Justice Committee
Tribunals (Scotland) Bill
Written submission from John Wright QC

Introduction

1. Having been requested to give evidence to the Justice Committee, I consider an individual response, in addition to Lord McGhie’s response on behalf of the Lands Tribunal Scotland (LTS) (with which I generally agree) appropriate. I have experience in a variety of tribunals in various capacities. I have no personal agenda in this, being on the verge of retirement!

2. I share the reservations of others about the appropriateness of overarching unified tribunals, the central proposal of this Bill. I agreed with the expression of caution by the 2009 “Philip Report” at Paras 8.42-46. They reported that it seemed:- “premature to conclude that the creation of a two-tier structure for devolved tribunals that mirrored the new structure for GB tribunals would be a desirable reform”

I find it difficult to see what has changed since then. I have particular difficulty in understanding what actual shape an upper tribunal in Scotland would take, given the really tiny number of appeals from devolved tribunals in most areas.

3. However, I was asked to give evidence particularly in relation to the Bill’s proposals as they affect LTS, of which I have been a legal member for around 10 years.

4. I regret that in my view, while LTS could benefit from some of the Bill’s provisions, there is no benefit, and probably some detriment, to LTS users in being included in the Bill’s central proposal of a unified tribunal scheme, for the reasons which I give below...

LTS at present

5. LTS is a very different type of body from the administrative tribunals to which these proposals basically relate. LTS is a specialist body dealing – generally more like an adversarial civil court than an inquisitorial administrative tribunal – with a relatively small number of disputes in some particular areas of law. These disputes mostly relate to property titles or land valuation and can be either very complex or very high value or both. If one had been starting again, one might have called it a court not a tribunal, although it benefits from the direct judicial involvement of highly respected surveyors, reflecting the specialist land valuation aspect of much of its work. As Table 1 of the Policy Memorandum shows, there are very few appeals against LTS decisions – apparently only one in a two year period.

6. The work of LTS, with its specialist legal and surveyor members (two of each), is primarily case management and adjudication of disputes in several different areas:- (i) Title Conditions – applications to discharge, vary, renew or preserve title conditions, or determine certain questions as to validity/enforceability, etc. (these
jurisdictions were enlarged in various ways by the Title Conditions (Scotland) Act 2003)

(ii) Land Registration – appeals against decisions of the Keeper of the Registers, often involving three parties, i.e. the two landowners with competing interests and the Keeper, with difficult legal issues, although the value of the subject matter may not be very high (the nature of the different types of disputes which can arise under this jurisdiction is set to change under the Land Registration Etc (Scotland) Act 2012)

(iii) ‘Tenants’ Rights’ – some disputes around the current entitlement of secure tenants to buy their homes

(iv) Valuation for Rating (Non-Domestic) – appeals which satisfy certain criteria generally related to complexity or difficulty may be determined by LTS rather than local Valuation Appeal Committees. Highly technical legal and/or valuation issues are involved.

(v) Land Compensation – this may be compensation for compulsory purchase (or related planning blight issues), ‘injurious affection’ caused by the construction, or the use, of public works, or one of a number of other more particular types of compensation, e.g. for mining subsidence, effect of flood prevention works, compulsory utility ‘wayleaves’, etc.

(vi) Miscellaneous, including ‘voluntary referrals’ (in effect, arbitration by LTS in areas within its expertise), community rights to buy, issues about ‘tenancies at will’, etc.

(vii) Disputes occasionally arise in ‘reserved’ areas, mainly in relation to taxation, e.g. base values of land/buildings for Capital Gains Tax purposes.

7. LTS also has a minor administrative function certifying some matters under certain procedures introduced by the Title Conditions (Scotland) Act 2003.

8. The actual number of cases in these various categories is relatively low, and varies from time to time, but considerable case management, lengthy hearings and lengthy written judgments are sometimes required.

**Inclusion of LTS in a unified tribunals scheme: general**

9. The main focus of any reform should be the requirement of users of LTS for fair and efficient specialist adjudication. In each area, a particular legislative decision has been taken to refer disputes to us and not to any general court or tribunal. Although I would welcome appropriate consideration of rationalisation and up-dating of our jurisdictions, which have developed gradually – it might be said piecemeal – over a period of time, I am not aware of any suggestion from anyone that our distinctive system of adjudication by specialist lawyers and surveyors would benefit from merger into a unified tribunal.

10. It is crucial to understand, in relation to LTS, that our case management is tailored to the needs of each of our particular jurisdictions. This is not simply a question of judicial decision-making, but is central to the work of our office clerks, two of the three of whom have particular qualifications and experience.

11. I am certainly very open to joining up our basic administration and administrative support with other tribunals or courts, as is already happening under the Scottish Tribunals Service (as suggested by the 2009 Philip report, at Paras 8.42-46). We can always work at improvement. Increased contact with courts and other tribunals is
welcome. Common overall leadership, and also more integrated arrangements in the fields of, for example, recruitment, training and monitoring, regulation of conduct, etc would be advantageous, whether LTS is seen as a court or as a tribunal. I also recognise the need for due economy and making the best use of resources.

12. However, the central proposal in this Bill for unified first tier and upper tribunals is altogether different. LTS would not fit well into either. The proposal in Para 46 of the Policy Memorandum to preserve our specialist qualities by creating us as a single division of the Upper Tribunal appears to recognise this, but it would not avoid the need to dis-apply, or make separate or different provision about, much of the Bill’s provisions. It might be suggested, on a superficial basis, that that could be done without too much difficulty, but I think that would be an optimistic view. It would make more logical and practical sense, and better serve the general purpose of improving tribunals for users, to keep us out of this scheme, perhaps as part of a separate ‘pillar’ of bodies dealing with land disputes, rather like the position of employment tribunals in relation to the UK Tribunal Service. This would help to concentrate on providing the best service for users of adjudication and dispute resolution services in the particular areas with which LTS is well equipped to deal.

13. In my view, the inclusion of LTS in such a scheme is, if anything, more likely to dilute, and therefore reduce the quality of, the specialist adjudication service which it presently offers than to improve it. I appreciate that there is no intention to take away the specialist ethos of individual tribunals such as LTS (Para 96 of the Policy Memorandum), but I am very much afraid that that is what would inevitably gradually happen. Any move in the direction of standardisation of case handling and procedure would tend to undermine the service which we aim to provide.

14. I would also suggest that a unified tribunal scheme, with a first tier and an upper tribunal, would appear tidier and more logical without LTS, which does not fit happily in either.

Some particular issues/problems for LTS

15. In this section, I highlight some particular matters of concern in relation to LTS (although some of these might have relevance for other tribunals also):

(i) Practice and procedure. I appreciate the usefulness of comparative consideration of the practice and rules of other courts and tribunals, but there is nothing to suggest that users of LTS require any similarity in procedure with, e.g., users of mental health or additional support needs tribunals. Further, there is no justification for a standardised starting point for LTS rules of practice with those of other divisions of the Upper Tribunal (if that is where LTS is to be put): specialised first instance rules would need to be devised in a basically appellate tribunal.

(ii) Tribunal members:-
   - Names and types: it is unhelpful to describe only ex officio ‘visiting’ judges as ‘judicial members’, and the legal and surveyor members of LTS are of equal status
   - Qualifications
• Status and Tenure: basically, tenure is to be removed, albeit with protection – that does not apply to judges and sheriffs and may accordingly affect recruitment

(iii) Appeals to LTS – presumably, if we were a division of the Upper Tribunal, appeals from, e.g., valuation appeal committees and housing tribunals might be expected to be directed to us, but I am aware of no consideration whatever of the desirability of that. It would represent an enormous change in relation to rating valuation, distorting the established scheme for authoritative decision-making on matters of principle by the Lands Valuation Appeal Court. If we were in the first tier, there would be a problem with existing procedural appeals from VAC’s to LTS.

(iv) Appeals from LTS:-
• Difficulties if LTS in first tier
• Questions about nature of appeals – again, the very particular nature of appeals to LVAC would require consideration
• Apparently no necessity in LTS for any permission to appeal requirement, or at least for any such requirement standardised with other tribunals
• Unqualified delegated power under S 48(2) worrying
• Generally, so few appeals from LTS that inappropriate to interfere with existing position

(v) Review. The different nature of civil disputes before LTS makes anything more than the existing accidental/mathematical error ground of review entirely inappropriate.

(vi) Expenses. There appears to have been no consideration of any justification for standardising rules in LTS (whether in the first tier or the Upper Tribunal) with those of tribunals exercising very different jurisdictions. The Committee recently considered the issue of expenses under one particular LTS jurisdiction (in relation to title conditions – 8th Report, 2013 (Session 4)). What is significant is that the Committee was looking carefully at the particular context, not at any suggestion of standardisation. LTS has particular rules on expenses under two other jurisdictions – valuation for rating and compulsory purchase compensation.

(vii) “Allocation of cases” – Section 36(1) refers to allocation of cases to a particular division of the Upper Tribunal. This appears to imply some central clerking, by less specialist personnel not well qualified to answer users’ enquiries, or possibly duplication of clerking.

Conclusion
16. The above list provides only examples – more issues or problems will surely arise when the detail to be covered under delegated powers comes to be considered. Both at a general level – the inappropriateness of, and the lack of any apparent real need in the interests of users for, placing LTS either at first tier or at Upper Tribunal level – and on the basis of the extent of implementation issues and problems in relation to LTS, I think the conclusion should be clear: LTS can appropriately be involved in rationalisation and improvement of courts and tribunals,
but should not be included in the list of tribunals to be taken into a unified tribunal scheme.

**A technical problem**

17. So far as I can see, the Bill as drafted produces the undesirable result that tribunals either not yet brought into the scheme of unified tribunals, or not to be part of that scheme, will not be subject to provisions of the Bill which should surely apply to all Scottish tribunals, e.g. in relation to common leadership, conduct, etc. I would add that such provisions might usefully also include some consolidation by statute of fundamental general rules, including as to overriding principles, and also encouragement of alternative dispute resolution, etc. This could be addressed by a clause applying such provisions to all the tribunals, either under reference to a list or under reference to a more general definition.

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