Introduction

The Commission welcomes the opportunity to comment on the Tribunals (Scotland) Bill. The Commission welcomes the aims of the Bill to increase the independence of the tribunal system from the Scottish Government and to provide, overall, a more coherent and consistent system. Having considered the specific measures of this Bill, we would like to provide some general comments on the independence and impartiality of tribunals and access to justice. The Commission hopes these brief comments are useful and provide a framework for the approach to changes to the tribunal system, particularly as seen in the context of the ongoing process of changes to the justice system as a whole.

An independent and impartial tribunal

Both the European Convention on Human Rights (ECHR)\(^1\) and the International Covenant on Civil and Political Rights (ICCPR) provide for the right to a fair trial by an independent and impartial tribunal established by law, in Articles 6 and 14 respectively. The Bill pursues a clear aim of ensuring the independence and impartiality of members of the tribunal system and, with this in mind, the Commission wishes to highlight the following essential elements of the requirement.

It is a pre-condition of the judiciary’s ability to uphold the rule of law that they should be independent and impartial from all outside pressures or influence, whether by the parties or by the executive or legislative branches of the state. The essential elements necessary to achieve this standard of independence are the process of appointment of judicial members, their terms of office and security of tenure, and guarantees of their independence from outside influences and pressure. It is also important that the judicial body presents an appearance of independence, in accordance with the maxim that justice must not only be done but must be seen to be done.

The United Nations Basic Principles on the Independence of the Judiciary highlight these key elements, outlining the importance of securing the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement.\(^2\)

In light of these requirements, the Commission wishes to highlight the importance of ensuring that the process of appointment and removal of judicial members of the tribunal is in accordance with these standards.

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\(^{1}\) See Le Compte, Van Leuven and De Meyere v Belgium (1981)4 EHRR 1.

Access to justice

The right to a fair trial encompasses a broad range of specific rights, which cumulatively amount to the standard of fairness. A key element of this right is ensuring that parties have access to justice, so that rights are “practical and effective”, rather than “theoretical and illusory”\(^3\). Access to justice refers to the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.

There are a variety of barriers in accessing the legal system such as complexity of the law; lengthy proceedings;\(^4\) restrictions to legal aid\(^5\); and the lack of implementation of effective remedy and reparation.\(^6\)

Access to justice depends on a properly designed and functioning system of justice. It is therefore important that the transfer of functions to the new tribunal system proposed by the Bill enhances rather than erodes this system.

The changes to the tribunal system present an opportunity, when viewed as part of the ongoing process of reform of the justice system currently underway in Scotland, to ensure the establishment of an accessible, relatively simple and inexpensive system for the individual. In order to enhance fair trial rights, the Commission wishes to highlight the need for the whole process of reform to be coherent in its approach to ensuring access to justice. An overarching view of the cumulative effect of the current reforms should be taken, to ensure that all measures in tandem amount to an enhancement of fair trial rights and access to justice. The Tribunals (Scotland) Bill can be seen as an opportunity to address any further obstacles to these rights, in the broader scheme of these changes.

The Scottish Human Rights Commission
August 2013

\(^{3}\) *Airey v Ireland* ECHR (1979)


\(^{6}\) For example *E and others v UK* Application No 3321 8/96. This case pointed to gaps in the current framework for remedies of historic abuse in Scotland.