



Scottish Public Services Ombudsman

Scottish Welfare Funds independent review process consultation

September 2015

If you require this document in another format (for example large print, audio or Braille), please contact us on 0800 377 7330 or at consultation@spsso.org.uk

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Ombudsman's Introduction

The Welfare Funds may be the final safety net for some of the most vulnerable in our society. They provide for support to be given to those facing a crisis or an emergency, and help others to remain independent in their home rather than need to enter institutional care.

In April 2016 the new statutory funds will come into existence and, with them, a new role for this office. We will be able to review welfare funds decisions made by local authorities and, where appropriate, change those decisions. The independent review process will always be a small part of the wider fund. It is, however, important for the success of the fund as a whole that there is confidence in this process, and that lessons learned from the reviews people bring to us are shared widely and used to improve decision-making.

This consultation is our way of asking for your input into how we will undertake this new role. We are consulting on three separate but important parts of our approach. The first document is our Statement of Practice, which explains how we will approach the decision-making. The second sets out rules that allow us to hold oral hearings where we consider that it is the only way we can make a fair decision. The third explains how we are evaluating our work from an equalities and human rights perspective.

In developing these documents we have been very grateful to have had comments and advice from councils, the Convention of Scottish Local Authorities (COSLA), third sector advice, advocacy and support agencies, the Scottish Tribunals and Administrative Justice Advisory Committee (STAJAC) and the Scottish Government. Some of the most powerful comments we have received have been about the need to be truly accessible, to have a process that is simple and not intimidating, and to allow people to be heard.

We are developing an approach which we hope will provide certainty about how we will handle reviews while allowing us the flexibility to change and develop as we learn from our own and others' experience of the service we provide. I am keen that we are transparent in our work and also that we ensure we can learn from our experience. I know we will learn a great deal from the people who bring us reviews, those who support them, and the councils who deliver the welfare funds.

I look forward to hearing your views.

Jim Martin

Ombudsman

About the consultation

The Welfare Funds (Scotland) Act 2015 gives the Scottish Public Services Ombudsman (SPSO) the responsibility of reviewing decisions made by local authorities (section 7).

The Act allows us to make the decisions about how we conduct reviews and the procedures that we will put in place. It says we must prepare a Statement of Practice setting out the approach we intend to take to the conduct of reviews, and also gives us power to obtain information and to hold oral hearings if we consider it necessary to do so.

The Act requires us to consult on the Statement of Practice and rules for oral hearings, and to consult whenever we need to make changes to these documents. We are given discretion about how to consult. We must consult before we revise the Statement of Practice or oral hearings and it is our intention that these documents will only change very rarely, so it is important that these documents are fit for purpose.

We have already consulted and had some useful feedback from representatives from some councils, members of the third sector, the Convention of Scottish Local Authorities (COSLA), and STAJAC (the Scottish Tribunals and Administrative Justice Advisory Committee) who have given us views on early drafts. This feedback has informed the version that we now present for consultation.

If you are used to commenting on legislation and legal documents it might be helpful to think about these commitments as at a similar level to regulations.

Key documents

The draft Statement of Practice (Annex A)

This sets out how we will approach decision-making, including some of the most important aspects of the process like how we will decide when we can accept a review or how we will gather evidence.

The Statement of Practice will be a formal document and one that will not change very often. Any change requires further consultation and will take time. This means it is important that it is fit for purpose on 1 April 2016. We will ensure that clear and simple information is provided for users and advisers in addition to the Statement of Practice, for example through information leaflets. However, we hope to make the Statement of Practice as accessible as possible, and we would therefore appreciate views on the language used as well as on the Statement of Practice itself. We will

seek to ensure the final published version is written in plain language whilst still meeting our legal requirements.

The Statement of Practice will be supported by more detailed internal guidance to help our staff with their decision-making. The internal guidance will be developed in the coming months and will build on the Statement of Practice. It will be a living document which will change as we gain experience. We intend to make key aspects of the internal guidance available on our website. This internal guidance will also include technical aspects (such as how to use our database) which will be available on request.

For each section we identify the wording that could form part of the Statement of Practice. The section headings are for ease of reference and may not ultimately be the headings used in the final document. Explanatory notes offer some context for our approach. These are not intended to be included in the final document.

Our draft rules for oral hearings (Annex B)

There are some circumstances where an oral hearing may be the only fair way to resolve matters. This is why we asked the Scottish Government for a power to provide for these. We know from speaking to Councils and the third sector that there are concerns that overuse of this power would be disproportionate given the average level of payments made. It would also be time-consuming or even possibly intimidating for applicants. We are committed to looking at each case on its merits. In many cases we will be able to make decisions based on the information already provided to local authorities as part of the initial application and decision-making process. When it is the only fair way to make a decision, we want to ensure that we have the option to hold an oral hearing. We intend to be flexible about how we hold oral hearings to make them as accessible as possible for applicants.

Our approach to an Equalities and Human Rights Analysis (Annex C)

We are in the process of undertaking an Equalities and Human Rights Analysis of this new role and of our approach to it. We have decided to adopt the practice advocated by the Scottish Human Rights Commission (SHRC) and the Equalities and Human Rights Commission (EHRC) and will draft a joint Equality and Human Rights Impact Assessment. This analysis will inform our approach including any decisions required on final versions following this consultation. Our aim is for this to also help us to review and assess our work on ongoing basis.

The document at Annex C sets out how we are taking this work forward and some of our early findings. You will see that one decision we have made early on is to ensure that we can meet the standards set for fair hearings in terms of human rights law. One of the standards we need to meet to achieve compliance with human rights law is the ability to hold oral hearings and to have clear rules for them.

Your feedback

We look forward to your comments. At the end of the document are a series of questions that we are particularly interested in having views on. Please do though comment on any aspect of the documents. You can use the response form with all the questions to structure your response and this is available in a separate word format. We ask with each response that you provide information about yourself and tell us whether you are responding personally or on behalf of an organisation. You should also tell us whether or not you would be happy for us to publish your response.

How you can respond

Questions and a Respondent Information Form are at the end of this consultation document. Responses can be sent by email to: consultation@spsso.org.uk

Or by post to:

SWF reviews consultation

Scottish Public Services Ombudsman,

FREEPOST EH641,

Edinburgh,

EH3 0BR

If you have any questions, please contact us on 0131 240 8845.

We may publish responses so if you do not wish your response to be published please let us know.

The consultation ends on Friday 27 November 2015.

If you require this document in another format (for example large print, audio or Braille), please contact us on 0131 240 8845 or at consultation@spsso.org.uk

Annex A: draft Statement of Practice

Introduction to the draft Statement of Practice

The Welfare Funds (Scotland) Act 2015 gives the Scottish Public Services Ombudsman (SPSO) the responsibility of reviewing decisions made by local authorities (section 7).

The Act allows us to make the decisions about how we conduct reviews and the procedures that we will put in place. Section 9 of the Act says we must prepare a Statement of Practice setting out the approach we intend to take to the conduct of reviews, and the Act also gives us the power to obtain information and to hold oral hearings if we consider it necessary to do so.

The aim of the Statement of Practice is to set out how we will consider, investigate and respond to reviews. It does not cover every detail but sets out the most important steps.

The Statement of Practice is designed to be a formal document as these are commitments that we will ensure are met.

In this document, unless otherwise specified, the applicant means an applicant for further review (someone requesting that the SPSO consider a Scottish Welfare Fund (SWF) decision that has already been considered at the local authority review stage), or someone authorised to act on their behalf).

Section A: Principles

We will ensure applicants are able to access an easy and simple to use process which allows the SPSO to make quick, fair and clear decisions. We will have a range of investigative tools to help us make decisions and will use the ones most appropriate for each decision.

The key principles in our approach to reviews is to ensure that our process is:

- independent
- accessible
- fair
- proportionate
- timely; and
- designed to ensure that applicants are treated with dignity and respect

These principles will guide our approach to reviews. Our actions will always be in line with these principles. These principles will be used when we interpret how the Statement of Practice and sections of related internal guidance are applied to a particular case. If we find that anything in this Statement of Practice or our internal guidance conflicts with the principles, we will follow the principles. In cases where such a conflict has been identified, we will record the reasons why we have followed the principles, and explain the reasons for this to the local authority and the applicant.

Notes for the consultation: Section A

For us, the principles are the most important aspect of the Statement of Practice. Apart from the last principle (dignity and respect) which is clearly focused towards applicants, the principles apply to both applicants and local authorities. The principles are broadly the same as those we set out in our response to the consultation on the Welfare Funds (Scotland) Bill when it was being considered by the Scottish Parliament.

We have added two further principles to those:

Independence: following feedback from stakeholders this has been added. One of the key advantages of providing the review function to the SPSO, identified by stakeholders in response to Scottish Government and Scottish Parliament consultations, was our status as an independent organisation. Although we assumed this was taken for granted, feedback suggested that it would provide

Notes for the consultation: Section A

additional reassurance to emphasise this important feature in our principles.

Dignity and respect: this mirrors a similar commitment in in the Welfare Funds (Scotland) Act and repeated references in Parliamentary debates on the Bill.

We hope that everything in the Statement of Practice reflects these principles. However, it is impossible, particularly when you are planning a new role, to be sure that every possible circumstance is covered. This is why we think we need to have the ability to do things in the way we outline, so we can ensure that we are treating people in accordance with these principles.

Section B: Information we will provide

We will ensure that information about our process is available and accessible to applicants, possible applicants and their advisers. We want to make sure applicants are able to access any information they need about applying for a review.

The information we will provide will include details of what we will do when we receive a request; how long this may take; and how we will manage any information provided by applicants or obtained as part of the review process.

Notes for the consultation: Section B

The Statement of Practice makes a public commitment to ensuring information about our process is available and accessible. Like all public organisations, we are already required to ensure our information is as accessible as possible but we wanted to make that commitment here too. The Statement of Practice sets out our minimum commitment on the types of information we intend to provide. We consider this is the information that should always be available.

Section C: Applications for review

This section deals with how an individual can contact us and what information we need from an applicant.

Section 8 (3) of the Welfare Funds (Scotland) Act 2015 allows us to accept a review in writing or orally. We will accept a request for review when an applicant tells us (in writing or orally):

- they applied for a Welfare Funds grant
- they have received a response to that application
- they asked for a review
- they have received a response to that review
- (if available) reasons why they think the review decision was wrong
- they have provided sufficient personal details for us to obtain the relevant documents from the local authority

Notes for the consultation: Section C

The Statement of Practice does not set out how an individual must contact us, for example, by specifying phone/email/online form/in person. This will allow flexibility when we start to take reviews, and for the future. However, at present, the need to receive personal details means it would not be appropriate to allow reviews by social media.

Explanations of two terms:

- “when an applicant tells us”: we will make it clear in any online form or telephone conversation what information we need to ensure that applicants provide it.
- “If available, reasons why they think the review decision was wrong”: we have used the words ‘if available’ here to allow us to take a review from someone who is sure the decision is wrong but is struggling to tell us why. Given that we can take a full review, we can still assess the decision in those circumstances.

Section D: Application for review by someone other than the applicant

We will accept a request for review from someone other than the applicant when:

- they can provide the information referred to in section C and
- they either have the consent of the applicant to act on their behalf or
- the applicant is unable to consent and they are a suitable person to represent the applicant.

When someone is representing the applicant in this way they would normally be our main point of contact. References to applicant throughout the Statement of Practice should, therefore, be taken to also include a representative acting on their behalf.

Notes for the consultation: Section D

We do not want to put barriers in the way of people bringing applications to us. We know people often appreciate help and support when undertaking appeals or reviews. In the original draft of this document, this section was quite complex and we considered a number of options to make it possible for us to confirm consent in different situations. The discussions we have had have led us to believe that what we need is a simple commitment and then to have detailed internal guidance on:

- how we will make sure there is consent and;
- when someone is suitable to represent someone who cannot consent.

We want to explain a bit more about the issues we will likely be developing in internal guidance and would appreciate your comments on these points 1 and 2 as well as the Statement of Practice.

1) Obtaining consent

If someone is being assisted to make an application for a review we are considering the following options:

- relying on consent given to the local authority for that person to represent them in the initial application without the need for further consent for the review
- starting the process of review because the person contacting us has all the information above but not obtaining or releasing any additional information before we receive a copy of written consent
- allowing for consent in a form other than written when written consent would prove difficult.

2) Who can represent someone who cannot consent?

This will allow us to consider applications when someone has limited or perhaps fluctuating capacity. When considering whether they are suitable we are going to develop internal guidance which will allow us to take into account when they are:

- the primary carer
- someone who holds a formal role – such as the holder of a welfare power of attorney
- someone who regularly speaks on behalf of that person, such as an

Notes for the consultation: Section D

advocate.

Section E: How we will consider evidence

We will only seek to establish matters which are required to make the decision. We will take into account new information obtained during the review about the applicant's circumstances at the time the local authority made their final decision on the application.

If, when making the decision a point of fact, opinion or other evidence was:

- known or should have been known to the local authority; and
- was accepted or not disputed by the local authority; and
- had or should have had a role in determining that decision

we will proceed on the basis that the point of fact, opinion or other evidence has been accepted as established.

Unless:

- it is disputed by the applicant, whether it was disputed earlier or not, or
- the local authority now dispute the point and have provided reasons why it was not reasonable for them to have done so earlier and is reasonable for them to do so now.

Where we consider we need to resolve a point that is disputed to make a decision we will make such a decision on the basis of what is, on balance, more likely.

We may decide we need more evidence or that we need to test the evidence we have in order to make this decision fairly. This means we may:

- obtain further information direct from the applicant; the local authority or any other person either orally or in writing
- conduct interviews
- undertake a visit to an applicant's home or other relevant location
- hold an oral hearing.

It is our responsibility to decide what we need to do to make a fair decision.

Applicants and local authorities will be able to ask for any one of the methods listed above to be used to resolve a matter they consider to be under dispute. They will

need to explain what the dispute is and why they think that method is the only fair way to resolve the dispute.

Notes for the consultation: Section E

We appreciate the amount of information that “should have been known” will vary from a crisis grant and a community care grant and that local authorities should not be required to undertake extensive searches or have to make decisions in more detail than is necessary. The aim of this approach is to allow us to be proportionate and not re-establish facts which are not under dispute. All key facts should be noted in the decision itself.

We will only do what we think we need to do to make a fair decision and will explain this to the applicant carefully. We will be clear in our public communications that most decisions will be made on the basis of what we are provided by the applicant and the local authority supplemented by additional information from third parties where appropriate. In many cases, we anticipate we may be able to resolve matters on the basis of the information that applicants and councils have already provided to us.

We will look at each case on its merits and it may be that the only fair way in some cases to resolve matters may be to hold an oral hearing and we need to be able to do this. Annex B sets out our draft rules on holding oral hearings.

Section F: Obtaining information

Section 10 (3) allows us to require people to supply us with the information we need to make a decision. This includes the applicant, the local authority or any other person.

If we consider we need further information to make a decision we will:

- contact that person as soon as we become aware we need this additional information and
- clearly state what information we need and why.

In circumstances where the person needs time to provide the information or we are unable to contact them by telephone to obtain this directly, we will provide a deadline by which the information should be provided and let them know that, if not provided by the deadline, we will proceed on the basis of the information we hold. We will

also tell them we have discretion to extend the deadline and to contact us if they are having difficulties.

We will proceed on the basis that, in bringing a review to us, the applicant is consenting to us obtaining any additional information we need to make that decision.

However, if the information we wish to obtain is from a third party and may be sensitive, we will, whenever possible, seek to discuss this with the applicant first.

Notes for the consultation: Section F

It is important we can easily access information that may be held elsewhere. We know that some of the information we may need may be sensitive and, while we can generally assume consent, we should be particularly carefully when an individual may be at risk if personal information is released or may be concerned about medical or employment information being obtained by us. We will seek to be transparent with people about what we are seeking and why and are intending to produce internal guidance to ensure we only seek information we really need and that, if it is sensitive, we ensure that the applicant is aware and can comment before we do this.

While not limiting the way we receive information in this Statement of Practice, we may specify on a case-by-case basis that the information should be in a particular format/from a specific source.

Section G: Other methods of obtaining evidence (interviews, visits, oral hearings)

If we consider we need to conduct interviews or visit a location in order to make a decision, we will contact the applicant and local authority and clearly state what we want to conduct and why we have decided to do this.

If anyone refuses to be interviewed or to allow a visit we will proceed on the basis of the information we hold but may take a negative inference from their refusal to help resolve the disputed/unclear point.

If, after deciding to conduct an interview or visit a location, we are provided with this information by alternative means, we may decide not to proceed.

Notes for the consultation: Section G

Notes for the consultation: Section G

Further information on our proposed rules for holding oral hearings are in Annex B.

Section H: Opportunity for applicant to challenge new information

Where we obtain from the local authority or a third party or otherwise new information, and it is likely or it is the case that the new information will form part of a decision not to change the decision made by a local authority we will, whenever possible, share that information with the applicant to allow them to comment or challenge that information before the decision is made.

Notes for the consultation: Section H

Section L explains that there will be an opportunity to challenge any decision. This means that in situations where it has not been possible for us to provide information in advance of a decision to an applicant for comment, or where we have mistakenly assumed information had been seen by the applicant previously but had not been, they will still have an opportunity to comment.

This statement should also be read with section E which helps us to ensure we focus on the key aspects of the decision and do not seek to establish evidence where it is not required.

We have included an “otherwise” to cover any other information which may include information we may already hold.

Section I: Order of decision-making

When making a decision about a review request we will consider:

- our own remit/jurisdiction
- the decision on eligibility
- the decision on qualifying criteria
- the decision on priority
- the merits of the decision

In considering the merits of the decision we will consider whether it was fair and reasonable.

Notes for the consultation: Section I

We intend to follow the order used by Welfare Fund decision-makers. We do not want to limit what aspects of decision-making we will look at at each stage in the Statement of Practice but will take into account information and evidence obtained and used; information and evidence obtained and not used; legislation; the guidance and any discretion.

Section J: Decisions to be issued in writing

Decisions will be issued in writing to both the applicant and the local authority.

Decisions may also be communicated in any further way that is appropriate. In particular, we may discuss the decision by phone when issuing the written decision.

In the case of a crisis grant, where the decision is made to award a grant we may inform the local authority in a summary form to allow the grant to be processed prior to the issuing of the written decision.

We will seek to establish procedures with local authorities which will allow for a quick issue of crisis grants in these situations.

Notes for the consultation: Section J

This section should be read with section K below. To allow for flexibility, we are not seeking to set out the local authority contact or process in this Statement of Practice – but we do intend to have arrangements for quick and easy implementation of any change of decision. We have included information on crisis grants because speed of implementation will be critical.

Section K: Information to be included in all written decisions

Written decisions will include:

- the decision
- details of the key information on which that decision was based
- information about how to challenge the decision
- where the decision was changed or referred back to the local authority we may ask them to reconsider information about what will happen next.

- where we have identified potential or actual failings but found that the decision should remain the same, we will highlight this to the local authority along with a suggestion for improvement.

Notes for the consultation: Section K

We need to ensure our decisions are clear and also that people understand what may happen next. In particular, we will work with local authorities to ensure we have processes in place to allow for simple implementation. Including this information in the decision letter this should help to avoid confusion about what will happen next or even what the applicants expect to have already happened.

We intend to feed back to councils, when appropriate, in circumstances where we see failings but have not changed the decision. These comments will not have the same status as SPSO recommendations on a complaint. We may report the comments publicly.

Section L: Asking us to reconsider a decision

An applicant and the local authority will be able to ask us to look again at a decision on the basis that we have made a mistake. This could be an error of fact or law. They will be given notice of this in our written decision. We will not normally accept a request to reconsider a decision made more than one month after the day on which the applicant or local authority first had notice of the outcome of the review. However, we may extend the time limit if we consider that is appropriate in all the circumstances.

Any such request will be dealt with by someone other than the first decision-maker and the response to the request will be issued in writing.

In considering such a request we will consider whether or not we have made an error and, if there was an error, whether our original decision should be changed.

No reduction in award will be made as a result of such a request. However, only the corrected decision will be reported or recorded in statistics about the performance of the local authority.

Notes for the consultation: Section L

We want to have the ability to correct mistakes without individuals or local

Notes for the consultation: Section L

authorities being compelled to go to judicial review. This is not a further attempt to review the initial decision but to ensure our decisions are correct. We intend to report on how many requests we receive and also on how many lead to changes. We will also seek to learn from our mistakes and information from requests will be used as part of our Quality Assurance process. Applicants and local authorities will also be able to complain about the service they have received from us. The time limit is the same as that set out in legislation for the original request to us (section 7 (4) of the Welfare Funds (Scotland) Act 2015 and we are following that because we thought the consistency would be helpful.

Section M: Change in circumstances following the decision by the local authority

Where there has been a significant change in circumstances since the local authority considered the application we will not take that into account in our decision. We will advise the applicant of this and of their ability to make a new application on the basis of this change. We may set up systems to allow us to refer such applications direct to local authorities with the agreement of the applicant.

The applicant will be able to use the review process for any new decision made in these circumstances.

We would not regard the availability of new information about the situation as it existed at the time a decision was made as a change. This only covers changes in circumstances since the application was made.

Notes for the consultation: Section M

Section 8 of the Welfare Funds (Scotland) Act 2015 gives us powers to direct decisions when we consider a different decision should have been made. We consider this section correctly interprets the meaning of 'should' in the legislation.

Section N: Time taken to make decisions

We will try to make all decisions as soon as is practical and will aim to respond within the following timescales:

- one working day for crisis grants, from the point at which we have received all the information required to make a decision.
- 21 working days for community care grants, from the point at which we have received all the information required to make a decision.

Where we have failed to meet these timescales, our decision letter will include the reasons why this happened.

Notes for the consultation: Section N

The targets are the same as those set by the Independent Review of the Social Fund who in their last full year of operation made 95.5% for crisis loans (there was no grant equivalent under the old scheme) and 98.9% for community care grants within these time limits. These targets are, and are meant to be, challenging. While the new scheme is not the same and, in particular, we will be working not with one but with 32 organisations who are delivering the scheme, they represent the closest available baseline for us to benchmark against.

For reporting purposes, we also intend to measure and report on: the full length of time that a decision has taken, from date of receipt.

It has been suggested as part of our informal consultation that we also (or as an alternative) report from the date when information from the local authority has been received. For many cases this may be the same as all the information we need, for others we may need to obtain more than that we receive from the local authority before we make a decision. One of the benefits of this is there is no need for us to assess the date. We appreciate there may be lots of useful and interesting information that we could record and report on in terms of timescales but this needs to be weighed against factors such as the costs of ensuring we are able to do this. We would appreciate views on what may be most useful. Certainly in the first few years we think there are benefits to having something to benchmark against but with experience, we may decide that other measures are more appropriate. Putting this in the Statement of Practice means we will need to consult before we change those key measures.

Section O: when we receive a possible complaint with an application for review

Nothing in the Welfare Funds (Scotland) Act 2015 prevents us from also considering complaints in the terms of the Scottish Public Services Ombudsman Act 2002.

If we receive as part of a request for review an allegation that could be a complaint in terms of the SPSO Act 2002 we will:

Assess whether the allegation:

A is a description of a failing that could alter the decision

or

B relates to an aspect of service provision which, even if upheld, would not affect the decision.

If **A**, we do not intend to investigate the allegation as a complaint unless:

- this is a significant failing which indicates possible issues with the management of the SWF by that organisation; **and/or**
- there is an alleged or potential injustice suffered as a result of this failing which could not be remedied by any potential change in decision.

We will not proceed to investigate a complaint without confirming that the applicant wishes us to do so. If they do, we will consider this in line with our powers under the SPSO Act 2002.

If **B** we will confirm whether the person wants us to take this forward as a complaint. If they do, we will consider this in line with our powers under the SPSO Act 2002.

If the person does not wish us to look at this, we may still record and report that we have received a complaint about service aspects of the welfare fund delivery in line with our general reporting of complaints received.

Notes for the consultation: Section O

The SPSO Act 2002 sets out what we can and cannot look at, and also what we need to do before we investigate or come to conclusions. This will all still apply for complaints we receive alongside a request for review.

Category A: It is important that we can still exercise our current powers when we have the additional ability to review welfare fund applications. However, we accept it would be unfair to record as complaints and investigate all points which we receive as a request for review which could also be allegations of maladministration. This statement is designed to avoid this where appropriate. We need to be careful not to limit our discretion to investigate so this statement is carefully worded as “intend to”. We will let local authorities know on what basis we

Notes for the consultation: Section O

are investigating.

Category B: We currently log all complaints that come to us even when we refer those back to the local authority or the person does not provide us with additional information we need to proceed. That is why we will still log issues we receive as part of a review but could not look at as a review and the individual does not want us to proceed. These will be reported statistically as concerns raised about service aspects of welfare fund delivery. This will ensure that important information is not lost.

Section P: SPSO management of information

Information will be handled in line with the SPSO's archiving and retention policy. This policy ensures that we handle sensitive information with care and in line with data protection. It also ensures we can comply with freedom of information requirements.

Additionally, if an applicant makes specific requests not to pass on information to the local authority or a third party we will respect that as far as we can but will let them know if that may affect our ability to make a decision. We will only be able to make decisions based on information that we can include in a decision sent to a local authority.

Notes for the consultation: Section P

The nature of the work we already do which includes complaints about health matters and complaints from prisoners means we already have systems in place for securing and managing personal and sensitive data. We also have a detailed information governance policy and records management plan (www.spsso.org.uk/spsso-policies).

We intend to act in line with this plan in this new role. This will mean that generally personal data is only held in paper form for 24 months and in electronic form for three years after the final contact with the individual. This ensures we do not hold such data for longer than is necessary. All SPSO staff are trained in the policy to protect personal data.

We know that we may have to release information if someone discloses something which indicates a child or adult protection concerns which is why there may be a limit on our ability to not pass information on. Outside of those risks, we do intend to respect the wishes of an applicant but if we have information we cannot release we will not be able to include that in the decision.

Annex B: SPSO Rules on Oral Hearings (draft for consultation)

Note for consultation

There are some circumstances where an oral hearing may be the only fair way to resolve matters. Having these rules helps us to make sure we can act in line with human rights law. This is why we asked the Scottish Government for a power to provide for these in the legislation. We have prepared these rules with the support of our lawyers.

(Draft) Rules on Oral Hearings for Further Reviews of Welfare Fund Applications 2015

1. Status of these Rules

These Rules are made by the Scottish Public Services Ombudsman ("the Ombudsman") under section 10(5) of the Welfare Funds (Scotland) Act 2015 ("the Act") in relation to an application for review made under section 7(2) of that Act.

2. Citation and Commencement

These Rules may be cited as the Rules on Oral Hearings for Further Reviews of Welfare Fund Applications 2015 and are to come into force on 1 April 2016.

3. Interpretation

(1) In these Rules, unless the context requires otherwise:

"2002 Act" means the Scottish Public Services Ombudsman Act 2002 (2002 asp 11),

"2015 Act" means the Welfare Funds (Scotland) Act 2015 (2015 asp 5),

"applicant" means a person who has applied to the Ombudsman for a further review under section 7(2) of the Act in respect of an application for assistance they have made to a local authority under section 2 of the Act,

"application for further review" means an application for further review made under section 7(2) of the Act,

"clerk" means a person appointed by the Ombudsman to provide administrative support in connection with an oral hearing,

“hearing statement” means a written statement outlining the matters which a party intends to put forward at an oral hearing in relation to an application for further review,

“local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39),

“Ombudsman” means the Scottish Public Services Ombudsman appointed under the Scottish Public Services Ombudsman Act 2002 or any person exercising functions on behalf of the Ombudsman,

“parties” means the applicant and the local authority in respect of whose decision the applicant has made an application for further review,

“supporter” means an individual who accompanies an applicant to an oral hearing relating to an application for further review, but does not represent them in either a legal or lay capacity.

(2) In these Rules, except where the context otherwise requires, words in the singular include the plural and words in the plural include the singular.

(3) Where the provisions of these Rules expressly or impliedly confer any power or impose any duty then, unless the contrary intention appears, that power may be exercised and that duty shall be performed from time to time, as occasion requires.

4 Factors to be taken into account in deciding whether or not to hold an oral hearing

(1) The Ombudsman may decide to hold an oral hearing in relation to an application for further review in respect of which a decision by the Ombudsman has not yet been made, if the Ombudsman considers that it is in the interests of fairness to do so and either:

(a) any of the parties to that application for further review request an oral hearing;
or

(b) on the Ombudsman’s own motion.

(2) If a party to an application for further review requests an oral hearing under (1)(a), all parties must be given an opportunity to make representations to the Ombudsman in writing, as to whether an oral hearing should take place, giving reasons for their view, by no later than a date to be specified by the Ombudsman.

5 Notice of oral hearing and further procedure

(1) Where the Ombudsman decides that there will be an oral hearing to deal with an application for further review, the Ombudsman must give written notice of that decision to the parties 7 days before the oral hearing, or within such other period as the Ombudsman considers to be fair in all the circumstances, setting out the reasons for that decision and the scope of the oral hearing.

(2) The clerk to an oral hearing, to be appointed by the Ombudsman, will communicate to parties in writing:

(a) the date, time and place at which an oral hearing is to be held, and any subsequent variation in those arrangements,

(b) the date by which parties must communicate to the Ombudsman whether they intend to give oral evidence,

(c) the date by which parties must submit any hearing statement to the Ombudsman and to other parties in advance of the oral hearing, and

(d) the date by which a party intending to refer to, or rely upon, any other documents at the oral hearing, must provide a copy of each document to the Ombudsman and to other parties.

(3) All hearings will be held in private.

6 Admissibility of evidence and questions to witnesses

(1) The Ombudsman may, in proceedings under these Rules, admit such evidence, and in whatever form, as it would in the opinion of the Ombudsman be fair to admit, regardless of whether such evidence would be admissible in proceedings in a Scottish court.

(2) If a party wishes to put questions to another party during the oral hearing, such questions are to be addressed to the other party through the Ombudsman.

7 Attendance at oral hearing

(1) Any person who intends to give evidence at an oral hearing may be accompanied to the oral hearing by a supporter.

(2) If a party intends to be legally represented at an oral hearing, they must inform the Ombudsman of that intention, in writing, in advance of the oral hearing.

- (3) Oral evidence may be given through a live television link or through any other electronic means:
 - (a) if all the parties agree, or
 - (b) if the Ombudsman is satisfied that evidence so given will not prejudice the fairness of those proceedings.
- (4) If any of the parties declines, or fails, to attend an oral hearing fixed by the Ombudsman, the Ombudsman may, but need not, proceed to reach a decision in respect of the application for further review.

8 Minutes of proceedings and notice of decisions

- (1) The clerk will be responsible for producing a written minute of the oral hearing proceedings, to be provided to all parties within 7 days of the date of the oral hearing.
- (2) Where the Ombudsman delivers a decision in respect of an application for further review at the oral hearing, the decision will be recorded in the minute of the oral hearing.
- (3) Where the Ombudsman reaches a decision in respect of an application for further review after the oral hearing, a decision notice will be issued in writing to all parties by the Ombudsman in due course.

Annex C: Proposed approach to completing an Equalities and Human Rights Assessment

In line with best practice suggested by the EHRC and SHRC, we intend to complete a joint Equalities and Human Rights Assessment.

We are not consulting on a completed assessment. We are still developing our Statement of Practice and internal guidance and want to undertake the assessment alongside that and not see this as a separate step.

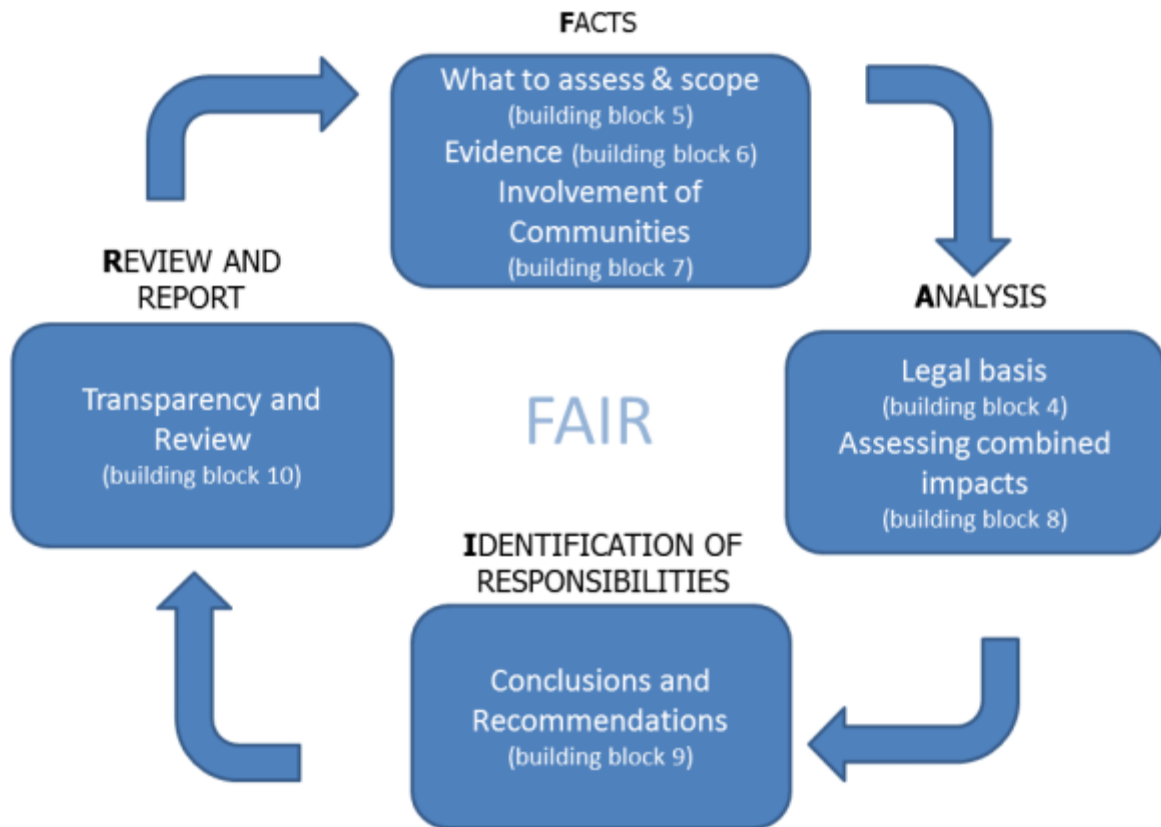
In this consultation document, we set out how we intend to approach the assessment and some early views and thoughts about this. We are seeking comments on this and how we can ensure that our assessment is comprehensive, proportionate and exemplifies best practice.

The assessment itself will be published prior to April 2016 and we will also welcome comments on that final document.

Undertaking a joint assessment

The [EHRC and SHRC have outlined the benefits of undertaking a joint approach](http://www.scottishhumanrights.com/eqhria) (<http://www.scottishhumanrights.com/eqhria>) They also set out 10 good practice building blocks. We are committed to demonstrating good practice in all of those building blocks. In this consultation we want to ask for views on some of the most critical building blocks.

The SHRC has developed the FAIR approach as a tool to undertake assessments practically. This involves four stages and the diagram below shows how this reflects key building blocks. This approach can be used in assessing individual impact as well as policies. We have decided to use this approach to structure this consultation and our approach to the assessment.



Facts

What to assess and scope

The Welfare Funds have been created as a direct result of Scottish Government policy. The Government have undertaken a number of Impact Assessments. An Equality Impact Assessment (EQIA) was prepared for the interim scheme and then updated for the legislation. Business and Regulatory Impact and Privacy Impact assessments were also completed. The EQIA which was undertaken at the time of the legislation considered specifically the introduction of the review process.

This means it is not our responsibility nor would it be proportionate for us to repeat the work already undertaken and assess the scheme. This means the scope of the proposed assessment is focussed. It will consider simply the way we deliver the review process.

Evidence

We have already identified three sources of evidence that will be helpful to us.

Information published by the Government relating to the interim scheme.

This will include information about the scheme as a whole and its impact and the EQIAs already published. This does also include some specific comment about the review process. In June 2014, the EQIA¹ that was published with the draft legislation commented directly on the proposal that we should undertake the review process. The EQIA pointed to the existing obligations that we were already under as a public organisation and noted the work we have already undertaken in terms of our current role. The Government also said they intended to use information from our work to improve the scheme in the future.

The experience of the Independent Review of the Social Fund (IRS)

The IRS was abolished in England, Wales and Scotland in 2013. It is still available in Northern Ireland. The IRS reported and continues to report on equalities duties although under the Northern Irish legislation.² Advice was also published on human rights for inspectors – the title of decision-makers at the IRS³. The legal environment under which we operate will not be the same but the IRS did undertake a broadly similar role and therefore we will look at the IRS experience to ensure we build on lessons already learned.

What we have learned from our own experience

We have been providing a complaint handling service since 2002. Our strategic plan makes five public equalities commitments and we review these annually to ensure we are making progress against them. The commitments currently are:

- 1** to take proactive steps to identify and reduce potential barriers to ensure that our service is accessible to all.
- 2** to identify common equality issues (explicit and implicit) within complaints brought to our office and feed back learning from such complaints to all stakeholders.
- 3** to ensure that we inform people who are taking forward a complaint of their rights and of any available support, and that we encourage public authorities to do the same.
- 4** to ensure that we play our part in ensuring that service providers understand their duties to promote equality within their complaints handling procedures.

¹ <http://www.gov.scot/Resource/0045/00452180.pdf>

² <http://www.osfcni.org.uk/index/publications-and-consultations/corporate-publications-and-reports.htm>

³ We had contact with the IRS in Birmingham before it was abolished and were provided with copies of some of the most relevant documents.

5 to monitor the diversity of our workforce and supply chain and take positive steps where under-representation exists.

We are going to be consulting on our next strategic plan in the Autumn of 2015 which will look at the commitments we make to all of our users and information from that consultation will also be used in this assessment.

Involvement of Communities

We are committed to talking to users and potential users of the service. We hope to have:

- direct contact with third sector groups who work with users
- direct contact with users from the groups to explore their experience of the review process and to allow them to comment on the consultation and other documents we are producing

We have been very pleased that a group of third sector organisations have already provided us with comments on our proposals and we intend to continue to engage throughout the consultation and into the pre-implementation and implementation phases of the project.

Analysis

We will ensure that we understand and set out clearly our understanding of our obligations and legal commitments in terms of equalities duties and the human rights of users. This is one of the benefits of the joint approach. This analysis will develop alongside the evidence gathering and we will seek support and advice on technical aspects.

The best practice model suggests we do not consider the policy in isolation. We will therefore look not only at our formal practice statement and related guidance but ensure that there is consistency with the training and support we give to staff and also the information and advice we give to users and their advisers.

At this early stage, we would highlight the way the principles in the Statement of Practice already indicate how we intend to take things forward.

In particular, in order to be accessible; to be fair; and to treat people with dignity and respect, we need to ensure that we fulfil our equalities duties and ensure that human rights are respected.

- accessibility will be interpreted broadly and taken to mean: ensure that an applicant can make their best argument to change the decision by a local authority;

- to ensure we treat people with dignity and respect we know that decision-makers will need to take a person-centred approach and to understand the context including changes to the wider welfare system and also the impact of specific vulnerabilities to do so.

Identification of Responsibilities

We will be responsible for ensuring that the review service is delivered accessibly, fairly and with respect for an individual's human rights. We will use the information from our analysis, including that from direct contact with users, to identify what areas of the process we need to consider both in terms of our equalities duties and human rights. We will assess whether changes should be made and identify clearly who at SPSO will have responsibility for these changes.

Review

Once completed the analysis will be published we intend to use the analysis as part of the regular review and reporting of our work.

Consultation Questions

Respondent information form

This form must be completed and returned with your comments in response to the consultation to ensure that we handle your submission appropriately. We have produced a separate document which you can fill in electronically and return by email. Alternatively, you can print this version and fill in by hand.

Your name:

Mr/Ms/Mrs/Miss/Mx/Dr (delete as applicable or insert other title)

Organisation Name (if responding on behalf of a group/organisation)

Contact details

Address:

Postcode

Phone

Email

Permissions

I am responding as (please tick as appropriate)

an Individual

(a) Do you agree to your response being made available to the public, including on the SPSO website?

Please tick as appropriate

Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis (please tick one box):

Yes, make my response, name and address all available

Yes, make my response available, but not my name and address

Group / Organisation

(c) The name and address of your organisation will be made available to the public and may be included on the SPSO website. Are you content for your **response** to be made available?

Please tick as appropriate

Yes No

Yes, make my response and name available, but not my address	<input type="checkbox"/>	
<p>(d) Question for all respondents: We may wish to contact you in the future to discuss the issues you raise, but we require your permission to do so. Are you content for us to contact you again in relation to this consultation exercise? Please tick as appropriate Yes <input type="checkbox"/> No <input type="checkbox"/></p>		

Responses can be sent by email to: consultation@spsso.org.uk or by post to: SWF reviews consultation, Scottish Public Services Ombudsman, FREEPOST EH641, Edinburgh, EH3 0BR . Please respond by Friday 27 November 2015

If you have any questions, please contact us on 0131 240 8845.

Consultation Questions

We are keen to have as much feedback as possible, so please comment on any aspect of the documents. For each document there is a general question but we have also some specific questions which set out points on which we are particularly keen for views.

Questions on Annex A: Draft Statement of Practice

- 1. The draft Statement of Practice sets out our approach to handling Scottish Welfare Fund decision reviews. What are your thoughts about our approach?**

Please type your comments here.

- 2. Should there be any changes to the principles (either to add or remove any of the principles we have listed)?**

Please select: Yes / No / Don't Know

Please type your comments here.

- 3. Do any of the individual sections of the Statement of Practice conflict with the key principles (Section A)?**

Please select: Yes / No / Don't Know

Please type your comments here.

4. Have we correctly identified the minimum information that needs to be provided by us about how to apply for a review (Section B)?

Please select: Yes / No / Don't Know

Please type your comments here.

5. We have set out what we consider to be the minimum information we need to receive to start the process of a review (Section C) – do you agree this is the minimum we need?

Please select: Yes / No / Don't Know

Please type your comments here.

6. Relating specifically to Section D (Application for review by someone other than the applicant), do you agree with the general approach to obtaining consent?

Please select: Yes / No / Don't Know

Please type your comments here.

7. Do you have any comments on the additional matters about consent in the notes to Section D?

Please type your comments here.

8. Do you have any comments on the proposed approach to evidence (Section E).

Please type your comments here.

9. We have outlined our process for obtaining information (Section F). What do you think about the process?

Please type your comments here.

10. If anyone refuses to be interviewed or to allow a visit, we say that we may take a negative inference from this (Section G). What do you think about this?

Please type your comments here.

11. Local authorities can challenge mistakes at the end of the review process. However, if new information from a third party is likely to change a decision in the applicant's favour, should the ability to comment or challenge be extended to the local authority (Section H)?

Please select: Yes / No / Don't Know

Please type your comments here.

12. We have suggested the order in which we will approach decision-making (Section I). Do you agree with this?

Please select: Yes / No / Don't Know

Please type your comments here.

13. We have laid out what information we will include in all decisions (Section K). What other information should we include in this section (if any)?

Please type your comments here.

14. Where there is a change in circumstances following the decision by the local authority (Section M), do you agree with the approach we plan to take?

Please select: Yes / No / Don't Know

Please type your comments here.

15. We have set out the timescales we intend to work to (Section N). What do you think about these?

Please type your comments here.

16. We have outlined scenarios for an instance when we receive a possible complaint alongside a request for review (Section O). Are the scenarios clear?

Please select: Yes / No / Don't Know

Please type your comments here.

17. What should we let people know about the information they disclose to us (Section P)?

Please type your comments here.

18. Do you have any other comments on particular sections of the draft Statement of Practice?

(Please use this section to also draw our attention to any points that haven't been covered in the previous questions. If you are commenting on a particular part of the Statement of Practice, please state which section(s) you wish to make comment on)

Please type your comments here.

Questions on Annex B: Draft rules on the conduct of oral hearings

19. Do you have any general comments on the rules?

Please type your comments here.

20. Do you have any comments on the individual rules (please state which sections)?

Please type your comments here.

21. Do you think there is anything else we should include in the rules?

Please type your comments here.

22. What steps do you think we can we take to make sure oral hearings remain informal and accessible, particularly to an unsupported applicant?

Please type your comments here.

Questions on Annex C: Proposed approach to an Equalities and Human Rights Impact assessment

23. What are your views on the general approach?

Please type your comments here.

24. What other sources of information do you think would be useful for our analysis?

Please type your comments here.

25. What issues in terms of equalities and human rights do you think we will need to consider in our analysis?

Please type your comments here.

26. Do you know of examples of good practice that we could learn from?

Please type your comments here.

27. How do you think we could best support improvements to the broader scheme?

Please type your comments here.