Justice Committee

Tribunals (Scotland) Bill

Written submission from the Faculty of Advocates

The Faculty of Advocates is asked to assist the Scottish Parliament's Justice Committee and Finance Committee by providing views on aspects of the Tribunals (Scotland) Bill, as introduced on 8 May 2013. The Faculty reiterates its support in principle for the proposed reform. It confirms that it considers that the new structure would be an improvement on the existing lack of coherent structure, which is a consequence of the piecemeal establishment of various tribunals over decades. The Faculty also notes the current Scottish Government Consultation paper on the Proposed Merging of the Scottish Tribunals Service and the Scottish Court Service. This proposal would also mean that it was sensible to develop a more coherent and unified Tribunal structure. The Faculty would however wish to draw attention to a number of matters which relate to the proposals in the Bill. This response is a combined response to the inquiries of the two committees, together with the current Scottish Government consultation.

The announcement by the UK Government in June 2013 that reserved Tribunals will not be devolved in the foreseeable future does have some serious implications for the Bill. We note that the currently “Listed Tribunals” will probably deal with fewer than 4500 cases per annum (taking figures from para 11 of the Consultation paper on the Proposed Merging of the Scottish Tribunals Service and the Scottish Court Service as a guide). In particular, the very extensive jurisdictions of Social Security and Employment will remain outside the new structure for the foreseeable future. Given the case load which it is likely would be dealt with under the proposed new system compared to the substantially greater volume of cases dealt with by the reserved Tribunals, the effect will be to produce a Rolls Royce structure for a relatively small number of cases. We appreciate, however, that it may be seen as desirable to create a structure capable of absorbing reserved tribunals and we have already commented on the desirability of this.

Within the new structure, the Faculty welcomes the preservation of the Lord President as judicial head, and new leader, of the Tribunal system in Scotland. This is the best guarantee of fairness and impartiality. It notes the supplementary provisions which enhance this.

The Faculty has already stated its reservations about the suggestion that the new structure must have as its President a Senator (High Court Judge), and it reiterates those reservations for the following reasons: (i) the cost of a Senator’s time may be regarded as disproportionate for what would currently be a tiny jurisdiction; (ii), few, if any, Senators have recent hands on experience of these Tribunals; and (iii) a requirement that the President must be a Senator may be regarded as narrowing the

1 There is a reference to the Pension Appeal Tribunal in the “Consultation on the Proposed Merging of the Scottish Tribunals Service and the Scottish Court Service” - paras 11 and 12: although this is currently administered by the STS, it appears to the Faculty that it is correctly not included in the Listed Tribunals as it falls within reserved functions in the Scotland Act 1998, Schedule 5, F4.
pool of prospective candidates unnecessarily. It is for consideration whether the position should be the subject of an appointments procedure.

The Faculty does not take issue in principle with the proposals to recruit legal and lay members, which meet objectives of openness and fairness. However, the Committee's attention is drawn to practical difficulties which are already arising, and which will continue to arise, particularly while most judicial salaries and pensions remain reserved under the Scotland Act 1998. Parity with comparable judicial office holders will have to be considered. A pension scheme will need to be put in place for part-time judicial office holders, following the decision of the Supreme Court of the United Kingdom in *O'Brien v Ministry of Justice* [2013] ICR 499. The Ministry of Justice has promised to put this in place; the Scottish Government has not as yet, although the decision in *O'Brien* is equally applicable in Scotland. Terms of Appointment will therefore need to be thought through with care, and we urge the Committee to ensure that specialist legal advice is taken on this. These comments apply to the “lay” judiciary, who will often include medical practitioners, as well as to legally qualified chairpersons. In short, while the relevant sections of the Bill do not attract any concern, some practical issues underpinning these appointment proposals are not being articulated, much less consulted on.

The appointment of judicial tribunal members to one tribunal, with the possibility of transferring them to work on another is not opposed in principle, but the Faculty notes that in practice this can prove difficult. Presidents of one Tribunal system, or their Court system equivalents, sometimes object to the transfer in of such people for various valid reasons. The Faculty suggests that there should be a clause in the Bill to preserve their right to control this, as it is in the public interest that specialist tribunals are staffed by specialist judges. This saves hearing time, and enables the unrepresented applicants to put forward their cases more effectively. Moreover, the recruitment of lay members is influenced by the nature of the jurisdiction, so (for example) people with experience of children with disabilities will be useful to the Additional Supports Needs Tribunal, and psychiatrists are essential for Mental Health Tribunals, but they would not necessarily be best used the other way round. It is important, in order to achieve the objective of fairness and impartiality, and also sensitivity to the needs of particular groups of tribunal user that there is judicial control over this issue. To take the example of the Mental Health Tribunal, tribunal members have developed expertise through experience and training in providing a procedure that meets the needs of those using the system, who may be ill and distressed but still willing and able to some extent to participate in hearings. There is a concern that transfer into a specialist tribunal of this type of members who do not have that expertise and experience (at least in the absence of substantial and jurisdiction-specific training) will be a step backward for tribunal users. The proposals to organise First Tier Tribunals into chambers, and the Upper Tribunal into divisions, are subject to the same caveat.

It should also be noted that there are very considerable cost implications to cross-ticketing, as a great deal of training can be required. The Faculty is surprised by several of the conclusions reported to the Finance Committee which appear to underestimate costs on several fronts. See for example paras 31 (training); recruitment by the JAB, which we expect to be significantly more expensive than current Tribunal recruitment methods (para 15); and the alleged absence of cost
considerations for establishing the Upper Tribunal (para 36). A new computer system for processing appeals, which is compatible with the various totally separate systems in the Listed Tribunals, will surely have cost implications. However, this is really beyond the expertise of the Faculty, so we say no more.

The Faculty appreciates that there will be more Tribunals to add to the first List, both existing and new. For example, it had been suggested that there might be a new environmental tribunal in the Tribunals Bill to deal with the appeal rights in the Regulatory Reform (Scotland) Bill and other environmental legislation. Although the Bill does not contain any such provision, it is possible that future developments might see an environmental tribunal and a housing tribunal (as has also been widely mooted in the past, and recently in the Consultation on the Introduction of a New Housing Panel for Scotland, which the Faculty strongly supported). The Faculty is not clear what is meant by the reference to appointments which will continue to be made by the Secretary of State at para 15 of the FM. Does this refer to miniscule jurisdictions such as appeals against decisions of the Dentists’ Vocational Training Board? If so, there is every reason to include those jurisdictions in the List, as they are vulnerable to challenge as not being Article 6 compliant.

The Faculty notes that the scheme of rule-making in the Tribunals is that Rules are to be made by a Tribunals Committee of the Scottish Civil Justice Council: schedule 9 paragraph 12. It agrees with that approach. It also notes, however, that until the establishment of that Committee Rules may be made by the Scottish Ministers. That is undesirable on constitutional grounds; Scottish Ministers should have the same rights as other parties to proceedings before the tribunals to comment on proposed rules, but no power to write them. This demonstrates the need to establish that Committee no later than the coming into force of the substantive provisions of the Bill.

Generally the Faculty would favour the writing of rules by ad hoc committees of tribunal judges. This would mean cost saving - see FM para 30. This applies to the rules relating to appeals and to the rules relating to First Tier business. There appears to be a long term objective of standardising the rules across the Tribunal jurisdictions, and the Faculty would caution that this is highly unlikely to work. Time scales for detained mental patients and tenants with problems with their landlords would be completely different, for example.

The proposed provisions for Review at section 38 are welcome, but they seem to be incomplete: this may be deliberate, as the grounds would be different according to the jurisdiction, so subsidiary legislation may be contemplated. The Faculty notes that an articulated basis for review is essential, as an open ended right to seek review would otherwise be used by most disappointed applicants/appellants. The chairman/judge concerned is assisted where defined grounds are stated, as he can say none have been invoked where that is applicable.

The broad scheme of appeals from the first-tier tribunal to the Upper Tribunal, and from the Upper Tribunal to the Court of Session, are satisfactory. The Faculty however notes with concern the terms of section 45 (4), which mirror the provisions relative to the UK Upper Tribunal in the Tribunals, Courts and Enforcement Act 2007 section 13, as recently amended by the Crime and Courts Act 2013 section 23 to apply to Scotland. This superficially-reasonable language has its genesis in problems
of repetitive appeals in the English courts which have little or no relevance to the Scottish system, and it has been interpreted with a startling lack of liberality by the English courts. In *SA v Home Secretary*, [2013] CSIH 62, the Inner House of the Court of Session held (following English authority) the test to be so ‘stringent’ that only ‘rare and exceptional’ cases could survive it: see paragraphs 36 to 44. The Faculty considers that this sets the test too high in matters which may be of critical importance to the citizen, and that section 45 as presently drafted is a missed opportunity to apply a test for appeals from tribunals to the Court of Session which would genuinely reflect Scottish needs and conditions, which could indeed be competently applied by this Bill to appeals from both Scottish and UK Upper Tribunals.

The Faculty notes that there are several very significant provisions in Part 7, including powers to charge fees (s70) and award expenses (s59). These powers are familiar in a court context, but are not normal for Tribunals; thus the extensive recent concern as to the introduction by the UK Government of fees in the Employment Tribunal. In some jurisdictions the charging of fees would be unthinkable, such as the Mental Health Tribunal. While it is said that there is no present intention of changing the status quo, these powers raise issues of principle and we would welcome the opportunity to comment on them. However, the invitation to comment does not mention these matters, so we assume that consultation on this aspect will take place later.

Faculty of Advocates
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