current. We are also planning to have detailed discussions with representatives of local authorities and users to make sure this works simply and clearly in practice. There is much more detail in the annex about how this might work in practice, including worked examples and a flowchart.

We appreciate that other models of delivering a review process could still be considered. If this function comes to us, however, we would like to ensure that the potentially unique benefits of having one organisation looking at both complaints and reviews are fully realised. This is undoubtedly in the interests of the user, who is not always aware of the distinction between complaints and reviews but is usually seeking justice in relation to a situation with which they are unhappy on a number of levels. We also see potential benefits to learning as we can use recommendations to improve the service for others and follow up to make sure they have been implemented.

4. Preparing SPSO structures, staff and processes to help us ensure we meet customers needs.

We recognise the distinct skills and expertise that this area of work requires and so our preference, dependent on volumes, would be to establish a separate unit to manage this work. We know we will need to make decisions quickly and efficiently. We set out below the practical issues we need to address to help us perform this review function effectively.

- We would like to create a unit with sole responsibility for SWF review decisions. This will be dependent on volumes of applications for review. It is important to note that the ability to have a completely separate unit is dependent on having sufficient numbers of cases. If numbers are lower than the 2,000 predicted and much closer to the lowest estimate of 400, a unit will become difficult to sustain. If numbers mean a unit is not sustainable, we would establish a small 'team' of reviewers responsible for SWF complaints in addition to having ongoing responsibility for complaints about other services. This is an approach we previously followed with smaller transfers of responsibilities (prisons and water complaints) to allow for suitable training,

knowledge development and management and consistency of approach, whilst maintaining existing management and support structures.

- Ensure staff within that unit are fully trained in SWF and in related welfare rights issues.
- Ensure staff can make decisions quickly both by providing the correct support in terms of administration and databases and ensuring easy and swift access to appropriate and up-to-date information.
- Develop systems to ensure quick and secure transfer of all relevant information from local authorities. At present local authorities have ten days to respond to a request for information. The IRS reported in their last annual report that the average for the DWP was four days. We would seek to develop an electronic solution for information transfer to ensure quick turn-around and would work in consultation with local authorities in doing so.

5. Risks and challenges for the review process

Low numbers

In our response to the Scottish Government consultation, we highlighted as a particular risk to any review process the low numbers that, at that point, were being heard within the current second-tier review process. One of the reasons the IRS could confidently make decisions quickly was because of their experience of working with a large number of reviews. Low numbers will mean it takes more time to build experience, and experience will be a driver in our ability to make decisions quickly. It also means it may be difficult to sustain a separate, dedicated unit. If numbers are low because local authorities are making the decision correctly first time, that is of course of great benefit to the individual, but it will then take more time for the review process to mature.

High numbers

The uncertainty over numbers means we will be reliant on estimates of the resources needed. At a time of tight budgets, we do not intend to over-resource and will work with the Scottish Government and the SPCB to decide what is reasonable. This, however, may mean that unexpectedly high numbers will be a risk to the early functioning of the review process.

Overly complex legal restrictions

The benefit of our current process and legislation is the flexibility inherent in it. We do need to ensure our process is understandable and people know what to expect when they come to us. We would, though, be concerned if, as part of the process of the Bill going through the Scottish Parliament, changes were made that meant we lost some of that flexibility, or that our ability to work between powers was significantly curtailed (see section 3).

6. Taking this forward

While this would be a different role from ones we have had before we have, over the last few years, developed extensive experience of taking on new or extended jurisdictions. In 2005,

we took on further and higher education complaints, in 2010 prison complaints, and water complaints in 2011. Also in 2010, we were given a new and unique role when we became a statutory complaints standards authority. These changes have all been achieved successfully and we have managed to ensure they did not impact on 'business as usual'. This means we already have project management tools for transition towards, and the implementation of, new jurisdictions and functions, and these could be quickly adapted.

However, as we have said above, we recognise that there are unique aspects to this new role and if Parliament decide that we should take it on, we intend to work closely with stakeholders as part of our preparations. In particular, we will be asking the third sector to help us with case studies and to facilitate direct contact with past or potential applicants to help us design and test the systems and our planned communications, to make sure they are as user-focused as possible.

Annex – Complaints and reviews working together in practice

We felt that for those seeking to comment on the Bill, the area of most uncertainty in relation to the proposed changes to our work will be around how the two jurisdictions will work in practice. We have explored this in some detail. The main note sets out our aspirations and the possible benefits if we do have both of these jurisdictions. This Annex sets out more detail for those with a particular interest in responding to this point.

Complaint or review?

As we set out in the main note, we do not anticipate users clearly differentiating between a complaint or a review but bringing to us a number of reasons about why they are unhappy with a decision. The review gives us the power to change the decision and that is the most significant outcome so the review process will take precedence.

We also need to take care that we are not artificially generating complaints. However, in some cases we consider it would be appropriate for us to decide whether a case that comes to us as a review should also be considered as a complaint.

There will be two situations where we will need to make this decision: where issues of maladministration and service failure are linked very closely to the decision; and where those issues are more easily separated from the decision process.

In the first type of situation, the user will have already identified their unhappiness with the decision and we will have discussed their issues with them. We will have already received the documentation from the council and they will have had a chance to comment. Given this, we would not require the user to go back through a separate process but, having completed the review, we would look at that issue as we would any other local authority complaint. In practical terms, this could happen very quickly and we could issue both outcomes in the same decision letter ie: we could decide the decision did not need to be changed but there had been an error for which there should be an apology and recommend that appropriate action is taken to prevent that happening again.

In these cases, the local authority will already have had a chance to review their decision and to correct any failings in the internal review process. However, if we felt there were significant issues the local authority were unaware of, we would make sure they had a chance to respond, in line with our legal obligations.

The second situation will occur when, in the course of bringing us a decision to review, a user may also bring us concerns about the service they received or issues related to but not about the individual decision. We would have the option to consider it as a complaint or ask the local authority to do so through their process. If we did decide to consider these types of issues, which would not necessarily have been picked up in the internal review process of the local authority, we will be required by our current legislation to make sure the local authority has a chance to put their case before we come to any decision.

We are aware that we will need to be very clear, both in terms of our own process and to local authorities, what powers we are using and to be transparent in our reporting so that one incident doesn't become two issues against the local authority in our annual statistics.

Below are some examples which show initially how the new review role will work and then looks at more complex cases to show how the two roles of complaints handler and reviewer could work together in individual cases. It is important to state again that the council will have had a chance to review the decision *before* this comes to us and to provide us with information when we let them know we are reviewing a decision.

Examples

1. New information- new decision

Ms D tells us that the decision is wrong because they didn't take into account some important information. We agree this is new information, that it is significant and it is clear what the decision should have been. We will have the power to direct a new decision or to ask the Council to make a new decision on the basis of the new information.

2 New information not relevant – error in decision-making

Ms E tells us she has new information and that the decision is wrong. We disagree this is new information but agree the decision is wrong because of an error in the way a policy was applied. In this case, it is important to note that we do not expect people who come to us to be experts on the detail of the SWF. If we spot an error that affects the decision and they have not seen this, we will want to take that into account. This is the benefit of an inquisitorial approach, where we can take a lead in looking for information. If someone is unhappy with the decision, we will have the power to direct a new decision, if we find an error and are clear on what decision should have been made.

3 Directing the Council to remake the decision

Mr F says the decision is wrong and we agree with him. However, the guidance allows the council some discretion, which means that it may be appropriate not to direct a new decision. This could also be the appropriate outcome when there are practical delivery issues that mean it would be better for Mr F to work out with the council how any new decision should go forward. We can use our new powers to direct the council to remake the decision. It is important to note, however, that we consider we have power in the legislation to direct a decision even when discretion is available and that, when a quick decision is needed because of an urgent need, we would and could simply direct that a new decision is made.

4 Correct decision - Error in the process.

Mr C tells us that there have been mistakes and failings by the council and the decision should be changed. We review the decision and find it is correct but, in doing so, identify a

number of failings around the decision-making process. We would intend to use our existing powers to recommend an apology to Mr C and actions to ensure those failings do not happen again. This should be able to happen without requiring Mr C to enter a separate complaints process, or us initiating a new process with the local authority given that, as part of the internal review process, they will already have had the chance to consider whether or not failings occurred. To do so we need to ensure our current powers and obligations apply to the new process, to allow us to easily move between the two where complaint and review overlapped. We will keep the local authority informed and also need to ensure that we have a system in place that allows us to report this appropriately so that it is clear under what powers we have done this and that we do not count this as two issues brought to us about the local authority.

5 Review request includes a separate complaint

Ms H tells us there has been a mistake. She says this happened because the person on the phone was rude and unhelpful and she didn't realise that she should have provided some important information. She is unhappy about the way she was treated and thinks she should receive an apology.

This is both a complaint and a request to review the decision. While we could look at both aspects at the same time, in some cases it may be very important that we make a *quick* decision on the award of a grant. This means we could choose to quickly look at the decision and come to a view and then, separately, look at the customer service issue. Even although we would look at this separately, we would not want to have Ms H go through two separate processes, as for her this is a single experience. Depending on the seriousness of the issue, we could decide to ask the local authority to respond direct or investigate this ourselves. We would be more likely take forward the more serious issues as we would expect the local authority to be able to quickly resolve any straightforward customer service complaints. If we were investigating we would, however, ensure that the council had a chance to present their case to us on the service issue before we made a decision. Unlike the earlier cases where the errors and failings are about the decision and could have been picked up in the review process, it is possible that service issues may not have been, and we need to ensure fairness to everyone involved in the process.

Simplified Process Map

