

28 August 2014

Michael McMahon MSP  
Convener  
Welfare Reform Committee  
The Scottish Parliament  
EDINBURGH  
EH99 1SP

Dear Convener,

### **Welfare Funds Scotland Bill**

I am writing in response to your call for written evidence on the Welfare Funds (Scotland) Bill.

In July I published, for the first time, a briefing note to help individuals and organisations wishing to respond to a consultation. I did so because the Bill currently being considered by the Committee is proposing to give the SPSO not simply a new area of jurisdiction but a new function, that of reviewing decisions. This is an important step and I wanted to explain how this could look in practice in order to help those wishing to comment on whether or not that step was appropriate. I would like to thank the Committee for adding this note to their website and I hope it has assisted those responding to you.

I do not intend to repeat the points made in that note. In this, my own response to the Bill, I would like to highlight some specific changes that we consider need to be made to the Bill to help us undertake this role, and also to comment on the funding implications for us. I also make some general comments based on our experience of complaints handling. I would like to stress, as I did in the briefing note, that the Ombudsman is a Parliamentary and not a government-sponsored role. The decision on whether this is an appropriate role is for Parliament and I would be happy to provide any further information or clarification that assists with that.

Before I look at the impact on us, I would briefly like to comment on question 4 which deals with the proposal that local authorities be given the power to outsource or jointly administer the provision. I have nothing to say on the policy itself but I would like to stress the importance of ensuring that, if this is allowed, there is clarity about the review or complaints process and who is responsible for that. This is important not only for applicants but also for staff. This should be built in whenever such an arrangement is put in place.

### **SPSO and reviewing decisions**

The SPSO was created in 2002 as a one-stop-shop. Since then a number of additional roles and responsibilities have been added to our remit. In this case, the Welfare Fund as a function of local authorities is already within our jurisdiction. The policy being considered would give us additional powers over that function, to allow for an independent appeal process. At present the only appeal is internal to the council. The process being suggested in the draft regulations parallels the new complaints processes for councils, in that it only has two stages before an individual can access an external, independent organisation. Our experience of the previous system (where council processes had multiple complaint stages) was that that additional stages do not improve outcomes for individuals, rather they often cause delay and discourage people from pursuing the matter further.

We also know that few people raised concerns about the Independent Review Service (IRS). In 2012/13, the IRS considered 48,368 requests for review of Social Fund (the UK-wide system which was the predecessor to the welfare fund) decisions. Only 22 complaints about the IRS were lodged with the Parliamentary Ombudsman and none of those were investigated.

The process as set out in the draft Regulations and legislation is, therefore, one where there are successful parallels. However, for us this will be the first time we will be able to specifically review a decision and to make a direct and binding change to that decision. While this is unusual for us, the Ombudsman role has proved a very flexible one and powers vary around the world. Such powers do exist elsewhere. Although we appreciate there are other models, there may be benefits in one organisation being able to look holistically at both the decision and at any issues about how someone has been treated.

For us, the challenge will be how effectively we can undertake this new role as well as effectively managing the fact that our old role will remain. We concentrated on the practicalities of that in the briefing note. I would like to now highlight some legal issues.

### **Legislative changes**

We would highlight that we will be asking the Scottish Government to consider the following amendments at stage 2 and the reasons for those requests.

#### *Article 6 of the European Convention of Human Rights*

We said in our briefing note that we would comment on this further. We have taken legal advice and are also in discussion with the Scottish Government about article 6 compliance. There is no current case law requiring compliance. However, the advice we have had is that a court may well decide in the future that article 6 applies. We consider it prudent to approach this by ensuring that we have systems and legislation in place that allow us to be article 6 compliant. We do not think this will require significant additional cost and you will see that, where appropriate, we have taken the requirements of article 6 into account when considering the legal changes we need. However, it should be noted that this is not the sole reason for any of the requests below.

#### *Consequential amendments to ensure equality of protection between complaint and appeal*

We will be asking for some consequential amendments to our legislation, the Scottish Public Services Ombudsman Act 2002. At present our customers and our staff benefit from some key protections and powers, and we would like to ensure that those also apply to the review process.

To give some examples, key sections include the ability to obtain information and to take evidence under oath if required; the provisions that protect those coming to us, allowing them to speak to us freely and ensure their information is kept confidential; and provisions that ensure staff operate under the delegated power of the Ombudsman. We think it is logical that these protections and powers should also apply to this new function.

There would also be real practical difficulties for us if we had different powers for this function to those we have when handling complaints. If the new role is approved, it will be possible for us to receive both a complaint and an appeal, raising different issues about the same application. It would be difficult to, for example, manage our information if a local authority could refuse to send us information when we are reviewing the appeal about the application but we could ask for it when looking at the complaint. We are aware of no reasons why these powers should not also apply to this process and do not anticipate any of the amendments being controversial.

#### *A requirement that we issue rules after consultation with interested parties.*

We intend to ask the Scottish Government to include a provision in the legislation allowing us to produce rules, after appropriate consultation, showing how we will consider reviews. These rules will mean that both the public and local authorities will know the standards and criteria by which we will be approaching their decisions, and will set out some key aspects of the process.

This will ensure that if we are required to do so we can demonstrate article 6 compliance. However, even if that were not the case, we think it would be good practice to have these and it will ensure we comply with common law principles of natural justice and fairness.

The Scottish Government will be issuing regulations around the council stages and has already issued a draft version. However, we agreed that it was not appropriate for ministers to issue rules for the review stage because of our status as a Parliamentary body and statutory provision that explicitly excludes ministers from giving us directions. Allowing us to issue rules and to consult on them will ensure transparency. Like all of our current work, any decisions we make around the rules will be subject to the ultimate supervision of the courts on any individual case.

While we do not intend to pre-empt any consultation, at present we intend to include within any rules an indication of when we would, either on request or on our own initiative, hold hearings. This would be relevant in circumstances where there are critical facts in dispute, and where these can only be established by holding a hearing. This will help us to ensure we are compliant with article 6 if that does become a requirement. However, it also means we can use the full range of investigative tools and help to ensure we also fulfil the common law principles of natural justice. It should be stressed that we do not anticipate hearings being a regular occurrence. Indeed, it is the experience of other Ombudsmen who are subject to article 6 that they are used extremely rarely, and more usually a dispute on facts can be resolved by other methods. However, it is an option we would like to be able to access quickly when needed.

## **Funding**

I am responding on this in more detail to the Finance Committee but I understand why the Committee is asking questions about the realistic and proportionate funding of our role. It is intended that the Welfare Funds will make a real difference to vulnerable people and to those in crisis. It is the experience of the current system and those working with the previous Social Fund that individual payouts, while significant to those receiving them, often involve small sums of money. I appreciate the need to ensure that any review process balances the need to ensure that justice can be obtained with the need to ensure that the cost is reasonable.

I am aware from work done by the Scottish Government that the cost was considered, though it was not the deciding factor, in their policy decision. Any review process may seem disproportionate in relation to a single claim of, for example, perhaps £50-£60 for a crisis payment but it should be remembered that any independent review organisation will only look at a proportion of cases. It is appropriate that the route used should be accessible, flexible and user-focused, and also one that ensures that if something has gone wrong in one case then improvements are made to ensure this does not happen again to others in the future.

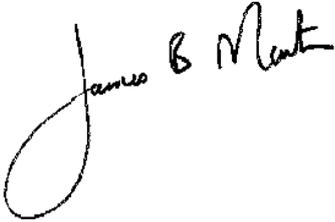
Having said that cost was only one factor, I understand that the estimates for us taking on this role were lower than the other options considered by the Scottish Government.

The estimates are not based on the way we currently operate, as we do not intend to manage this area in the same way. That is why we suggested the Scottish Government look to a model actually in use for a cost-base, which we considered was likely to be more realistic. There will be differences with the model used - for example, hearings are not part of that system. However, as we anticipate that the number of cases that may require hearings will be extremely low we do not anticipate that in itself adding significantly to the estimate. The transition costs are based on our own previous experience and, while we consider that is appropriate, there will always be some uncertainty given that this is a completely new area and function. We are already beginning to look at these in more detail and to date, apart from some possible upward pressure on IT costs, these continue to look reasonable.

In summary, apart from one particular issue around accommodation we do not currently anticipate ongoing costs being considerably higher than those set out in the estimates. It is, however, the case that there is still uncertainty on a number of points and, given this, the current cost projections are properly described as estimates.

Although this area is new for us, we have significant experience of taking on new areas of jurisdiction and to date have done so in a way that has usually generated savings for the public purse. We will also be working closely on the costs with the SPCB who approve all our budget decisions.

Yours sincerely

A handwritten signature in black ink that reads "James B Martin". The signature is written in a cursive style with a large, looping initial 'J'.

Jim Martin  
Ombudsman

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