

Consultation on draft Welfare Funds (Scotland) Bill and options for challenging decisions made by local authorities on applications to the Scottish Welfare Fund

The Scottish Welfare Fund

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<u>Contents</u>	<u>Page</u>
Ministerial Foreword	2
Introduction	3
Background	3
Scope	4
Consultation Topics and Questions:	5
○ Draft Welfare Funds (Scotland) Bill Content	5
○ Regulations and Guidance	6
○ Options for Second Tier Review	8
Responding to this Consultation Paper	21
Annexes	
Annex A – The Draft Welfare Funds (Scotland) Bill	23
Annex B - SWF Statutory Guidance Proposed Content	26
Annex C - SG Consultation Process	28
Annex D - List of Consultees	30



Ministerial Foreword

I am pleased to introduce this consultation on the draft Welfare Funds (Scotland) Bill and options for challenging decisions made by local authorities on applications to the Scottish Welfare Fund.

When the Department for Work and Pensions (DWP) decided to abolish the discretionary Social Fund, we saw this as a real opportunity to replace DWP's one-size-fits-all approach with a fair, equitable and more holistic service, that contributes to Scottish policy priorities such as tackling child poverty and reducing homelessness.

Working in partnership with COSLA, local authorities and others, we met the challenge of developing - on an interim basis - a new scheme for local delivery from April this year. Delivered by local authorities based on a national framework, the Scottish Welfare Fund aims to steer people towards a range of local services, as well as helping people in a financial crisis, or to enable them to live a more settled way of life by providing essential household goods.

Determined to do what we can to help the most vulnerable in these tough economic times, we decided to top up the funding transferred from DWP by £9.2 million, to give a total fund of £33 million and the capacity to help about 200,000 people this year. Looking ahead, we want to continue this level of support and our draft Budget maintains this level of funding for the next two years.

We also want to build on the successful launch of the interim scheme, by continuing to work in partnership with COSLA, local authorities and others to develop the scheme and put the Scottish Welfare Fund on a more secure statutory footing. This consultation is the first step in that process.

As a Government we will listen carefully to your views, as they are important to us. I encourage you to get involved, and I look forward to your response.

A handwritten signature in blue ink that reads "Margaret Burgess". The signature is written in a cursive style and is underlined.

Margaret Burgess, Minister for Housing and Welfare

Introduction

Scottish Ministers have been clear from the outset about their intention to set out in legislation the basis of the new Scottish Welfare Fund (SWF) that provides a safety net for some of Scotland's most vulnerable people.

The SWF was introduced from April 2013 on an interim basis using local authorities' (LAs') Powers to Advance Wellbeing and based on ministerial guidance developed in partnership with COSLA, LAs and others. It provides help to vulnerable members of the community in a financial emergency, and support to get household goods to set up home or remain at home and provide a safe and secure home environment, reducing the need for care.

This consultation is the first step in the legislative process. It includes a draft Welfare Funds (Scotland) Bill to underpin the basis of the SWF and seeks views on which elements of the current ministerial guidance for the SWF should be set out in regulations and which in statutory guidance. It also seeks views on options for independent scrutiny of decisions made by LAs on applications to the SWF. This is usually called "second tier review".

Informed by the outcome of this consultation, Scottish Ministers intend to introduce a Bill into the Scottish Parliament in 2014 that will include the basis for independent scrutiny of LA decisions. Again informed by this consultation, the Bill will be followed by regulations and statutory guidance that will set out the operational detail of the Fund.

Responses are invited by 7 February 2014. Details of how to respond to this consultation can be found at the end of this paper.

Background

The SWF was introduced following the abolition by the Department for Work and Pensions (DWP) of elements of its discretionary Social Fund, namely crisis loans for living expenses and community care grants. Community care grants were payments intended to help vulnerable people live as independent a life as possible in the community. Crisis loans for living expenses were generally paid to individuals to cover immediate short-term needs that arose because of a disaster or emergency.

The intention of the UK Government was for new assistance to be delivered in England using existing powers in the Local Government Act 2000 and for the Scottish and Welsh Governments to decide on what new assistance should be provided in Scotland and Wales respectively. Funding transferred from DWP to LAs in England to enable them to establish a new system of local welfare assistance and to the Welsh and Scottish Governments to enable them to establish newly created systems. It was therefore up to the Scottish Government to make decisions as to the type of any new assistance to be provided in Scotland, within the bounds of the additional powers to deliver this form of social security, created by the Scotland Act 1998 (Modification of Schedule 5) (No. 2) Order 2013.

Following a consultation¹, Scottish Ministers decided to set up the SWF, to be delivered by Scottish LAs, based on national ministerial guidance. Using the previous DWP Social Fund as a starting point and targeted on those on low income, there are two types of grants under the SWF: crisis grants, and community care grants. A crisis grant aims to help people, typically on benefits, who are in crisis because of a disaster or an emergency. A disaster is something like a fire or a flood. An emergency might be needing to travel to visit a sick child or when money has been stolen.

A community care grant aims to help people, typically on benefits, who may have to go into care unless they get some support to stay at home. Or, if they are leaving any form of care and need help to set-up their own home. For example, they may be leaving hospital, prison or a residential care home. A community care grant can also help families facing exceptional pressures, with one-off items, like a cooker or a washing machine.

The SWF is a discretionary budget-limited scheme that prioritises applications according to need. It provides grants that do not have to be repaid. It does not provide loans. LAs have the discretion to provide support in different ways. Not all grants will be cash payments. They may provide vouchers, a fuel card, or furniture if they think that the best way to meet the need.

Further information about the SWF, including the ministerial guidance, can be found at: <http://www.scotland.gov.uk/Topics/People/welfarereform/socialfund>

Scope

Ministers' intention is that the interim scheme will form the basis of the scheme to be set out in legislation. The practical framework for delivery which underpins the SWF is therefore out-with the scope of this consultation. For example, as agreed with COSLA Leaders, LAs will continue to deliver the SWF. They will continue to have discretion about how to deliver the SWF, including whether to provide cash payments or alternative types of awards. The SWF will continue to be a discretionary budget-limited scheme that prioritises applications according to need. It will continue to provide grants that do not have to be repaid.

The draft Bill gives Scottish Ministers the discretion to make grants to support the delivery of the SWF. Currently, Scottish Ministers and COSLA Leaders have agreed that the funding for the SWF should be ring-fenced on an informal basis. The Welfare Funds (Scotland) Bill will allow the funding for the SWF to be ring-fenced formally, should Scottish Ministers and COSLA Leaders agree that this should be the case. In any event, the level of funding for the SWF will be determined through negotiation between Scottish Ministers and COSLA, in line with our continuing partnership arrangements.

¹ <http://www.scotland.gov.uk/Publications/2012/02/8295/1>

The main areas on which we are looking for views through this consultation paper are:

- 1) a general view on whether the draft Welfare Funds (Scotland) Bill includes the key elements you would expect it to contain;
- 2) which elements of the SWF should be set out in regulations and which should be set out in statutory guidance; and
- 3) which of three options will be the best way to provide for second tier review of LA decisions.

For the interim SWF, LAs are arranging second tier review by an impartial panel. Setting out the basis of the SWF in legislation provides the opportunity to consider a wider range of options. One of the main purposes of this consultation is therefore to seek views on the principles and options for second tier reviews that we have developed in conjunction with COSLA, LAs, the Scottish Public Services Ombudsman (SPSO), the Tribunals Policy Team and other stakeholders.

Consultation Topics and Questions

1) Draft Welfare Funds (Scotland) Bill Content

Based on the key elements of the interim scheme, the draft Welfare Funds (Scotland) Bill:

- sets out the purpose of the Fund. The purpose replicates the purpose as described in the Scotland Act 1998 (Modification of Schedule 5) (No. 2) Order 2013. As for the interim SWF, statutory guidance will clarify the meaning of the purpose for the day to day running of the Fund.
- places a duty on LAs to deliver the SWF in line with regulations and any supplementary statutory guidance.
- makes outline provision for the review of cases where an applicant wishes to seek a review of a decision. This part of the Bill will be expanded or replaced once we have identified which is the preferred option for second tier review.
- provides for those delivering the SWF to report in the manner set out in regulations.

A copy of the current draft Welfare Funds (Scotland) Bill is attached at **Annex A**.

Q1 - Does the Bill as drafted contain the elements you would expect it to contain?

Yes

No

Don't know

Please provide comments to explain your answer.

Are there any elements you would add to the Bill?

Yes

No

Don't know

Are there any elements you would take out of the Bill?

Yes

No

Don't know

Please provide comments to explain your answers.

2) Regulations and Guidance

As signalled above, the Welfare Funds (Scotland) Bill will be supported by regulations and statutory guidance that will set out in detail the operation of the scheme. We have started to identify the elements of the current ministerial guidance that might be set out in regulations and those that might be contained in the guidance for the permanent scheme. Ministers' intention is for a first draft of the regulations to be available around the time the Welfare Funds (Scotland) Bill is introduced into the Scottish Parliament.

Generally speaking, we have suggested that the regulations should contain the "rules" of scheme, including matters such as the eligibility criteria, the review process and the reporting requirements. The statutory guidance would then go on to give more general information such as policy context, financial management, the types of support that can be provided and sample paperwork. Guidance is in general easier to change and more flexible than regulations.

We would welcome views on which elements of the current ministerial guidance should be set out in regulations and which should continue to be set out in guidance. This is a link to the current version of the SWF ministerial guidance: www.scotland.gov.uk/Topics/People/welfarereform/scottishwelfarefund/scottishwelfarefundguidance. The proposed content of statutory guidance under the permanent Fund follows this closely and is attached at **Annex B**.

Q2 - Our starting point is that the following elements of the scheme should be included in regulations. The actual wording of the regulations is still to be discussed but we anticipate that they would cover these areas:

a) Eligibility Criteria

- Residence in the local authority
- Residence exclusions for community care grants
- Qualifying benefits, and provision for exceptions to be made
- The age limit for applications
- Qualifying period in care/custody before a grant can be made
- A limit on the number of awards to an applicant in a rolling 12 month period
- Timescales and limitations on repeat applications

b) Financial calculations

- Maximum savings thresholds
- Capital to be disregarded in calculations

c) Situations where a grant might be given

- The 5 situations where a community care grant can be paid
- definitions of crisis, emergency and disaster

d) The 4 stage decision making process.

- When cases do not require a decision beyond stage 1
- Descriptions of the priority ratings allocated to items applied for
- Vulnerabilities which attract priority in decision making
- Target processing times

e) Arrangements for first and second tier review - details depend to a certain extent on who will be undertaking second tier review but we anticipate that the following would be included for first and second tier review:

- Situations where an applicant can ask for a review – first and second tier
- Target times for undertaking a review

f) Reporting requirements

- Regular statistical monitoring requirements

g) Discretion to make awards in cash and in kind

h) Requirement for decisions to be communicated in writing

Do you agree with the proposed list of topics to include in regulations?

Yes

No

Don't know

If no, what would you like to see added to the list?

If no, what would you like to see taken away from the list?

3) Options for Second Tier Review

Background on Review

If an applicant disagrees with the decision on their application, they can ask for a review of their case. Following this first tier review, if the applicant thinks that there has been an error made in their case or that the decision made was unreasonable, thinks that they have been treated unfairly or does not think that they were given an opportunity to put their case properly, they can ask for a second tier review. Second tier review is an important step in the SWF process. It provides an impartial check on local decision making processes, ensuring administrative justice for the applicant, drives improvement in decision making and gives stakeholders confidence in the integrity of the Fund.

During the development of the interim arrangements for the SWF it became apparent that second tier review would be a challenging aspect of the scheme. We worked with stakeholders to produce a solution which sought to get the best outcome for applicants and stakeholders while being workable and affordable for LAs. We concluded that the most proportionate approach for the interim scheme was to make arrangements for second tier review within LAs using an impartial panel. This was consistent with some other LA services, was the option most likely to result in a quick decision for applicants, was achievable within the timescale and offers some flexibility, for example for including independent members. It was also consistent with the discretionary nature and legal basis for the interim SWF. Full guidance to LAs on first and second tier review is available as part of the ministerial guidance at www.scotland.gov.uk/Topics/People/welfarereform/scottishwelfarefund/scottishwelfarefundguidance

We gather information on first tier review through the monitoring framework for the SWF, in order to understand how it is operating in practice. This allows for feedback to LAs on how their numbers compare to others. We do not anticipate a substantial change in the arrangements for first tier review under the permanent SWF.

For the interim SWF, community care grants and crisis grants are being made under advisory guidance from Scottish Ministers, not regulations. For this reason, any decision made by an independent reviewer could only be advisory. Providing for the SWF in primary legislation means that there are more options for second tier review under the permanent arrangements. Three options are outlined below, along with the advantages and disadvantages that we have identified, these are:

- A panel based in Local Government, with mandatory independent membership
- Scrutiny of decisions by the SPSO
- A tribunal, administratively supported by the Scottish Tribunal Service.

While primary legislation means that there are more options available, there is no option which is without disadvantages. In particular, there is a tension between quick decisions on reviews, incorporating relevant knowledge of local delivery and achieving independence. This is brought out in the advantages and disadvantages of the three options set out below.

Good Practice in Administrative Justice

Community care grants and crisis grants will be relatively small scale discretionary grants. Second tier reviews need to be undertaken quickly because of the circumstances of the applicants. The review process therefore needs to be straight forward and have open channels of communication with the decision maker. The Proportionate Dispute Resolution mapping factors identified in the Administrative Justice and Tribunals Councils (AJTC) publication Putting It Right – A Strategic Approach to Resolving Administrative Disputes suggest that:

- The review should adopt an inquisitorial approach, including fact finding by trained staff using telephone or email for speed and low cost.
- A formal hearing is not required.
- If there are a number of possible routes for complaint, for example a second tier review or a complaint to the SPSO, there should be a triage system to identify which is the most appropriate route depending on the issue raised. This is to avoid requests being mis-directed, resulting in delay and wasted resource.

The full document is available at <http://ajtc.justice.gov.uk/docs/putting-it-right.pdf>

The Scottish Government is keen to ensure that the permanent arrangements for second tier review continue to drive improvement in SWF decision making. We want decision makers to seek all the information needed to make the right decision first time. SWF is a discretionary Fund which gives LAs a great deal of flexibility to integrate delivery arrangements with local services and policies. This will have implications for any review process which operates at a national level. We need to make sure that arrangements for review support and do not cut across local arrangements for decision making and delivery.

Human Rights

Some stakeholders raised the issue of human rights in connection with second tier review for the interim scheme. Specifically, that Article 6 of the European Convention on Human Rights states that “in the determination of his civil rights and obligations ...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. A number of stakeholders questioned whether a review carried out by a LA during the interim scheme could be said to be sufficiently independent to meet this requirement.

The Scottish Government concluded that, because there is no entitlement to a grant, civil rights and obligations (in the autonomous Convention interpretation of the phrase), are not engaged.

Review Volumes

While the SWF is based on Social Fund community care grants and crisis grants there are important differences. In designing the Fund and review process, Scottish Government and stakeholders sought to avoid the high volume of reviews generated under the Social Fund by promoting good decision making (getting decisions right first time) and effective communication. Early reports of review numbers for the SWF are low. We will not have monitoring data on reviews until the data collection for the first quarter of operation is complete and audited. A survey of LAs, undertaken in August 2013 showed that, of 35,427 applications received across 32 Authorities, 827 had gone on to first tier review. Of these, 37% resulted in a change of decision. Sixty six cases had gone on to second tier review and, of these, 34% resulted in a change of decision. Over roughly the same time period, the SPSO reports that they have received ten contacts about the SWF but that not all of these are likely to result in a decision. These figures reflect the very first few months of the operation of the Fund and we would not necessarily expect them to be representative. The following explanations have been offered for the low review numbers:

- Lack of information about or confidence in the review process/ support workers not yet being familiar with the ministerial guidance and arrangements for review.
- Signposting to alternative services where an application is unsuccessful so that the underlying need is met.
- Active engagement between LAs and support workers. Some LAs are briefing support workers on how to fill in forms, what information is needed, what the Fund can offer and have been giving feedback on cases.
- Differing perceptions/cultural issues in dealing with LAs as opposed to the DWP.
- Competing pressures on applicants caused by other benefit changes which may mean that they do not have the capacity to pursue review.

We will not have a good sense of review numbers until the Fund has been in operation for at least a year. SWF applicants tend to be in significant need and reviews require a quick turnaround and specialist knowledge of the Fund. This will be difficult to achieve with a low volume of reviews, regardless of the solution chosen.

Purpose and Characteristics of Second Tier Review

The desired characteristics and purpose of the SWF review processes were established during the development of the interim arrangements in consultation with stakeholders. They are set out below. The first tier review by the LA offers an opportunity to “re-make” the original decision, based on a thorough look at the evidence. The purpose of the second tier review is more focused.

Q3 - Do you agree that characteristics of the review process and the purpose of second tier review should be the same under the permanent SWF as they are under the interim SWF?

Characteristics of First and Second Tier Review

- Transparency, fairness and accessibility
- Timeliness, recognising the circumstances of the applicant
- High quality, impartial, free to use and independent
- Quick to operate, making sound and accurate decisions
- Effective communication
- Proportionate and cost effective

Purpose of Second Tier Review

- To ensure that the correct decisions are being made and that the guidance for the Fund is being followed.
- To identify whether the SWF guidance and local policy is being consistently applied and feed back to LAs where it is not.
- To identify where the SWF guidance is having unintended consequences so that these can be rectified.
- To give confidence to the applicant that the SWF is subject to impartial scrutiny and add credibility to the Fund as a whole.

Yes

No

Don't know

Please provide comments to explain your answer.

Types of Issue Likely to Result in Requests for Review

In general terms a service or benefit for which there is a clearly defined entitlement, or set of rules lends itself to a legal judgment on whether or not the entitlement has been fulfilled. Decisions where there is a very high degree of discretion for the award making body are likely to generate a number of possible valid decisions and be less concerned with points of law. The SWF is a discretionary Fund but there is a clear process for decision makers to follow and a number of "rules" will be set out in regulations for the permanent scheme. We would like to identify the types of issues that are most likely to present systematically at second tier review under the interim SWF as a gauge of the issues that are likely to arise for the permanent scheme. This will help to determine whether the types of decisions that need to be made are best suited to a legal or an administrative solution. It will also help inform the drafting of the regulations for the permanent SWF.

Q4 - What do you think are the most likely issues to present at second tier review under the interim SWF i.e. what are the most common reasons that people will ask for a review?

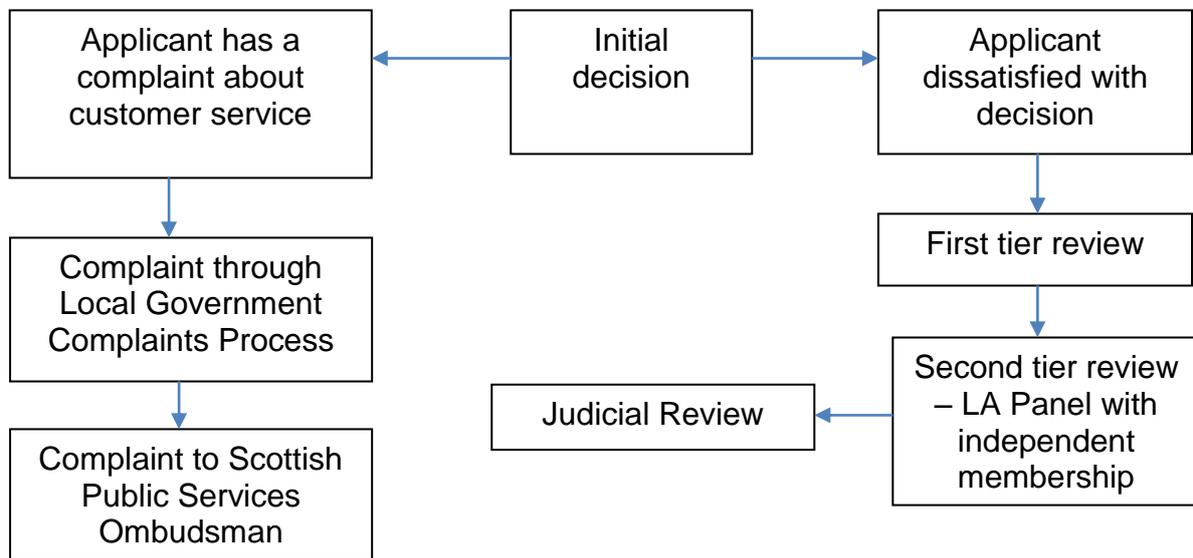
Three options for Second Tier Reviews

We have set out below three options for second tier reviews for your consideration. You will be asked to rank each of the options in order of preference.

Option 1 – Local Authority Panel with Independent Representation

Description of Proposal

This option would build on the arrangements for second tier review under the interim SWF. Review would be undertaken by an impartial panel, drawn from LA departments not connected with the decision making team. Under the current ministerial guidance, it is recommended that at least one member of the community care grant panel should be independent of the LA. This would become a requirement under the permanent arrangements, in order to guarantee an independent element in decision making.



Anticipated Costs

LAs incur costs for the following:

- recruiting and training panel members
- opportunity costs for LA panel members released from other duties
- organising and providing the secretariat for panel meetings
- communicating with applicants.

Advantages

- The service would be free to users.
- It is proportionate to size of awards being made.
- This option is easily scalable in response to variable review numbers.

- Requiring a panel member from outwith the LA ensures a degree of independence.
- Reviews are quick to administrate, giving a rapid response for the applicant.
- Panel members can build an understanding of local policy and delivery issues in a way that a national body cannot.
- This option fits well with the standard LA complaints process.
- Close proximity to decision making helps drive improvement and identify training needs.
- Applicants receive a resolution and an explanation from one source. Confidence in the service is not undermined by another organisation reversing decisions.

Disadvantages

- This option may not be perceived as independent, even with an independent member as the LA organises the panel.
- There is potential for a high degree of variability between panels, depending on members and local arrangements for training etc.
- Panels may not build sufficient expertise in decision making to make the right decisions if numbers are low.
- Panels may not feel empowered to overturn decisions if they are not undertaking many reviews/developing expertise.
- Previous experience of similar panels has not been positive – e.g. Social Work Review Committees.
- There may be difficulty in recruiting suitable lay members.
- There is a potential conflict of interest between services where the client is also using a service delivered by a panel member.

Option 2 –Independent scrutiny of decisions by the Scottish Public Services Ombudsman (SPSO) for complaints handling, possibly with increased powers.

Description of Proposal

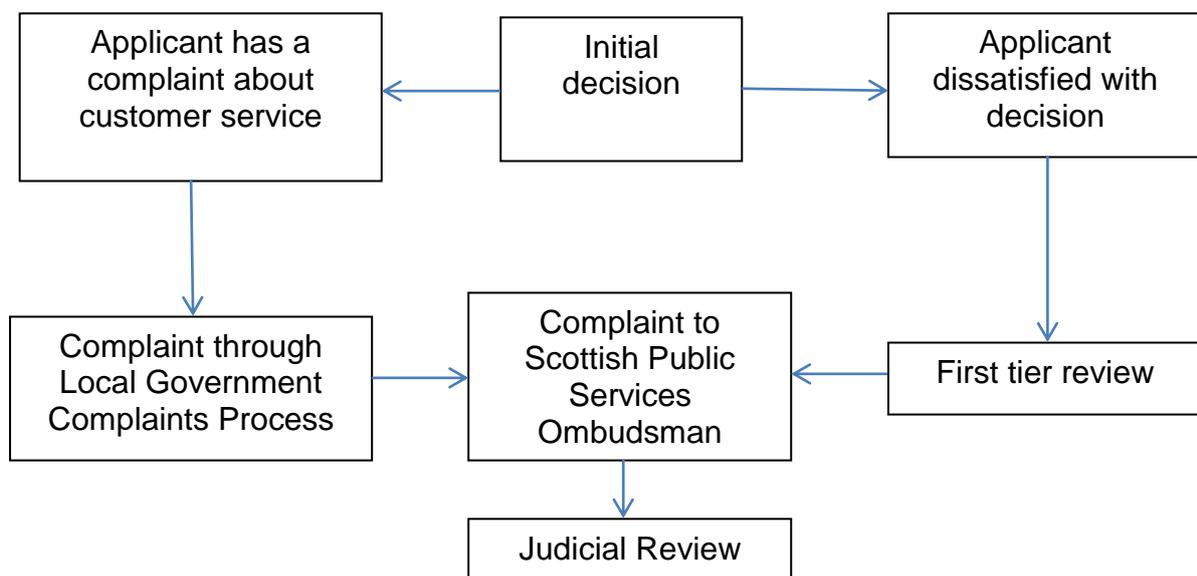
The legislation which sets up the permanent SWF could provide for second tier reviews to go to the SPSO.

Under its current powers, the SPSO judges the actions of an LA against the standards of maladministration or service failure. In practical terms, the SPSO could look at the process undertaken to make the original decision and internal review and give an opinion on whether the LA has complied with statutory guidance, local policy or on any other aspects of maladministration or service failure. The SPSO already has this role under the interim SWF.

The legislation to set up the permanent SWF could add to SPSO powers in two possible ways:

- so that it could review discretionary decisions on the merits of the case. This would allow them to assess the discretionary judgement made by the decision makers. Their current practice is to assess such judgments on the basis of reasonableness of the decision. If they have concerns about the decision, they could then recommend that an alternative decision should be made. Where the SPSO has this role for other services, this usually means that their decision is substituted, but they cannot require it to be. It is currently suggested that the SPSO might take on these powers for social work complaints.
- in addition to extension of powers set out above, also to give the SPSO powers to make their recommendation binding. This would mean that they could set aside a decision made by an LA and make a new decision. This would be beyond the existing powers of the SPSO for any service. Another way of achieving a similar outcome could be for the legislation to require LAs to have regard to the recommendation of the SPSO.

The client group and workload is quite different from the current work of the SPSO; for example, SPSO has a target completion time of 10 weeks for standard cases. We anticipate that if this option is chosen, the work would be undertaken by a separate team of SPSO staff, working to quicker response times, trained in the SWF statutory guidance and in handling the issues likely to arise for the client groups. However, this would only be possible if review numbers were sufficient to justify a specialist unit within SPSO.



Anticipated Costs

SPSO anticipates costs arising from:

- staff
- accommodation and office management, though these may be shared
- case handling systems, though lease may be shared
- liability cover
- communication and publicity.

Advantages

- SPSO is independent and respected, encouraging confidence in the legitimacy of review.
- It provides a one stop shop for complaints for LAs which is simple and transparent for people who do not necessarily distinguish a complaint from a request for review.
- Staff would build expertise in national decision making, legislation and statutory guidance. Makes use of in-house expertise and knowledge.
- The service is free to the user.
- The inquisitorial nature allows for communication with the applicant to get to the core of the problem
- This option would be administrative and inquisitorial which is proportionate to the size of awards and time pressure associated with the cases. It is a good fit with AJTC mapping factors set out above.
- Quality assurance processes are in place for ombudsmen, ensuring ongoing high standards.
- The SPSO publishes summaries of its cases on line and provides statistical feedback. It also provides a detailed response on each case to the body concerned.

Disadvantages

- If cases go from first tier review straight to the Ombudsman, it would remove a layer of review from the process, reducing the number of opportunities for applicants to be heard.
- The SPSO would need additional powers to change decisions made by LAs. There is some sensitivity over extending powers for the SPSO.
- The SPSO can't adjudicate where there are reasonable different interpretations of what the law requires.
- The SPSO is not in a position to share detailed information for the purposes of general service improvement, though reporting could be tailored to feed in to service improvement planning.

Q5 – If the SPSO is the chosen option, should this be with additional powers to:

- review discretionary decisions on the merits of the case?

Yes

No

Don't know

- make an alternative decision which would be binding on the Local Authority?

Yes

No

Don't know

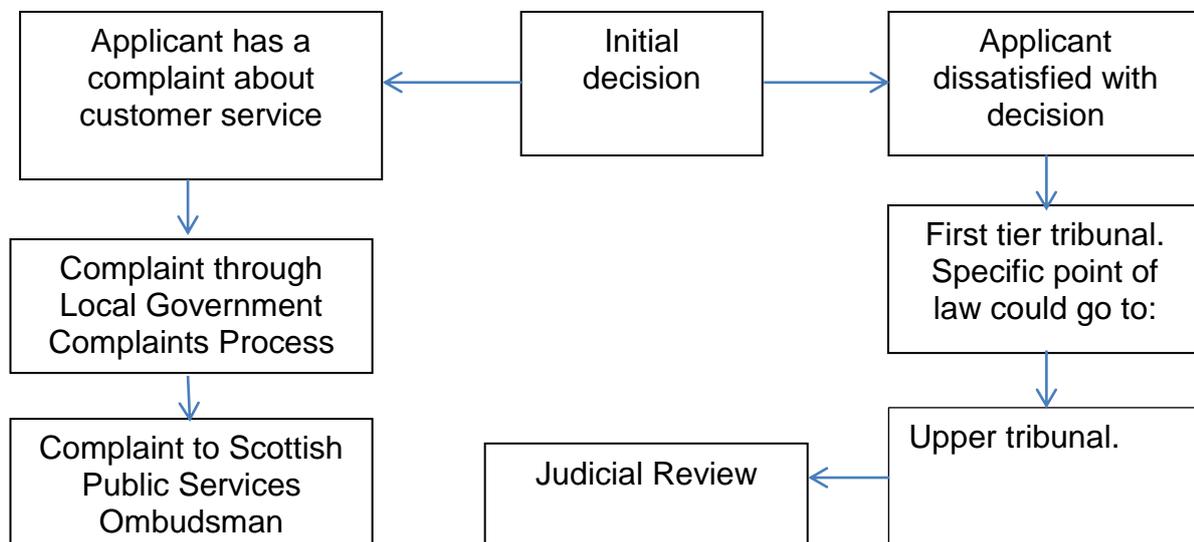
Please provide comments to explain your answers.

Option 3 – Establishing a Tribunal

Description of Proposal

The primary legislation which establishes the permanent SWF could create a new tribunal to hear second tier reviews for crisis grants and community care grants.

Tribunals are a route for appealing decisions. The route for maladministration cases is the SPSO. Please see the diagram below.



A panel of tribunal members would be appointed who would have experience of the SWF and/or the wider benefits system. A President or Convener would also be appointed to provide leadership to the tribunal. Decisions could be taken either on paper or at oral hearings. Paper consideration could speed up the process and potentially help keep costs lower.

The Scottish Tribunals Service (STS) operates as a delivery arm of the Scottish Government. The STS currently provides support to six tribunals and the Council Tax Reduction Review Panel. If administrative support for the SWF tribunal was provided by the STS, it would allow certain back office services such as IT, Finance and HR support to be shared with the other tribunals/reviews it currently administers.

The Scottish Government is currently looking at the feasibility of a merger of the Scottish Tribunals Service with the Scottish Court Service to create a single body, independent of the Scottish Government to support both courts and tribunals in Scotland. A consultation on this issue ran from 27 July to 19 September. If agreement is secured to proceed with a merger it will not take place before 2015.

The Tribunals (Scotland) Bill was introduced to Parliament in May 2013. The Bill will create a new, simplified structure for devolved tribunals in Scotland with a First-tier Tribunal for first instance decisions (into which most tribunal jurisdictions will be transferred) and an Upper Tribunal where the primary function will be to dispose of appeals from the First-tier. These will be collectively known as the Scottish Tribunals. The tribunals currently administered by the STS will be among the first to have their functions transferred into the new structure in a phased programme. It is expected that these tribunals will have had their functions transferred-in by the end of 2018. The Bill allows for new tribunals to be added to the list in schedule 1 to the Bill that can be transferred into the structure over time.

The First-tier Tribunal will deal with cases in the first instance from which there will be a general right of appeal on a point of law to the Upper Tribunal. The Upper Tribunal may also decide on petitions for judicial review which have been transferred from the Court of Session.

The Bill enables the First-tier Tribunal and the Upper Tribunal to review their own decisions where, for example, simple administrative errors have occurred. This does not affect the users' right of appeal.

Anticipated Costs

Costs can be estimated more accurately when we have a configuration for the tribunal and an estimate of case numbers. Costs will include:

Set up costs:

- recruitment
- training
- IT/case management systems
- forms, guidance, publicity.

Running costs:

- staff
- member fees
- travel and subsistence
- office and equipment costs for staff
- possible venue hire for hearings (neutral locations)
- postal/communication/reporting costs

- judicial training
- possible legal costs.

Advantages

- A tribunal is fully independent of Local Government and the Scottish Government.
- Tribunal judgements can clarify principles and encourage consistency in decision making.
- The Tribunals Bill enables the First-tier Tribunal and the Upper Tribunal to review their own decisions for maladministration purposes.
- There is a logical progression for cases to be appealed on a point of law, from the First Tier to Upper Tier tribunal.
- Members would develop an expertise in the national legislation and statutory guidance.
- A president or convener would provide leadership and guidance to members.

Disadvantages

- Tribunals can be resource intensive in case preparation and representation for applicants and local authorities.
- The costs of a tribunal may be disproportionate to the value of awards being made under the SWF/overall value of the SWF.
- Tribunals are usually chaired by legal members. Our early judgement is that review decisions are mainly likely to be as a result of maladministration or error and not likely to require judgements on complex matters of law/legal expertise.
- There isn't an obvious fit with the new structure created by the Tribunals Bill, particularly the Upper Tribunal which will hear cases only on points of law.
- There is little potential for driving service improvement and training within LAs. Hearings may result in an adversarial relationship with LAs.
- The tribunal would need to be in session very frequently to meet the turnaround times for crisis grants.
- This option has a poor fit with the AJTC mapping factors set out above.
- Local variation in delivery arrangements and discretionary powers would make it difficult for a national tribunal to make informed decisions on cases.

Q6 - Please rank the 3 options for second tier reviews in order of preference - where **1** is the option you would **most** like to see implemented and **3** is the option you would **least** like to see implemented:

Option	Priority you would give the option:
Local Authority Panel	
Scottish Public Services Ombudsman	
A Tribunal	

Please explain your choice.

Please include any further comments you have on the options outlined, including advantages and disadvantages for the options and other points we should take in to consideration.

A bespoke service, like the Independent Review Service

We also considered the option of setting up a bespoke body to provide an administrative review, akin to the Independent Review Service which undertook second tier reviews for DWP’s discretionary Social Fund. On the face of it, this has advantages in that:

- A new service would be independent of Local Government and the Scottish Government.
- Staff would build up an expertise in the legislation and statutory guidance.
- This option would be administrative and inquisitorial which is proportionate to the size of awards and time pressure associated with the cases.
- There could be a good fit with the AJTC mapping factors set out above.
- The service could provide a quality improvement, training and support function.
- This would most closely replicate the arrangements under the Social Fund and would be credible with stakeholders.

However, setting up a new body would be against the direction of travel for complaints processes and for the wider public sector landscape. In September 2007, The Report of the Independent Review of Regulation, Audit, Inspection and Complaints Handling of Public Services in Scotland (Crerar Review) made several recommendations about simplifying and improving consumer focus in complaints handling systems, aiming to:

- “Reduce the complexity of the current complaints handling systems;
- Introduce a single system led by a single agency with clear remit to allocate responsibility for dealing with complaints;
- Introduce improvements for the service user -
 - making complaining more straightforward;

- reducing the time taken to deal with complaints;
- dealing with complaints more locally; and
- standardising how complaints outcomes are reported;
- Improve consistency and co-ordination across sectors, removing potential for duplication and overlap;
- Centralise the system-design expertise from various sectors; and
- Allow the lessons learned from each case to be applied more easily across all public services.”

Subsequently, the Fit for Purpose Complaints System Action Group made a number of recommendations, including that:

“Government and/or Parliament should not establish any new complaints handling bodies without first considering if the SPSO could take on the function or, only where that would be inappropriate, whether an existing body could expand its role to take on the new function.” And that:

“The number of standalone complaints handling bodies should be reduced and functions should be transferred, where appropriate, to simplify the process and landscape for consumers.”

While SWF second tier review is not explicitly complaints handling, it shares a lot of common characteristics. It would go against the spirit of the Crerar Review and Scottish Government policy on public bodies to introduce a new bespoke body when realistic alternatives are available. A new body would add complexity to the public body landscape and make it more difficult for members of the public to understand where to go when they need help. We believe it is more appropriate to choose from the options above which are already in use for other Local Government services.

RESPONDING TO THIS CONSULTATION PAPER

We are inviting written responses to this consultation paper by **7 February 2014**.

Please send your response to the consultation questionnaire with the completed Respondent Information Form, available separately on the Scottish Government website (see "Handling your Response" below) to:

SWFDraftBill-consultation@scotland.gsi.gov.uk

or

Scottish Welfare Fund,
Area 1G – South,
Victoria Quay,
Edinburgh,
EH6 6QQ.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>.

The Scottish Government has an email alert system for consultations, <http://register.scotland.gov.uk>. This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). It complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** which forms part of the **consultation questionnaire**. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on the contents of the Welfare Funds (Scotland) Bill. We aim to issue a report on this consultation process by Spring 2014 if possible, and introduce the Welfare Funds (Scotland) Bill by June 2014. We plan to make draft regulations available around the same time.

Comments and complaints

Annex C gives more information on the Scottish Government consultation process and a list of the people that this consultation has been sent to is at **Annex D**. If you have any comments about how this consultation exercise has been conducted, please send them to:

Chris McGhee
Scottish Welfare Fund,
Area 1G-South,
Victoria Quay,
Edinburgh
EH6 6QQ.

or,

E-mail: chris.mcghee@scotland.gsi.gov.uk

CONTENTS

Section

- 1 Welfare funds
- 2 Use of welfare funds: assistance for short term need and community care
- 3 Review of decisions
- 4 Administration of welfare funds
- 5 Welfare funds: further provision
- 6 Guidance
- 7 Commencement
- 8 Short title

Welfare Funds (Scotland) Bill

CONSULTATION DRAFT

An Act of the Scottish Parliament to make provision about the maintenance of welfare funds and to provide for them to be used to help certain individuals; and for connected purposes.

1 Welfare funds

Each local authority is to maintain a fund (called a “welfare fund”) comprising—

- (a) any grants paid into the fund by the Scottish Ministers, and
- (b) any amounts paid into the fund by the local authority.

2 Use of welfare funds: assistance for short term need and community care

- (1) A local authority may use its welfare fund only in order to provide occasional financial or other assistance to or in respect of individuals—
 - (a) for the purposes of meeting, or helping to meet, an immediate short term need—
 - (i) arising out of an exceptional event or exceptional circumstances, and
 - (ii) that requires to be met to avoid a risk to an individual’s wellbeing, or
 - (b) for the purposes of enabling qualifying individuals to establish or maintain a settled home.
- (2) A “qualifying individual” means an individual who has been or, without the assistance, might otherwise be—
 - (a) in prison, hospital, a residential care establishment or other institution, or
 - (b) homeless or otherwise living an unsettled way of life.
- (3) A local authority may exercise its power under subsection (1) by making a payment to a third party with a view to the third party providing, or arranging the provision of, goods or services to or in respect of an individual.

3 Review of decisions

A local authority must make arrangements under which decisions it makes in pursuance of section 2 may be reviewed.

4 Administration of welfare funds

- (1) A local authority may make arrangements for another person to administer its welfare fund on its behalf.

- (2) Two or more local authorities may make joint arrangements under subsection (1) for another person to administer the authorities' welfare funds jointly in accordance with any instructions agreed between the authorities.
- (3) Such arrangements may include arrangements under which a joint committee established by the local authorities administers the authorities' welfare funds jointly.

5 Welfare funds: further provision

- (1) The Scottish Ministers may, by regulations, make further provision about welfare funds or local authorities' functions in relation to those funds.
- (2) Regulations made under this section may, in particular, make provision—
 - (a) about the eligibility of individuals to receive assistance in pursuance of section 2,
 - (b) about other circumstances in which assistance may, or may not, be provided in pursuance of section 2,
 - (c) about the type of assistance which may be so provided,
 - (d) about circumstances in which amounts may require to be repaid or recovered in respect of assistance which has been so provided,
 - (e) setting out the types of arrangements which must be made under section 3,
 - (f) prescribing types of decision which are, or are not, to be subject to review in pursuance of section 3,
 - (g) requiring a local authority to provide the Scottish Ministers with such information in connection with the exercise of its functions under this Act as may be specified in the regulations,
 - (h) about arrangements which may be made in pursuance of section 4.
- (3) Regulations made under this section may make—
 - (a) different provision for different purposes,
 - (b) incidental, supplementary, consequential, transitional, transitory or saving provision.
- (4) Regulations made under this section are subject to the negative procedure.

6 Guidance

- (1) A local authority must have regard to any guidance issued by the Scottish Ministers in connection with the exercise of its functions under this Act.
- (2) Guidance may—
 - (a) be general or specific,
 - (b) relate to all local authorities or such local authorities as may be specified,
 - (c) be varied or revoked.
- (3) Before issuing, varying or revoking guidance, the Scottish Ministers must consult—
 - (a) every local authority to which the guidance relates, or
 - (b) where it relates to all local authorities, such body representing local authorities as they think fit.

- (4) The Scottish Ministers must publish guidance issued under this section in such manner as they consider appropriate.

7 Commencement

- (1) This section and section 8 come into force on the day after Royal Assent.
- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.
- (3) An order made under this section may include incidental, supplementary, consequential, transitional, transitory or saving provision.

8 Short title

The short title of this Act is the Welfare Funds (Scotland) Act 2014.

SWF STATUTORY GUIDANCE PROPOSED CONTENT

- a) Policy context and background
 - The history of the SWF and the discretionary Social Fund
 - Background on Welfare Reform
 - The wider Scottish Government policy context and specific objectives for the guidance
 - Advice on equality impacts
 - Human Rights considerations
 - Groups likely to benefit from the SWF
- b) The purpose and objectives of the grants
- c) Financial management approach
 - How LAs should approach setting priority ratings for the decision making process
 - Making connections to audit, risk assessment and fraud
 - How to charge items awarded to the SWF budget
- d) The holistic approach – other services to link to and the value they can add
- e) Links to wider welfare system/DWP benefits
 - Data sharing with DWP
 - Interaction with short term benefit allowances and budgeting loans
 - What to do if an applicant is subject to sanctions and disallowances
- f) Detail on eligibility and how to interpret regulations
 - Examples of when an LA might make an exception to qualifying benefits
 - How far in advance of need an application can be made for a community care grant
- g) Financial calculations
 - Examples of capital to take in to account in making calculations
 - What to do when capital is not releasable
 - Guideline daily amounts for payments for living expenses
 - A guideline minimum award
- h) Four stage decision making process.
 - An explanation of the inquisitorial role of decision makers in gathering and assessing the information in an application
 - Good practice in decision making
 - Information that should be recorded about applications and decisions
 - How long to keep paperwork
- i) Situations where a grant might be given
 - Examples of situations where a grant might be given

- Things to take into account in making an award
- j) The type of support that might be given when an award is made
- Grants, vouchers, items etc.
 - Making an award in principle, on the condition that something else happens.
 - Points to consider in making an award, for example stigma, disability, religious observance
 - Provision of supervised spend to support an applicant
- k) The application process
- Requirement for LAs to promote awareness of the SWF on their websites as a minimum
 - How the service should be made available – on line, on the phone, face to face
 - Good practice in meeting needs of vulnerable groups
 - Good practice in communicating the decision
- l) First and second tier review
- The objectives of review
 - What an applicant should include in a request for review
 - How to deal with additional information and a change of circumstances during the review process
 - The process for first tier review
 - The process for second tier review
 - The role of the Scottish Public Services Ombudsman
 - The role of Judicial Review
 - Review as a driver for improving the service
- m) Monitoring and quality improvement
- Promoting consistency in decision making
 - Advice on monitoring
 - Benchmarking and quality improvement
- n) Definitions – e.g. of a child, dependent child, family, planned re-settlement programme
- o) Excluded items/needs i.e. a list of items not provided by the funds
- p) Sample paperwork – e.g.
- Application form
 - Decision recording
 - Decision letters
 - Review letters

THE SCOTTISH GOVERNMENT CONSULTATION PROCESS

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses

Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Government consultation papers and related publications (e.g., analysis of response reports) can be accessed at:

Scottish Government consultations (<http://www.scotland.gov.uk/consultations>)

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review,
- inform the development of a particular policy,
- help decisions to be made between alternative policy proposals,
- be used to finalise legislation before it is implemented.

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

LIST OF CONSULTEES

The following, is a list of the groups, or organisations, that we intend to consult on the Welfare Funds (Scotland) Bill.

- COSLA
- Local Authorities in Scotland
- Clerk of the Welfare Reform Committee
- Departmental Committee Liaison Officer
- Scottish MSPs, MPs, and MEPs
- Equal Rights organisations
- Scottish Government Library
- SPICE library
- The Scottish Welfare Fund Reference Group
- The Scottish Government Welfare Reform Scrutiny Group
- Respondents to the informal consultation on the Scottish Welfare Fund Draft Guidance
- Organisations invited to respond to the Devolution of Community Care Grants and Crisis Loans, Consultation on Successor Arrangements Consultation
- Scotland Office
- DWP
- Relevant national bodies and third sector umbrella organisations
- Community Planning Partnerships

A full list, showing all the organisations separately, is available on request from:

chris.mccghee@scotland.gsi.gov.uk



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