Justice Committee

Tribunals (Scotland) Bill

Written submission from the President of the Private Rented Housing Panel/Homeowner Housing Panel

1. An improvement on the existing structure

The Tribunals listed in Schedule 1 of the Bill are currently served by Scottish Tribunals Service (STS) and feedback suggests that they all operate efficiently and effectively, although differently, as you would expect, given the different user groups, specialisms, procedural rules and subject matters in dispute. The benefit of the Bill is that it will provide a chamber structure which is flexible to allow the addition of other tribunals not listed and to create a coherent approach for the future.

However, whilst the intention is to preserve the approach of the existing tribunals who will continue to hear their relevant cases in their own distinctive manner, there is a danger that grouping tribunals into chambers may result in the distinctive features of individual tribunals being lost and an overriding principle to maintain these features written into regulations may be appropriate. This would give reassurance that the distinctive ethos of individual tribunals would be maintained particularly in the event of a merger between STS and Scottish Courts Service (SCS) and closer working links as a result with the courts.

2. Guarantees of openness, fairness and impartiality in tribunal procedures and whether there will be sufficient specialisation?

The Bill emphasises the judicial nature of the tribunals and provides important guarantees for the independence of the Scottish tribunal judiciary. This is particularly important where some tribunals have links to a “sponsoring department”, which control the tribunal budget, and hence a risk exists that there may be indirect influence on the judicial working of the tribunal.

A chamber structure under the leadership of the Lord President will emphasise the judicial nature and impartiality of Scottish tribunals and separation of tribunals from the Executive.

The President of Scottish Tribunals, who is a senior member of the judiciary, to oversee the working of tribunals will provide important safeguards and ensure a consistency of approach. The ability of the President of Scottish Tribunals to delegate functions to Chamber Presidents is appropriate and essential to ensure the operational efficiency of each chamber, particularly given that each chamber and tribunal jurisdiction has different requirements and in some jurisdictions specific duties rest with the Chamber President. The President of Scottish Tribunals and Chamber Presidents could be charged with ensuring that the distinctive nature and specialism of the individual tribunals are maintained.

On a technical point, whilst Section 3 provides that Scottish Ministers are to uphold the independence of members of Scottish Tribunals, Schedule 2 Para 1 indicates
that the Scottish Ministers may by regulations provide for some or all of the transferable persons to become the holders of any of the particular named or other membership positions within the Scottish Tribunals. Schedule 2 Paragraph 1 would seem to contradict the undertaking in Section 3 since ultimately the Scottish Ministers seem to have discretion as to who within the existing tribunal judiciary is to become holders of particular named or other membership positions within Scottish Tribunals. Some reassurance is given in this regard in the policy memorandum to MHTS membership but this reassurance is not extended to other existing Scottish tribunal membership and holders of named positions (although my understanding is that this is the intention). It may be appropriate to extend that same assurance in the policy memorandum to other Schedule 1 listed tribunals.

3. Rules relating to Appeals

The Report of the Scottish Committee of the Administrative Justice and Tribunals Council on Tribunal Reform: a vision for the future (2011) examined reasons for a single appellate body and the Bill incorporates this approach which is to be recommended. It is appropriate that appeals are confined to points of law. It is also important that judges with specialist knowledge of the jurisdiction sit on appeal cases. The structure proposed will create an appeal route from chamber decisions to an Upper Tier Tribunal which will have special expertise in the chamber jurisdictions.

I welcome the proposal to allow tribunals to review their decisions.

4. Rules relating to appointments/membership

The Provisions in the Bill for the appointment and training of members is welcomed and will help to improve the standing of tribunals and the assignment provisions will give flexibility in the event of workload pressures.

A differentiation in the Bill is made between the status of tribunal judiciary and the court judges. Whilst the introduction in some tribunal jurisdictions of judicial titles may prove unwelcome with some users, there may also be advantages in other jurisdictions to emphasise the judicial nature of the tribunal and its membership. It is also unfortunate if the members of the tribunal judiciary are perceived to have lesser value than court judges, or indeed for there to be distinctions between legal and ordinary members since all members perform a judicial role. There may be merit in allowing a degree of flexibility in approach with regard to the use of judicial titles with the President of Scottish Tribunals and the Chamber Presidents being able to make the decision after consultation with users. In time with the increased recognition of the place of tribunals in the judicial structure, the public perceptions of tribunal members fulfilling a judicial role will be more widely recognised and the use of a judicial title is less likely to be an issue.

5. The rule making powers granted to the Scottish Civil Justice Council

Making a uniform set of rules for all tribunals would be a challenge and may prove counter-productive to achieving an efficient procedure tailored to the needs of the different jurisdictions and its users. Procedural rule-making involves specialist knowledge of the working of the individual jurisdictions. The benefit of a body such
as Scottish Civil Justice Council would be to provide guidance and experience in this area of work but it is difficult to envisage a Rules Council implementing rule change without a major input from the Chamber Presidents.

6. Any other aspect of the Bill

- 6.1 On a technical point specific to the jurisdictions of which I am President, Schedule 1 of the Bill details the Listed Tribunals. This includes in relation to Housing and other Acts (a) a private rented housing committee and (b) a homeowner housing committee. Section 26 (4) states that a tribunal includes any body, officeholder or individual having decision making functions that are exercisable in the manner of a tribunal (but only in so far as such functions are so exercisable).

Section 23 of the Housing (Scotland) Act 2006 and Section 18 of the Property Factors (Scotland) Act 2011, give the President of prhp/hohp a decision making function in relation to individual cases, which decisions are subject to appeal in the courts. Schedule 1 of the Bill may need amendment to reflect this.

- No acknowledgement is made of the importance of maintaining the specialist tribunal administrations which are essential for the efficient working of the tribunals. Consideration should be given to assurances in this regard and possible inclusion of this in the policy memorandum.

Aileen Devanny
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2 August 2013