This briefing looks at how changes to the system for supporting tribunals in England and Wales (and tribunals in Scotland dealing with reserved matters) are impacting on the justice system in Scotland. Specific issues include:

- the creation of a single service, the Tribunals Service, to support the majority of tribunals operating in England, Wales and in relation to reserved issues in Scotland
- changes to the structure, appointments system and administration of English, Welsh and reserved tribunals operating in Scotland brought about by the Tribunals, Courts and Enforcement Act 2007
- changes to the jurisdiction of the Court of Session to support the new tribunals administration
- the work of the Administrative Justice Steering Group in assessing the current performance of Scottish tribunals and producing options for future development
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EXECUTIVE SUMMARY

This briefing looks at how changes to the system for supporting tribunals in England and Wales (and reserved tribunals in Scotland) are impacting on the justice system in Scotland. Tribunals form one part of the administrative justice system. They are intended to provide a more accessible and user-friendly forum for resolving disputes than the courts.

Most tribunals have been created by individual pieces of primary legislation, resulting in a complex variety of administrative arrangements providing little coherence between tribunals. Some tribunals operating in Scotland deal with reserved issues while others deal with issues which are devolved to the Scottish Parliament. Tribunals may be supported by UK Government departments, Scottish Government directorates or local authorities.

REFORM

Over the past eight years, there has been significant reform of the systems supporting tribunals in England and Wales. This has included the creation of one organisation to provide administrative support to most tribunals operating in England and Wales, and on reserved matters in Scotland. There has also been legislation to overhaul the structure of tribunals and to introduce an independent appointments system for tribunal members.

There is concern that these developments have not been matched in Scotland. In particular, there is concern that users of Scottish tribunals dealing with devolved matters may not receive the same level of service. The Administrative Justice Steering Group was set up in 2006 with the support of the then Scottish Executive in order to consider this and other issues.

The “Tribunals for Users” report

Sir Andrew Leggatt authored a 2001 report, Tribunals for Users: One System, One Service. It made wide-ranging recommendations in relation to tribunals operating in England and Wales (and, after consultation, those covering reserved matters in other parts of the UK). Its main concern was improving the user-friendliness of tribunals, and it emphasised the importance of: tribunals which were independent; tribunal members who were well trained; and a streamlined administrative system which cut out duplication.

The Tribunals Service

The Tribunals Service was created in 2006 with over-arching responsibility for the administration of most tribunals operating in England and Wales, as well as a number covering reserved issues in Scotland. Its functions include providing information to members of the public wishing to use a tribunal, creating procedural rules, managing staff and the scheduling of tribunal cases.
The Tribunals, Courts and Enforcement Act 2007

The Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) created a new structure for English, Welsh and reserved tribunals, in line with that recommended by the Tribunals for Users report. The new structure features first and upper tier tribunals divided into themed chambers, gathering together tribunals with similar subject areas. As a general rule, initial cases are heard by a first tier tribunal, with a route of appeal to an upper tier tribunal and then to the Court of Appeal or, in Scotland, the Court of Session. It also created an independent appointments system for tribunal members working for reserved tribunals.

The Court of Session

The 2007 Act enables certain judicial review cases to be transferred from the Court of Session to an upper tier chamber of the Tribunals Service. Cases can be transferred at the discretion of the court. However, under section 20(1) of the 2007 Act, a case must be transferred if it covers certain reserved areas, to be specified by Act of Sederunt. Some commentators have noted that removing cases from the jurisdiction of the Court of Session could weaken its role in providing oversight to the justice system and result in contradictory decisions, making the law more complex.

The 2007 Act also limits the situations in which an appeal can be taken from upper-tier tribunals to the Court of Appeal in England and Wales. The 2007 Act is silent in relation to the Court of Session. However, the same restrictions to the Court of Session’s discretion to hear an appeal have since been introduced by Act of Sederunt. Concern had been raised about the use of secondary legislation to effect what may be a significant constitutional change. It has been argued that there is insufficient pressure of business on the Scottish courts to justify limiting access to justice in this way.

THE CURRENT SITUATION IN SCOTLAND

The Administrative Justice Steering Group was tasked with reviewing the administrative justice system in Scotland, taking into account the impact of UK-wide reforms. Its interim report, Options for the Future Administration and Supervision of Tribunals in Scotland, assesses the current tribunals system against the recommendations of the “Tribunals for Users” report. The recommendations are summarised under three headings – independent and impartial processes, an independent and skilled judiciary, and a coherent system.

1. Independent and Impartial Processes

Some tribunals in Scotland are funded directly by their sponsoring departments in the Scottish Government. Rules and procedures may differ and may also be under the influence of the sponsoring department. The report concludes that most could not be said to be independent on the criteria listed by Sir Andrew Leggatt.

The Education Appeal Committee is a much discussed example of alleged poor practice. Research from both the Scottish Committee for the Council on Tribunals and the Scottish Executive has highlighted working practices which fail to demonstrate its independence from the local authority which issued the decisions being appealed. More recently, the Fit For Purpose
Complaints System Action Group has recommended that responsibility for Education Appeal Committees is transferred from local authorities to an independent body.

2. An Independent and Skilled Judiciary

Tribunal members appointed to reserved tribunals under the remit of the Tribunals Service in Scotland go through a judicial appointments procedure. However, most other tribunal members are appointed through the public appointments system.

In relation to training, there is no central resource in Scotland, meaning that training is left to the discretion of individual tribunals. Scottish Government research into the training needs of tribunal members concluded that some shared training for devolved tribunals was essential in order to support good practice and to achieve best value (Ross 2009).

3. A Coherent System

Sir Andrew Leggatt saw advantages to having one administration for all tribunals, including a single point of contact for the public, more opportunities for effective case management, more coherent development of the law and better use of resources. As discussed above, there appears to be duplication of effort among devolved Scottish tribunals around training, and it is likely that this is replicated in relation to IT development and administration. Scottish users may also suffer from a lack of awareness of their options in relation to redress through a tribunal.

The Way Forward

The interim report of the Administrative Justice Steering Group put forward five options for tribunals in Scotland. The Scottish Government has since stated that its preference, if deliverable, is for a Scottish Tribunals Service which will cover all tribunals operating in Scotland. It plans to consult on how this could work in practice.

The Final Report of the Administrative Justice Steering Group

The Administrative Justice Steering Group produced a final report in June 2009. It looks at administrative justice in Scotland more broadly. It highlights problems with initial decision-making, a number of barriers to redress and a failure to learn from previous mistakes.

The report makes some specific recommendations in relation to tribunals. These include: a clear statement of tribunals' inquisitorial role; consolidation of policy development in relation to tribunals in the Scottish Government’s Justice Directorate; making appointments through the Judicial Appointments Board for Scotland; the creation of a Scottish Tribunals Service to support devolved, and potentially reserved, tribunals; and rationalisation of procedural rules for devolved tribunals.
INTRODUCTION

The Administrative Justice and Tribunals Council (AJTC), which is responsible for overseeing the delivery of administrative justice in the UK, gives the following description of administrative justice (from www.ajtc.gov.uk):

“Government regulates various aspects of our everyday lives, making decisions in relation to individual people. ‘Administrative justice’ includes the procedures for making such decisions, the law that regulates decision-making, and the systems (such as the various tribunals and ombudsmen) that enable people to challenge these decisions.”

Tribunals form one part of the administrative justice system. They are intended to provide a more user-friendly forum for resolving disputes than the courts. Tribunals should adopt an “inquisitorial” approach, supporting parties to make their case by asking questions and offering information. This is in contrast to the “adversarial” approach taken by the courts, where it is up to the parties’ representatives to make any relevant points in relation to their case.

Because tribunals adopt an inquisitorial approach, it should be possible for citizens to present their own case without the need for representation. However, there is evidence that those who are represented, or receive advice prior to a hearing, can have higher rates of success1. Indeed, legal aid is available for some more complex tribunal forums (such as the Employment Appeal Tribunal) in recognition of the advantages of representation.

The vast majority of tribunals deal with disputes between the individual and the state, such as in relation to social security benefit decisions or tax assessments. The Employment Tribunal, which deals with disputes between employees and their employers, is an example of a citizen versus citizen tribunal, as is the Private Rented Housing Panel, which deals with disputes between tenants and their landlords.

Most tribunals have been created by individual pieces of primary legislation, resulting in a complex variety of administrative arrangements providing little coherence between tribunals. The interim report of the Administrative Justice Steering Group2 (2008) lists (at appendices 3 and 4) a total of 42 tribunals operating in Scotland. There are 25 tribunals operating on reserved issues, 11 of which were at the time of the report administered by the GB-wide Tribunals Service and four of which were funded by the Scottish Government. In addition, there were 17 tribunals with a wholly Scottish jurisdiction, 14 of which existed before devolution. The Scottish Committee of the AJTC (2009) conducted a similar audit in relation to their response to the first report. They found 48 tribunals operating in Scotland, 20 of which operated in a devolved context.

Oversight of the tribunals system is provided by the AJTC. It draws its membership from lawyers, academics, ombudsmen and lay-people. Its Scottish Committee is responsible for

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1 The evidence in relation to representation and pre-hearing advice is discussed in detail at paragraphs 7.74 to 7.77 of the Administrative Justice Steering Group’s report “Administrative Justice in Scotland - the way forward” (2009).
2 The work of the Administrative Justice Steering Group is considered later in this briefing.
promoting good practice across all the tribunals operating in Scotland, regardless of whether they deal with reserved or devolved issues.

The tribunals operating in Scotland include social security and employment tribunals, which between them handle over 40,000 Scottish cases every year. They also include tribunals which may not meet in Scotland from one year to the next, such as the Horse Betting Levy Appeal Tribunal. Examples of devolved tribunals include the Mental Health Tribunal for Scotland, the Lands Tribunal for Scotland and the Children's Hearings system. Some tribunals share resources and venues, whilst others operate very much on their own with varying rules and procedures. Some are funded by Scottish Government directorates, some by UK Government departments and some by local authorities. Appeal routes may also differ depending on the tribunal.

REFORM

There has been significant recent reform of the systems supporting tribunals in England and Wales (and reserved tribunals operating in Scotland). This has included the creation of one organisation to provide administrative support to most tribunals operating in England and Wales, and on reserved matters in Scotland. There has also been legislation to overhaul the structure of tribunals and to introduce an independent appointments system for tribunal members.

There is concern that these developments have not been matched in Scotland. In particular, there is concern that users of Scottish tribunals dealing with devolved matters may not receive the same level of service. The Administrative Justice Steering Group was set up in 2006 with the support of the then Scottish Executive in order to consider this and other issues. The purpose of the group is to report to the Scottish Government on the state of the administrative justice framework in Scotland, taking account of UK-wide reforms.

The Administrative Justice Steering Group produced an interim report in 2008, which put forward several options for better integrating Scotland’s tribunals. Its findings are discussed in detail below. The Scottish Government has since announced that their preferred option, if deliverable in practice, is the creation of a Scottish Tribunals Service dealing with all tribunals operating in Scotland. The Government intends to consult on these proposals. The Administrative Justice Steering Group produced a final report in June 2009 looking at the administrative justice system in Scotland more broadly.

This briefing has been produced to highlight the ongoing work in relation to tribunal reform and its impact on administrative justice in Scotland. Key issues include:

- whether the adjustments to the role of the Court of Session which have been made to accommodate the development of the new Tribunals Service (considered below) are in the best interests of administrative justice in Scotland

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3 Both social security and employment tribunals are administered by the Tribunals Service, which is discussed later in this document. Appeals in relation to social security decisions are heard by the Tribunals Service’s “social entitlement” division.
• whether Scottish tribunals are seen to be sufficiently independent of government, both in relation to the way they are administered and in the way tribunal members are appointed
• whether tribunal members in Scotland receive sufficient training to support tribunal users to present their cases effectively and to weigh up evidence and reach reasoned decisions
• whether would-be tribunal users in Scotland are disadvantaged because there is no single point of contact to find out information about their rights
• whether a lack of co-ordination means that there is unnecessary duplication of effort and expense in the Scottish tribunals system

THE “TRIBUNALS FOR USERS” REPORT

In 2001, the Lord Chancellor gave Sir Andrew Leggatt the remit of reviewing the performance of tribunals operating in England and Wales (including a number which also operated in Scotland) to ensure that they were fair, efficient and effective. His report, *Tribunals for Users: One System, One Service* (2001), put user-friendliness at the heart of the system. This led to wide-ranging recommendations designed to take the plethora of haphazardly-developed tribunals and forge them into one streamlined delivery system which could command a level of respect equal to that of the courts. In order to create a user-friendly system, his recommendations emphasised the importance of:

• tribunals which were – and were seen to be – independent of their sponsoring departments
• tribunals members who were well trained in the interpersonal skills necessary to ensure users were supported to present their case
• an administration which cut out unnecessary duplication of effort and cost, shared good practice and ensured that law was developed in a coherent fashion

To deliver this, he proposed that all tribunals in England and Wales were brought under one administration, The Tribunals Service (under the remit of the then Lord Chancellor), and that appointments of tribunal members were made through the judicial appointments process. He further recommended that tribunals were split into themed divisions, with a clear route of appeal to an appellate division and then to the Court of Appeal. He noted the need for training to be made a priority and for increased funding so that generic training could be provided by the Judicial Studies Board (which already had responsibility for training the judiciary in England and Wales).

Leggatt’s recommendations covered tribunals operating in England and Wales and, after consultation with the devolved administrations, those tribunals which operated in a reserved context in other parts of the UK. However, Leggatt noted the tension between the need for coherence across the tribunals system and Scotland’s devolved responsibility for justice. The report stated (paragraph 11.21):

“If the key consideration is to preserve the coherence of the Scottish legal system the most logical way to deal with tribunals in Scotland would be for the Scottish Minister for Justice to have responsibility for delivery of justice through tribunals as he does for civil
justice through the courts, taking account of the outcome of this review and consulting with the other administrations in the UK.”

THE TRIBUNALS SERVICE

The Tribunals Service was created in 2006 as the overarching body with responsibility for most tribunals dealing with English, Welsh and reserved matters, including a number of tribunals operating in Scotland. It initially covered a core of tribunals which came under the responsibility of the Department for Constitutional Affairs (now the Ministry for Justice), with the intention that other tribunals would be brought within its remit on a phased basis.

In 2007/08, the Tribunals Service had a budget of £305 million and 2,978 staff (Tribunals Service 2008, pages 42 and 72). Its mission is to “establish (...) a unified administration for the tribunals system”, including the following functions:

- providing information to members of the public wishing to use a tribunal
- creating procedural rules and practices
- liaison with stakeholders
- management of tribunal members and administrative staff
- ensuring tribunal documents are processed and distributed
- scheduling tribunal cases appropriately
- ensuring the availability and, where appropriate, maintenance of venues

Although training for tribunal members is provided independently, the Tribunals Service co-ordinates its provision.

THE TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

The Tribunals, Courts and Enforcement Act 2007 created a new structure for English, Welsh and reserved tribunals, in line with that recommended by Sir Andrew Leggatt. The 2007 Act was the subject of a Legislative Consent Motion in the Scottish Parliament, in relation to: (a) the powers of the Administrative Justice and Tribunals Council and the Criminal Injuries Compensation Appeals Panel; and (b) matters relating to the appointment of tribunal members and judicial review. The motion was considered by the Justice 2 Committee in its 1st Report, 2007 and debated by the Scottish Parliament on 31st January 2007. Members were broadly supportive of the bill’s content.

The new structure features first and upper tier tribunals divided into themed chambers, gathering together tribunals with similar subject areas. As a general rule, initial cases are heard by a first tier tribunal, with a route of appeal to an upper tier tribunal and then to the Court of Appeal or Court of Session, although it will be possible for complex cases to be heard at first instance by an upper tier tribunal. So far, first tier chambers with the following jurisdictions have been created:
• **social entitlement** covering social security, asylum support and criminal injuries compensation tribunals (from 3 November 2008)

• **health, education and social care** covering social care, mental health and special educational needs tribunals for England and Wales (from 3 November 2008)

• **war pensions and armed forces compensation** covering that tribunal for England and Wales (from 3 November 2008)

• **tax and duties** covering the general and special commissioners of income tax, the VAT and duties tribunal and the section 704/706 tribunals \(^4\) (from 1 April 2009)

In addition, upper tier chambers with the following jurisdictions have been created:

• **administrative affairs** covering appeals from the social entitlement, health and war pensions first tier chambers, as well as judicial review work delegated from the High Court and the Court of Session (from 3 November 2008)

• **finance and tax** dealing with tax and duties appeals and, in the future, other tax business which would previously have gone to the High Court or the Court of Session (from 1 April 2009)

• **lands** dealing with the work of the Lands Tribunal for England and Wales (from 1 June 2009)

The intention is to add more chambers to encompass the tribunals already under the Tribunals Service’s remit, while also maintaining a flexible structure to allow currently independent tribunals to be brought into the organisation and to accommodate any new rights of review which may be created by legislation.

The Tribunals, Courts and Enforcement Act 2007 also created an independent appointments system for tribunal members working for reserved tribunals, so that they are appointed using the same system as that used for the judiciary in England and Wales. This provides for a degree of independence between government (the decisions of which are being considered by tribunals) and tribunal members.

**THE COURT OF SESSION**

**Judicial Review**

The Tribunals, Courts and Enforcement Act 2007 enables certain judicial review cases to be transferred from the Court of Session (and the High Court in England and Wales) to an upper tier chamber of the Tribunals Service. The [Explanatory Notes](#) to the 2007 Act state that this will allow parties to the case to benefit from the specialist expertise of the tribunal (paragraph 112).

\(^4\) The section 704 tribunal was constituted under section 704 of the Income Tax Act 2007 (c. 3) and the section 706 tribunal under section 706 of the Income and Corporation Taxes Act 1988 (c. 1). Both tribunals deal with tax avoidance in relation to stock market transactions.
Cases can be transferred at the discretion of the court. However, under section 20(1) of the 2007 Act, a case must be transferred if it covers certain reserved areas, to be specified by Act of Sederunt. The Act of Sederunt (Transfer of Judicial Review Applications from the Court of Session) 2008 (SSI 2008/357) has introduced one such class of cases – those which seek to challenge a procedural decision of a first-tier tribunal. In such circumstances, a judicial review application to the Court of Session will be automatically transferred to an upper-tier tribunal for consideration.

Concern has been expressed about the implications of these changes for administrative law in Scotland (Mitchell 2008 and Lord Clyde 2008). Commentators have noted that removing cases from the jurisdiction of the Court of Session could weaken its role in providing oversight to the justice system and result in contradictory decisions, making the law more complex.

An example of the potential effects of limiting the powers of the Court of Session in this way is given in a UK Borders Agency consultation entitled Immigration appeals: fairer decisions; faster justice (2008). Current proposals (UK Borders Agency 2009) would enable a significant proportion of asylum and immigration judicial reviews to be removed from the jurisdiction of the Court of Session at some point in the future. In 2006, immigration judicial reviews constituted 44% of judicial review business in the Court of Session (Scottish Civil Courts Review 2007, page 102). Mitchell (2008) argues that the loss of such a significant body of work would impact on the Court of Session’s ability to function as an administrative court.

It should be noted that Sir Andrew Leggatt in the Tribunals for Users report (2001) recommended that the option of judicial review be expressly removed by statute for both first and upper tier tribunals. Regarding first tier tribunals, his reasoning was that there would now be a clear route of appeal to an upper chamber, allowing the law to be developed in a consistent manner without the need for supervision from the courts (paragraph 6.35). In relation to the upper tier, he argued that subjecting the decisions of upper tier tribunal members, who in most cases would be senior judges, to the supervisory jurisdiction of equally ranked judges in the High Court was not appropriate (paragraph 6.32). He also argued that excluding judicial review would enable the tribunals system to develop the law free from interference from the courts, in a manner which preserved its distinct, user-friendly approach (paragraph 6.34).

Appeals

The Tribunals, Courts and Enforcement Act 2007 Act limits the situations in which an appeal can be taken from upper-tier tribunals to the Court of Appeal in England and Wales. Section 13(6) of the 2007 Act enables the Lord Chancellor to require that permission to appeal to the Court of Appeal will not be granted unless the case raises an important point of principle or practice, or there is some other compelling reason for the court to hear the case.

The 2007 Act is silent in relation to the Court of Session’s ability to hear appeal cases. However, Act of Sederunt (Rules of the Court of Session No. 5) (Miscellaneous) 2008 (SSI 2008/349) amends the rules of the Court of Session to place the same limits as those experienced by the Court of Appeal in England and Wales on its ability to hear appeal cases from the upper-tier tribunal. This has the effect of limiting the discretion the Court of Session had previously enjoyed in deciding whether it should hear an appeal.

5 Acts of Sederunt are made by Court of Session judges and create the rules of court in Scotland.
Mitchell (2009) raises concerns about the use of secondary legislation to effect what he argues is a significant constitutional change. He further states that there is insufficient pressure of business on the Scottish courts to justify limiting access to justice in this way. The Scottish Parliament’s Subordinate Legislation Committee considered some of these issues in its 41st Report of 2008 and concluded (paragraphs 10-17) that SSI 2008/349 made unusual or unexpected use of the powers conferred in relation to Acts of Sederunt because it has the effect of limiting access to justice.

THE CURRENT SITUATION IN SCOTLAND

In 2006, the Scottish Public Services Ombudsman and the Scottish Committee of the Council on Tribunals (now the AJTC), with the support of the then Scottish Executive, established an Administrative Justice Steering Group. The group, chaired by Lord Philip, was tasked with reviewing the administrative justice system in Scotland, taking into account the impact of the UK-wide reforms discussed above.

Its interim report, Options for the Future Administration and Supervision of Tribunals in Scotland, assesses the current tribunals system against the recommendations of Sir Andrew Leggatt. His recommendations are summarised under three key issues – independent and impartial processes, an independent and skilled judiciary, and a coherent system. These three issues are considered in turn below.

1. INDEPENDENT AND IMPARTIAL PROCESSES

Sir Andrew Leggatt noted in his Tribunals for Users report (2001, paragraph 3)

“Yet nowadays when a department of state may provide the administrative support for a tribunal, may pay the fees and expenses of tribunal members, may appoint some of them, may provide IT support (often in the form of access to departmental systems), and may promote legislation prescribing the procedure which it is to follow, the tribunal neither appears to be independent, nor is it independent in fact.”

Some tribunals in Scotland are funded directly by their sponsoring departments in the Scottish Government. Rules and procedures may differ and may also be under the influence of the sponsoring department. Most could not be said to be independent on the criteria listed by Sir Andrew Leggatt. A further issue is whether they would be considered to be adequately independent in terms of the right to a fair trial under the Human Rights Act 1998 and the European Convention on Human Rights.
Education Appeal Committees

One much discussed example of alleged poor practice in relation to independence is the Education Appeal Committee in Scotland. This committee hears appeals against local authority decisions to exclude pupils or to refuse a placing request to a different school. Education Appeal Committees are the responsibility of individual local authorities so practices differ from area to area.

Membership is made up of members of a local authority’s education committee (who are generally councillors), parents and people who are not employed by the authority but have an understanding of education within the authority (such as retired teachers). It is usual to have three, five or even seven members present at a meeting and Councillors may outnumber other members. Generally, the committee uses local authority accommodation to hold meetings.

The Scottish Committee for the Council on Tribunals issued a report, Education Appeal Committees in Scotland in 2000. The report raised a number of concerns around venues, procedures, administrative support and committee deliberations. In relation to deliberations, the report noted that some decisions they had witnessed were taken by a show of hands, with no indication that evidence had been weighed up or that the statutory framework within which the committee operates was being considered. The main concerns were the need for committees to have working methods which emphasised their impartiality, and the importance of training to allow committee members and clerks to perform their functions effectively.

The then Scottish Executive followed this up with research in 2004, Appellants’ experiences of Education Appeals Committees, which highlighted a number of undesirable practices in relation to Education Appeal Committees. These included allowing solicitors representing the council’s case to sit at the same side of the table as the committee members; allowing council representatives to remain in the room while a decision was being reached; and, on one occasion, hearing a number of appeals together because they were running out of time. The report found “a serious imbalance of power between the local authority and appellants” (Executive Summary).

The then Scottish Executive consulted on reforming practices around Education Appeal Committees in 2006. This work has not yet been taken forward. However, the Fit for Purpose Complaints System Action Group has since recommended that responsibility for Education Appeal Committees is transferred from local authorities to an independent body.

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6 The Scottish Committee for the Council on Tribunals was the predecessor to the Scottish Committee of the Administrative Justice and Tribunals Council. The new name and remit were created by the Tribunals, Courts and Enforcement Act 2007.

7 The Fit for Purpose Complaints System Action group was set up by the Scottish Government in response to the Crerrar Review of regulation, audit, inspection and complaints handling. Its remit was to simplify complaints procedures across the public sector and to put forward proposals for oversight of the complaints system, with specific consideration of the role of Scottish Public Sector Ombudsman.
2. AN INDEPENDENT AND SKILLED JUDICIARY

There is no streamlined system for tribunal appointments in Scotland. Those appointed to reserved tribunals in Scotland, operating within the Tribunals Service, go through an independent procedure described above. However, most other tribunal members are appointed through the public, as opposed to judicial, appointments system, by Scottish Ministers or local authorities. This system may be particularly open to challenge under human rights legislation because of a potential link between the tenure of the post and the favour of Scottish Ministers.

A further issue of concern to both Sir Andrew Leggatt and the Administrative Justice and Tribunals Council is the provision of training. Their view is that much of the training required is on generic subjects, such as weighing evidence and supporting users to make their case. They argue that this should be nationally co-ordinated. This function is carried out by the Judicial Studies Board for England and Wales in relation to the Tribunals Service. There is no central resource in Scotland, meaning that training is left to the discretion of individual tribunals.

The Scottish Government has recently conducted research into the training needs of tribunal members, entitled Tribunal Training in Scotland (2009). The report found a divergence in experience between reserved tribunals and devolved tribunals and concluded (paragraph 14):

“Some sharing of effective training methods for devolved tribunals is essential in order to disseminate good practice and, since most training activities are funded by the public purse, to achieve best value.”

3. A COHERENT SYSTEM

By recommending the creation of one Tribunals Service to oversee the administration of most tribunals in England and Wales, Sir Andrew Leggatt was quite consciously creating an arm of justice to equal the courts. He felt this was the best way of ensuring that tribunals garnered the respect and resources they deserved. Among the advantages to the user of a single, “coherent” system are a single point of contact and more opportunities for effective case management to minimise delays and maximise flexibility.

His system, as enacted through the Tribunals, Courts and Enforcement Act 2007, also enables tribunal members to be assigned to multiple tribunals depending on their expertise (“cross-ticketing”). He argues that this allows tribunal members to have a broader overview of the issues appearing before tribunals and prevents the development of law “in silos”. He also noted the economies of scale that a single system would bring around administrative support, IT, training and recruitment.

As discussed above, there appears to be duplication of effort and cost among devolved Scottish tribunals around training, and it is likely that this is replicated in relation to IT development and administration. Scottish users may also suffer from a lack of awareness of their options in relation to redress through a tribunal. Without any central point of contact, it may be more likely that potential users are left to work out for themselves whether there is a tribunal appropriate to their situation and what procedures they need to follow to raise their case.
THE WAY FORWARD

The Administrative Justice Steering Group put forward five options for tribunals in Scotland:

- retain the status quo
- improve mechanisms for co-operation between those tribunals which form the Tribunals Service and devolved Scottish tribunals
- bring all tribunals, including devolved Scottish tribunals, within the remit of the Tribunals Service
- create a Scottish Tribunals Service to support devolved Scottish tribunals
- create a Scottish Tribunals Service to support all tribunals in Scotland, including those currently administered by the Tribunals Service

The Scottish Government asked the Scottish Committee of the AJTC for its observations in relation to these options, with the Scottish Committee concluding that a Scottish Tribunals Service supporting all the tribunals operating in Scotland provided the best option for users in Scotland. However, the committee noted that there would be significant practical difficulties to achieving this option, meaning that a Scottish Tribunals Service supporting devolved Scottish tribunals may have to be an interim or compromise solution (Scottish Committee of the AJTC 2009).

The Scottish Government has since stated that its preference, if deliverable, is for a Scottish Tribunals Service which will cover all tribunals operating in Scotland. (Consumer Focus Scotland 2009). It plans to consult on how this could work in practice.

THE FINAL REPORT OF THE ADMINISTRATIVE JUSTICE STEERING GROUP

The Administrative Justice Steering Group produced a final report in June 2009, *Administrative Justice in Scotland – The Way Forward*. It looks at administrative justice in Scotland more broadly. Its key concern is the importance of getting decisions right first time. It concludes that too many of the initial decisions made by public sector organisations in Scotland are unsound; that citizens experience a number of barriers when it comes to redress (including confusion about the options available); and that not enough is being done to ensure that learning from complaints is used to improve frontline services.

The report emphasises the role of public sector managers in ensuring frontline staff have sufficient training and resources to make sound decisions and to put in place systems which allow learning from mistakes. In relation to redress mechanisms, the report makes a raft of recommendations around simplification, rationalisation, adequate support in terms of advice and representation for citizens and the advantages of a “one-stop shop” approach, including a national signposting service, wherever possible.

The report draws some specific conclusions in relation to tribunals. It notes that, while there may be policy concerns about the independence of tribunals, in practice citizens consider tribunals to be independent forums (paragraph 7.63). However, there is considerable concern around
citizens’ ability to access and use tribunals. Research shows that both representation and pre-hearing advice can improve outcomes for tribunal users (paragraphs 7.74-7.77). However, free services offering advice and/or representation are not universally geographically available and paid-for services may create a cost barrier (paragraphs 7.66 and 7.68).

The report sets out a number of possible ways forward for tribunals, including:

- a clear statement of tribunals’ inquisitorial, rather than adversarial, role
- that a two-tier tribunal system (as is in place for the Tribunals Service) may not be appropriate for Scotland, due to the smaller jurisdiction generating fewer cases and significantly fewer appeals
- a guarantee in statute in relation to the independence of tribunals
- consolidating policy development in relation to Scottish tribunals in the Scottish Government’s Justice Directorate to provide additional separation between devolved tribunals and their sponsoring government departments
- making appointments to tribunals through the Judicial Appointments Board for Scotland (which carries out this task in relation to the judiciary) in order to emphasise the independence of tribunal members and to streamline aspects of the process such as terms and conditions of appointment
- establishing a Scottish Tribunals Service to provide administrative support to devolved (and potentially reserved) tribunals operating in Scotland
- a sharing of expertise and resources between a Scottish Tribunals Service and tribunals in other UK jurisdictions in relation to the training of tribunal members
- rationalisation of the procedural rules for devolved tribunals (this has already happened to a large extent for those tribunals under the supervision of the Tribunals Service)
- consideration of how alternative dispute resolution processes, such as external review, can be integrated into the process of considering a tribunal case
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