

Scottish Public Services Ombudsman (SPSO) response to Consultation on Regulations and Guidance under the Welfare Funds (Scotland) Act 2015

Background

In terms of the Welfare Funds (Scotland) Act 2015 the SPSO will be responsible for reviews of Welfare Fund decisions. In responding to this consultation, we have not commented on aspects of the regulations or guidance which are simply about how the intention of the fund is fulfilled but about aspects of the regulation or guidance which would or could affect the review process.

General comments

Any lack of clarity or confusion in the regulations and guidance will make the process of application and review more difficult. While we have commented where we have seen this, we would also recommend that comments received from others, particularly about definitions and any ambiguity are considered carefully.

In terms of the comments below, we would particularly highlight concerns about the requirements for the application for reviews which seem to us to be significantly more difficult for applicants than is, perhaps, necessary, and would be less accessible than the process we are planning to consult on later in the year. While how we approach reviews is a matter for us and equally the regulations for local authorities is for the government, it is likely to be easier for applicants if there is consistency across some practical aspects such as how to apply and consent.

We would also highlight as a matter of particular concern that it is not clear that the reasons for the decision need to include the facts on which the decision is based and suggest that they could be stored separately. It is simply impossible for someone to challenge a decision or even to know they should challenge a decision if they do not know the basis on which it is made. It is particularly important when decision-making is fast that the applicant is clearly told what facts were taken into account in case they can evidence that the "facts" were wrong. It is critical to the efficiency of any review process that decisions are clear and include the important facts on which that decision are based. We also find that the requirement to explain a decision including facts on which it are based is an important way to ensure the quality of the decision. We note that this information is being recorded and it may be possible to develop a template that means it is only recorded once and then shared. The good practice guidance "right first time" which you mention in the guidance makes it clear the decision letter should be based on the information recorded and that it can expand on this, it does not suggest that critical aspects of the decision can be left out.

We do not intend that this means every single fact gathered is in the decision letter but that facts which made a difference to the decision are clearly included so that they can be challenged. It may help to explain that if the fact made a difference to the decision, that should be included.

Below we also mention the need to be clear about what will happen in a couple of situations where decisions may be made at a point where the fund priority has changed or has become exhausted.

Regulations

Regulation 8 It is not clear whether someone can ask the review process if they are refused on the basis that the application is out of time. This is a discretionary decision in terms of the fund so it appears to us they would be able to do so on that basis. It may help to make it clear in the guidance that this and the similar decision not to make an exception for repeated applications is a decision and should be recorded and issued with information about a review.

Regulation 15 No explanation is given why applicants must meet considerably higher requirements to access the review process compared to the application process. Currently it is stated that reviews must be made in writing and must be signed unless there are exceptional reasons.

This appears to us to conflict with the ability we have been given in terms of the legislation to take reviews orally and also with the guidance which stresses in paragraphs 4.10-4.13 the importance of accessibility. It is not clear in the accompanying consultation paper why this is the case and why such a significant barrier is being put in the way of applicants being able to enter the review process. It feels very regressive in light of other aspects of the fund.

Regulations 16 and 17 We have significant concerns that the way these regulations are worded appear to suggest that the facts on which the decision are based may not be part of the reasons for the decision. Failing to include facts which are critical to the decision make it very difficult for anyone to properly understand the decision and to challenge any “facts” which have been included but about which they have not been told. If facts have not been shared prior to a complaint coming to us, it will cause delay while we allow the applicant to consider whether or not they have been challenged. However, of even greater concern is that this unclear, unfair and may prevent people from challenging decisions which were plainly wrong.

Guidance

Paragraph 1.4 In this paragraph exceptional pressure is not as clearly defined as it is in the regulations or elsewhere in the guidance where it is clearly linked to the ability to maintain a home.

Paragraph 2.22 We appreciate this may be a fairly complex situation but would suggest if possible that this paragraph could be set out more plainly.

Paragraph 3.5 From 3.7 it is clear that this also applies the other way round and it would make sense to set that out here.

Paragraph 4.36 – We would suggest it should clear that the standard list needs to be reasonable and kept up to date to reflect local prices if that is the case. We would suggest that if they use one they need discretion to deviate when in the individual case it’s not reasonable which may be about specialists but may be because of access to a local store or how reasonable that person can access at those prices.

Paragraphs 5.12; Paragraph 8.33; Paragraph 9.1 – and some general comments on when fund priorities change or fund is exhausted

It seems to us that the priority that should be applied should be that on the date of application unless a change has been made to the benefit of the applicant (ie there is a lower level on the date of consideration). This would mean if a change to pay out at a higher level was made before the application could be considered it would still be considered on the basis of the state of the fund at the date of application. It may be helpful to make this clear in guidance.

There is a potential problem if the fund becomes exhausted either between the date of application and the date of decision or between the date of the original decision and a review decision (internal or external by SPSO). If the decision on the date of application should or would have been to award but the time taken to either make or review that decision means there is no money in the fund at that point it would be unjust if a payment was not made but it is not clear that is what will happen from the regulations or guidance or how a local authority would account for that. There may be a number of solutions to the accounting problem but we think it is important that it is clear payments, in these circumstances will be made and that there is national consistency about this.

You may also need to think about what to do with decisions in principle if the priority level changes from that decision or the fund becomes exhausted. It would likely also be helpful to give local authorities some support about dealing with this too and also to ensure consistency.

Paragraph 7.29 and 7.31 – we appreciate why the timescales are kept so tight for Crisis grants but it may be unjust for some. If the relevant information arrives (it is implied they are waiting for it so it is on its way) and that would change the decision should there be an opportunity to re-contact the applicant with a new decision if that decision would be different and in their favour?

Paragraph 9.9 This relates to the concerns we have above. We would add that there seems to be the requirement for a lot of information most of which will be held by the local authority and may be difficult for someone in crisis.

Paragraph 9.13 This needs handled with particular care. It is helpful to have the opportunity to correct or change a decision without requiring a review. However, in this case the review has come in but for some reason has not gone to another decision-maker but the same one? It is not clear why suspending is more appropriating than simply issuing the decision as a review as this should have gone to a different person. This is in the particular context of a lot of information and a written review request being submitted and seems to be designed to discourage reviews.

Paragraph 9.15 We're not clear why the need to avoid inflation of reviews is so important as the applicant is unhappy with the decision which given the level of detail that needs to be submitted with a request for review seems very clear. They have not thought this is a new case and it should be checked as part of the review process because unless it is confirmed that it is not – given the limitation on numbers there may be an injustice. If it is felt that this step is important, in any event, it is confused. The message that needs to be communicated is that because circumstances have changed since the date of the decision they have actually submitted a new case, they would be entitled to do so and it's dealt that way. They could also be asked if they want to review the original decision to confirm that but a new decision will be on its way.

Paragraph 9.16 conflicts directly with 9.15 – why can they not simply do this at that stage – advise to reapply but that their original decision can also be looked at?

Paragraphs 10.4 -10.7 – The SPSO intends to consult in the Autumn of 2015 on its Statement of Practice on how it will undertake its SWF review function. This will include how we will link complaints to reviews. It may, therefore, be sensible to include less information in the guidance but link to our information with a short paragraph that the complaints route is still available if someone wants to raise issues about matters other than the decision.