



Citizens Advice Scotland response Tribunals (Scotland) Act 2014: Consultation on Draft Regulations Making Provision in Relation to Social Security Appeals April 2018

Citizens Advice Scotland (CAS), our 60 member Citizen Advice Bureaux (CAB), the Citizen Advice consumer helpline, and the Extra Help Unit, form Scotland's largest independent advice network. Advice provided by our service is free, independent, confidential, impartial and available to everyone. Our self-help website Advice for Scotland provides information on rights and helps people solve their problems.

In 2015/16 the Citizens Advice network in Scotland helped over 310,000 clients in Scotland alone and dealt with over one million advice issues. With support from the network clients had financial gains of over £120 million and our Scottish self-help website Advice for Scotland received over 4 million unique page views.

Introduction and context of response

Citizens Advice Scotland welcomes the opportunity to comment on the draft rules for the new Scottish Social Security Tribunals. We support a Tribunal continuing to be the forum for final dispute resolution within the Scottish social security system, and compared with some other aspects of the current system, the Tribunal system is relatively well-regarded by CAB clients and advisers.

CAS particularly welcomes some changes made as part of the Social Security Bill to streamline the process for moving from re-determination to appeal, making it appear as a single process from the appellant's point of view. By directly passing all evidence received from the re-determination process, and providing for a simple process where an individual would agree to 'continue their appeal' to the Tribunal, rather than having to make a separate request, the new process already has the potential to improve access to justice for people seeking to challenge a benefits decision.

In 2016/17, citizens advice bureaux in Scotland advised clients on 15,429 new issues related to benefits appeals. As detailed in the table below, a majority (55%) related to benefits that will be devolved and covered as part of these initial regulations, with the vast majority of those (8,444) relating to three disability benefits due to be devolved (PIP, DLA and Attendance Allowance).

Table – Appeal and reconsideration issues in CAB, 2016/17*N.B. benefits to be devolved highlighted in yellow, those already devolved in green.*

Benefit	Appeal	Reconsid- -eration	% of total appeals
Attendance Allowance	124	296	0.8%
Bereavement Allowance	22	18	0.1%
Bereavement - Lump Sum Payment	6	8	0.0%
Bereavement - Widowed Parents Allowance	5	2	0.0%
Carers Allowance	38	92	0.2%
Child Benefit	48	88	0.3%
Child Tax Credits	293	598	1.9%
DLA - Care component	374	407	2.4%
DLA - Mobility component	309	327	2.0%
Employment and Support Allowance	5,091	5,858	33.0%
Housing Benefit	536	641	3.5%
Income Support	109	181	0.7%
Industrial Injuries Disablement Benefit	38	48	0.2%
Jobseekers Allowance	204	343	1.3%
Maternity Allowance	9	15	0.1%
Pension Credit - Guaranteed	46	100	0.3%
Pension Credit - Savings	17	30	0.1%
PIP - Daily living	4,069	4,413	26.4%
PIP - Mobility	3,568	4,126	23.1%
Social Fund - Budgeting Loan	14	22	0.1%
SWF - Community Care Grant ¹	56	334	0.4%
Social Fund - Cold Weather Payment	0	4	0.0%
SWF - Crisis Grant ²	25	231	0.2%
Social Fund - Funeral Payment	23	59	0.1%
Social Fund - Sure Start Maternity Grant	12	44	0.1%
Social Fund - Winter Fuel Payment	1	4	0.0%
State Retirement Pension	10	N/A	0.1%
Universal Credit	130	247	0.8%
Working Tax Credits	252	475	1.6%
TOTAL	15,429	19,011	
Total Devolved	8,556	9,820	55.5%
Total Reserved	6,792	8,626	44.0%

In 2016/17, CAB advisers provided representation for clients at 939 First Tier Social Security Tribunals and three Upper Tier Tribunals. In 58% of the cases the client's appeal was upheld, and in a further 3% was partially upheld.

¹ Figures for First and Second Tier Reviews

² Figures for First and Second Tier Reviews

Official figures indicate that of a total of 228,604 Social Security and Child Support tribunal receipts in Great Britain in 2016/17, 115,262 (50.4%) related to devolved issues, with the vast majority relating to disability benefits (112,888)³, broadly mirroring the proportions of CAB appeals issues. From this it would appear that it is likely that when these draft regulations come into force they will cover the majority of cases currently heard in the Social Security and Child Support Tribunal (SSCST), with the overwhelming majority of cases relating to disability benefits.

In addition to analysis of CAB cases relating to appeals and tribunals, to further inform this response CAS conducted an online survey with 20 CAB advisers with experience of tribunal representation in March 2018. Responses to the survey are indicated where relevant, and quotes in this response are taken from advisers who responded to the survey.

Establishing a Chamber of the First-Tier Tribunal for Scotland dealing with entitlement to social security and setting out its functions

Do you have any comments on the description of functions exercisable by the Social Security Chamber in considering entitlement to assistance under the Scottish social security system?

Do you have any other comments you wish to make on the draft regulations?

Do you have any comments on the power of the Social Security Chamber to consider all aspects of a determination which it is called upon to review?

Citizens Advice Scotland is broadly content with the description of functions set out the draft regulations. In particular, CAS is content that the Tribunal should have the power to consider all aspects of a decision it is called upon to review. In our survey of CAB tribunal representatives, 15 respondents (75%) felt that the Tribunal should have the power to look at all aspects of a determination, with three (15%) believing it should not.

Enabling a Tribunal to look at all aspects of a decision will preserve the inquisitorial role of the Tribunal, and may enable an individual to receive the correct entitlement by considering areas not disputed in the original appeal. This can lead to an individual receiving a higher award. However, as it may also result in an individual with an award in place receiving a lower one, it is recommended that this is clearly communicated to individuals and their representatives as part of the appeal process.

Additionally, enabling a Tribunal to look at all aspects of a decision may, in theory, allow it to consider elements of decisions, such as disputed liability for overpayments, or appeals against a decision that an application was invalid. CAS would recommend that guidance clarifies whether there are any restrictions to the

³ Official Statistics: Tribunals and gender recognition certificate statistics quarterly: October to December 2017 – Ministry of Justice, March 2018 <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-october-to-december-2017>

type of determination that can be considered in areas where the Social Security Bill is silent.

Adding the name of the social security chamber to the list of chambers into which the first-tier tribunal for Scotland is divided

Do you have any comments you wish to make on the draft First-tier Tribunal for Scotland (Chambers) Amendment Regulations?

Citizens Advice Scotland agrees that the name should be the Social Security Chamber.

Setting out rules of procedure for the first-tier tribunal for Scotland social security chamber

Do you have any comments on:

(a) any of the elements of the draft rules of procedure described at paragraphs 27 – 38 above;

(b) any other aspect of the draft rules of procedure?

In addition to comments made on specific proposals below, CAS agrees that all interpreters should be qualified and independent. This is an important provision, as CAB advisers have reported difficulty securing this in some cases.

With reference to (a), do you have any comments, in particular, on:

- ***the proposal that hearings will be recorded as a matter of routine?***
- ***the possibility of referral for a medical examination, and the circumstances in which this may happen?***

CAS agrees that Tribunal hearings should be digitally recorded as a matter of routine. 95% of CAB advisers who responded to our survey supported doing so, believing it would ensure full transparency, provides protection to the appellant, provides reassurance that the tribunal is fair, and that an accurate record is kept. Some individuals will prefer sensitive information not to be recorded however, so tribunals should make provision for appellants to request that certain parts of hearings are not recorded if they wish.

CAS also agrees that the Tribunal should be able to order an independent medical assessment of an applicant to be carried out. As part of our survey, 95% of CAB advisers who participated agreed with the Tribunal having the power to do so if necessary.

However, participants stressed that the independence of the assessment would be crucial, and that it should only be used if the Tribunal is unable to make a decision based on all other evidence available to them.

More widely, CAS supports a substantial reduction in the number of face-to-face assessments used in the disability benefits process. From extensive engagement with CAB clients and advisers, there is an extremely clear view that the existing PIP assessment process was not working for clients, and has resulted in some clients not being treated with dignity or respect; poor quality of decision-making; and people on DLA losing their award on reassessment.

We have recommended that much greater use is made of further evidence, including existing medical evidence, and evidence from people who know how a person's condition affects their daily life and mobility such as family, support workers and specialists such as Community Psychiatric Nurses. This approach should lead to more accurate initial decision making, and reduce the stress experienced by people applying for disability benefits.

CAS has conducted extensive research and made detailed recommendations on how medical evidence should be gathered in the new system, contained in our 'Burden of Proof' report (<https://www.cas.org.uk/publications/burden-proof>). However, in particular there are a number of ways that would encourage and support individuals to bring forward evidence throughout the process of applying for benefit and challenging a decision:

- It should be made clear throughout the process what evidence would be most useful in making a determination on an individual's case.
- The process for submitting evidence should be made clear to the individual throughout.
- It should be made clear at the redetermination stage that the individual can submit additional evidence.
- Letters should indicate clearly what further evidence is required, and how to submit it.
- Appellants should be given the option of submitting evidence in a variety of ways, including by post and in person, as well as online.

CAS warmly welcomes amendments made to the Social Security Bill which allow for all evidence gathered informing an initial decision and subsequent redetermination being passed from the Agency to the Tribunal, to avoid an appellant having to seek and submit evidence considered at an earlier stage.

In addition, routes should be established to enable evidence to be passed from the Agency to the Tribunal Service, if it is received after the redetermination has been made, to allow it to be considered. A model for this approach in the current system could be found in the arrangements between the Centre for Health and Disability

Assessments and DWP to forward on any evidence received with them after an assessment has been completed, for the purposes of making an ESA decision.

Would you welcome provision for supporters in cases before the Social Security Chamber to have the opportunity, with appropriate permission, to make representations during proceedings?

This proposal received a mixed response from the CAB advisers who responded to our survey. Those who welcomed it in particular felt that it would help to have someone who had knowledge of the impact of a condition on a person's daily life.

"Currently at the judge's discretion supporters may be allowed to speak after the Q&A. They do not always wish to do so and could instead appear as the representative's witness to be guaranteed a chance to speak. There would be no harm in making it mandatory for the Tribunal to offer the supporter a chance to speak if they wished to do so."

"In most cases supporters would have an in depth knowledge of the appellant's care and mobility needs so they would be able to provide additional detailed information for the Tribunal members to consider."

"Supporters who know clients can often give context to evidence."

"The supporter may know the client well (better than a representative) and be able to give a better understanding of the clients disability and their daily needs."

"If tribunals knew in advance 1.who was to be supporter (i.e. name) and 2. if supporter wished to be asked about an aspect of appellant's capacity they would reasonably know about."

"There are often times when clients are unable to articulate their needs and it would be useful where they are struggling that someone involved in their day to day life can [be] given more information where it is needed. There have been many occasions where I have observed supporters biting their tongues when clients are giving evidence as they have either gotten muddled with date or symptoms."

Other respondents however were concerned that in some cases the supporter's involvement may have a detrimental effect on the appeal.

"I disagree with this - I do not feel there is a need for supporters to have this opportunity."

"Would muddy the waters and almost certainly prejudice the appellant's case"

"Currently, those who accompany appellants such as family members or friends can provide verbal evidence in support of an appeal as well as mere moral support. The rules state that they shouldn't be involved in the entire hearing but instead are called in at the end to provide their submission. However, in practice, most Tribunal Judges allow them to be party to the whole hearing. Difficulties may arise if the supporter's

evidence contradicts that of the appellant's or if the rep feels that their contribution could be detrimental to the appeal."

"I would be wary of this. A representative has knowledge and the skills underpinning evidence. If a supporter was given the opportunity to make submissions without knowledge of the legal framework this could be deleterious to the appellant."

Other CAB advisers who took part in the survey had a more mixed view, or gave examples of caveats that would place on the role of supporters presenting evidence.

"I am a representative and I see my role as presenting the case. We often take a support worker into the hearing for moral support for the client and it is very helpful if they are allowed to provide additional information to the panel. Many Tribunals allow this. I would agree that allowing supporters to attend would help but rules would have to be clear that they cannot speak until invited to by the panel - otherwise it can interfere with the process."

"Perhaps limited to one supporter"

"Yes, those who care/provide support for the applicant should be given the opportunity to contribute and not those which POA [have Power of Attorney]."

On balance, therefore, whilst CAS would agree that supporters should be allowed to make representations during the proceedings, provided that clear guidance should be issued as to what or may or may not be an appropriate role, and what would be an appropriate permission to grant. This might include when the supporter is in a position to provide further evidence on the impact of a disability or condition, or to help an individual articulate this impact. Limitations might include ensuring there was not a blurring of lines between the role of a representative and that of a supporter.

Additionally, it would be helpful to consider the role of independent advocacy in the appeals process. Independent advocacy is an integral part of the advice and support process and has an important role to play in a well-functioning social security system. The holistic approach of the CAB network already provides a voice for disabled people, and amendments to the Social Security Bill will ensure that they are empowered to not only access the new system but challenge it where necessary.

Are there any other respects in which you would consider that the approach of the 2008 Rules should be departed from?

In general, CAB advisers who took part in our survey were relatively content with the current rules. As one participant put it *"I have been involved in benefits advice and represented hundreds of appeals over 20 years and found the process to be entirely fit for purpose."* There were however, a few other areas where CAB advisers felt changes should be made to the rules and procedures compared with the current system.

Withdrawal of case

CAS believes that, on balance, an individual's right to withdraw a case should not be contingent upon the tribunal's agreement – if an appellant decides to withdraw their case then the Tribunal should not be permitted to continue to consider the appeal.

65% of CAB advisers who responded to our survey believed that the individual should be able to withdraw their case without the Tribunal's agreement. 25% felt that the Tribunal should have to agree to a withdrawal, as is currently the case.

However, from additional comments and further discussions with advisers, a more nuanced picture emerged. The main concern for advisers was that allowing the theoretical possibility of a Tribunal continuing to consider an appeal that the individual wishes to withdraw may lead to a detrimental outcome for the client.

“Client's choice although it could be argued that not understanding the consequences of their actions could have some bearing on an informed decision”

“An appellant should be allowed to withdraw at any time, particularly if there is a chance that an award already granted could be at risk.”

“An individual should have the right to withdraw a case without the tribunal being in agreement as it is the client's case and benefit dispute though the client should be made aware of the consequences of withdrawing their case.”

“I have never experienced this as a tribunal representative. But I would not like anything to detrimentally affect my clients.”

“I have never seen a Tribunal refuse to withdraw a case and cannot see why they would refuse. A client should have the right to decide whether to proceed with their appeal. It is therefore not clear why this rule is in place - further information would be required on the type of reasons the Tribunal might have for refusing consent. Surely they cannot force a client to go ahead with a hearing if the client states they do not wish to do this?”

“In practice withdrawal of cases are requested and they are simply withdrawn. Permission is sought when a case is postponed or adjourned. In practice when it comes to a review of evidence and the whole case is before a rep decisions on a withdrawal or a withdrawal of representation is made in consultation with the appellant.”

“Individual should not need tribunal agreement”

Other respondents highlighted that they felt it would be appropriate for the Tribunal to have to agree to a person withdrawing their case to preserve the nature of the process.

“It would be rare for a tribunal not to agree to this but should be included as a safeguard to ensure that incorrect decisions can be corrected and preserve the inquisitorial role of the tribunal.”

“Having spent the money and time setting up a Hearing it is reasonable that the Tribunal has end say”

“In the interest of natural justice it may be in the client's interest to take guidance from tribunal”

Taking the above into consideration, whilst we recommend the requirement for a Tribunal to agree to a withdrawal should be removed, it is important that appellants are fully informed of their options in relation to continuing or withdrawing an appeal, such as ensuring individuals have access to independent advice throughout the process of making an appeal.

Timescales

A number of CAB advisers who responded to our survey spontaneously raised issues around the timing of hearings. CAB advisers raised the issue of delays in arranging a hearing.

“I think [the current Tribunal rules] work well but less waiting time between application and Hearing date would be a great improvement”

“Current system works reasonably well other than significant delays in scheduling hearings – often around 6 months after appeal is made. I realise that resolving this would require more funding but the waiting time is stressful for the clients.”

“Improve the waiting time of an appeal being heard.”

Two respondents however felt that the statutory notice period should be increased, or that further changes could be made to improve scheduling of hearings.

“The hearing notice timescale should be increased from at least 14 days to at least 28 days. Form SSCS1 [Notice of Appeal against a Decision of the Agency] should continue to give the option of receiving less notice.”

“Requests for postponements should be accepted when it is because clients are having to wait to get specialist advice and not knocked back because HMCTS have targets for the clearance time of appeals.”

Regardless of the timescales given as a statutory notice period, CAS would recommend that Scottish Courts and Tribunals is sufficiently resourced to prevent delays in social security Tribunal hearings being arranged.

Statement of reasons

The rules relating to requesting and issuing statements of reasons, which provide one month for either party to request, and one month for a judge to issue are

replicated in the rules for devolved appeals. CAS considers these arrangements broadly suitable. The current arrangements for providing a statement of reasons are broadly suitable. In the new system, they could be helpful for providing feedback to the Agency to aid continuous improvement of decision-making. However, in some current cases however, the DWP has delayed reinstating the benefit of a person who has successfully appealed a decision due to waiting to consider the statement of reasons. We would recommend that Tribunal decisions are enforced promptly, regardless of whether the Agency wishes to make a further appeal.

Other issues

In response to the survey, CAB participants raised a small number of other issues, mostly related to administrative issues.

“The only change I would suggest is to include provision for participation by electronic means.”

“DWP should be compelled to deliver revised decisions to clients AHEAD of tribunal hearing, not on the day as has happened on occasion for me as rep. To avoid client travelling and attending needlessly.”

“Process should allow for verbal decisions to be issued on the day. In remote hearing centres there is not always the facility to print a decision notice and so clients have to wait for it to be posted out. If a verbal decision could be issued the client could then wait for the more detailed decision notice without the stress currently experienced.”

Do you have any other comments which you would wish to make on the draft procedure regulations?

Compelling of witnesses

CAS is content for any witnesses to be cited to the hearing (either requested by either party, or by the Tribunal themselves), but not compelled to do so, which would seem an appropriate power.

Presenting Officers

CAS agrees that there should be no requirement for a Presenting Officer to attend the hearing on behalf of the decision-maker. It is currently only in the minority of cases that an Agency Presenting Officer appears, and a requirement for them to attend would risk further delays to appeals. There are currently increasing difficulties in arranging convenient appeal dates for appellants and their representatives. Additionally, it is only comparatively recently that the number of Presenting Officers was increased. CAB advisers have reported that in some cases, the presence of a Presenting Officer has led to the Tribunal taking on more of an adversarial, as opposed to an inquisitorial approach.

Setting out the composition of the first-tier tribunal for Scotland social security chamber and the upper tribunal for Scotland

(a) Do you have any comments on the proposed composition of the Social Security Chamber when dealing with an appeal against a determination of entitlement to assistance under the Scottish Social Security System?

(b) In particular, are you content with the default position that cases should be decided by only one member, namely the legal member, unless certain forms of assistance are under consideration?

Do you have any other comments you wish to make on the draft composition regulations?

Citizens Advice Scotland is content with the proposed composition of the Chamber for appeals. As part of our survey of CAB advisers, 80% of respondents agreed with the panel being comprised as follows:

- For Disability Assistance appeals – the tribunal must consist of a legal member, a member who is a registered medical practitioner, and a member who has a disability qualification.
- For Employment-Injury Assistance appeals – the tribunal must (unless directed otherwise) consist of a legal member and a member who is a registered medical practitioner.
- For all other assistance appeals, the Tribunal must consist at least of a legal member. This ensures that where a case would normally be decided by a panel, but only questions of law are raised, it can be heard by a legal member sitting alone or by a legal member along with other ordinary members whose experience is relevant to the matters raised within the case.

A few advisers commented that in some disability and employment injury cases the medical practitioner should have particular expertise in the appellant's condition – for instance a mental health specialist where an individual has mental health problems, or an Occupational Therapist for employment injury appeals.

Do you have any comments on the proposed composition of the Upper Tribunal for Scotland when deciding appeals from the Social Security Chamber to the Upper Tribunal?

CAS is content with the proposed composition for the Upper Tribunal, given that it would be hearing appeals on points of law only.

Setting out eligibility criteria for appointment of ordinary members of the first-tier tribunal for Scotland: medical and disability experience

Do you have any comments on the proposals regarding eligibility criteria for appointment of ordinary members of the First-tier Tribunal with medical and disability experience?

In particular:

(a) can you envisage a situation in which a person may have gained experience of the needs of people with disabilities, but which may not be covered by the criteria set out in the draft regulations?

(b) do you have any concerns about our proposed approach to identifying when a person will be considered to have a disability?

Do you have any other comments you wish to make on the draft eligibility for appointment regulations?

On the whole, CAS is broadly content by the proposed eligibility criteria for tribunal members with a medical and disability qualification. For medical members, as outlined elsewhere in this response, it would be desirable for Tribunal members with expertise in particular areas to be assigned to cases where their specialism is particularly relevant. For instance, for cases where the appellant has mental health issues, having a panel member who specialises in mental health issues has the potential to lead to better outcomes.

With regard to the member with disability experience, whilst CAB advisers who participated in our survey were broadly content with the proposed qualifications required, a number raised comments on what should be given most weight in making appointments. Most commonly, participants felt that having experience in working with a broad range of disabilities was more important than having personal experience of being disabled.

“Must have sufficient knowledge gained through experience of others with a range of disabilities - not solely their own disability as they may make assumptions based upon their personal experience.”

“A member of the panel should have experience of working with people who have disabilities or knowledge of disability benefits. A formal qualification should not necessarily be a requirement. A person having a disability is not necessarily required as someone may have the same condition but different symptoms.”

“I do not believe it is enough to have a disability or have cared for someone with a disability – the member should have a vast knowledge of all various types of disabilities. For example – physical and mental disabilities affect people in very different ways. Somebody may not have a full understanding if they only have experience in one or the other.”

“The member with a disability may only know information on a particular disability and not necessarily know information on other disabilities. Especially if the member has a physical disability they may not realise on how severe some mental disabilities can be. It would be best for the member to have a medical background e.g. nurse, etc.”

“I think it crucial that the DQM have either experience working/caring with persons with a disability. In terms of a person with a disability I think it would depend on the nature of the disability; however in both cases adequate and appropriate training should be given.”

“I think that a professional disability qualification as well as experience should be mandatory. Merely having experience (which is in itself a vital component) does not mean someone can carry out an inquisitor role effectively.”

A smaller number of others however felt that experience of living as a disabled person was most important.

“Focus should ideally be on carers or someone who has a disability themselves.”

“Lived experience is the most important I think.”

Others made other comments about the need for formal qualifications.

“Official qualification not required. Skills in other fields useful but full understanding of disability important.”

“Applications should be considered on the merits of an individual and not be restricted by a few bullet points.”

“Some disability members can be quite judgmental and have a poor attitude towards the appellant.”

Setting out rules of procedure to be applicable to the upper tribunal for Scotland when dealing with cases under the current Social Security (Scotland) Bill

Do you have any comments on:

(a) any of the elements of the draft rules of procedure described at paragraphs 54 – 61 above?

(b) any other aspect of the draft rules of procedure?

Are there any other elements of the rules applicable to social security proceedings in the Upper Tribunal which you think should be replicated in the draft rules for the Upper Tribunal for Scotland, and have not been?

Conversely, are there any elements of the rules applicable to social security proceedings in the Upper Tribunal which have been replicated in the draft rules for the Upper Tribunal for Scotland, and which you do not think should be so replicated?

Do you have any other comments you wish to make on the draft procedure regulations for the Upper Tribunal?

In line with our response above, CAS believes that, on balance, an individual's right to withdraw a case should not be contingent upon the Upper Tribunal's agreement. However, it is important that in these situations that appellants are fully informed of their options in relation to continuing or withdrawing an appeal.

On balance, CAS agrees that the time limits for appeals to the Upper Tribunal should remain the same as in the present system. 60% of respondents agreed with this, although a significant minority felt that the time limits should be extended from 30 days to allow an appellant to seek specialist advice which can be difficult within the current timescales.

CAB advisers who took part in the survey were relatively content with the rules of procedure for the Upper Tribunal. One respondent suggested that the decision on whether a case should be allowed to proceed to the Upper Tribunal should always be made by an independent First-Tier Tribunal judge, rather than by the judge who presided over the original First-Tier Tribunal.