Justice Committee

Tribunals (Scotland) Bill

Written submission from the Scottish Committee of the Administrative Justice and Tribunals Council

Introduction

1. The Scottish Committee of the Administrative Justice and Tribunals Council (AJTC) (‘the Committee’) welcomes the opportunity to respond to the call for written evidence regarding the Tribunals (Scotland) Bill (‘the Bill’). The AJTC is a statutory body created by the Tribunals Courts and Enforcement Act 2007 (‘the 2007 Act’), and its remit\(^2\) requires it to scrutinise and comment on legislation, existing and proposed, relating to all aspects of administrative justice in Scotland.

2. The UK Government has indicated its intention to abolish the AJTC and its Scottish Committee and currently envisages such abolition taking effect at or about 19 August 2013. In presenting this submission the Committee is conscious that it is unlikely to be able to respond to an invitation to offer oral evidence to the Justice Committee after that date. In the light of that circumstance this written submission exceeds the length ordinarily recommended by the Justice Committee.

General comment

3. The Committee is conscious that the Justice Committee has requested comment on specific issues and proposes to address each of those. In advance of commenting on the specific issues identified in this consultation the Committee offers the following general comments.

4. In general terms the Committee welcomes the Bill. In ‘Tribunal Reform in Scotland A Vision for the Future’ [2011] the Committee set out recommendations for the reform of the Tribunals system in Scotland in the light of the two reports of the Administrative Justice Steering Group which had been chaired by Lord Philips. The Committee is pleased to note that many of the Report’s recommendations are reflected in the Bill.

5. The significance of the Bill - The Tribunals (Scotland) Bill (the Bill) is an exceedingly important piece of legislation. We are conscious that the scope of the Bill is relatively narrow being only 'to establish the First-Tier Tribunal for Scotland and the Upper Tribunal for Scotland. The Bill therefore addresses the structure and organisation of devolved tribunals in Scotland. It does not, nor could it easily, directly address the structure and organisation of reserved tribunals in Scotland. Its significance stems in part from the fact that it represents the first step which if

\(\text{1}\) The Committee took the place of the Scottish Committee of the Council on Tribunals.

\(\text{2}\) See para 13 Sch 7 to the 2007 Act; The Committee’s remit is
- to keep the overall administrative justice system in Scotland under review;
- to keep under review the constitution and working of those tribunals, under Scottish jurisdiction, which are designated as being under the AJTC’s oversight;
- to keep under review the constitution and working of statutory inquiries relating to Scotland.
followed up on may at last begin to establish some coherence in the Scottish Administrative Justice system, and in so doing also on the Scottish Civil Justice system. We feel that it is appropriate to provide some background on that assertion, partly because the Scottish Committee will shortly disappear from the scene, and we will not be able to answer for it in oral evidence.

6. The nature of administrative justice - Administrative Justice is a facet of civil justice. While it is often seen simply as that part in which adjudication is delivered via tribunals, the breadth of administrative justice is far wider than the tribunals system, encompassing also the whole area of decision making by public authorities where the rights of users are involved. By definition it also therefore includes complaints and ombudsmen systems affecting public authorities and public functions across government and public authorities as a whole.

7. The need for a joined up approach in the civil justice system - Scottish Government has not so far offered a comprehensive plan for the Scottish Administrative Justice system as a whole, far less the civil justice system. It has preferred to look at issues sequentially, and this Bill along with the upcoming Civil Courts Reform Bill are two important blocks in the development of the civil justice system. It may be that such an approach is unavoidable in the absence of any agreed overarching vision for the civil justice system, and also in the context of the shared responsibility within the administrative justice system which devolution necessarily implies.

8. A consequence however of an absence of an overall vision is that the overall system becomes compartmentalized. It is likely to be more difficult to achieve necessary major changes in the absence of a strategy for the entire civil justice system. However, recognition of the inter-relationship of the different and overlapping sectors of a civil justice system is a useful starting point for developing a coherent system. Users want and are entitled to a system which is easily navigable and which meets their needs.

9. Users’ understanding of the system - Citizens do not in general terms have a developed appreciation of the relationships of the different parts of the Civil Justice system. One example of this is the distinction between appeals and complaints. The circumstances in which an appeal is the relevant remedy where in other areas the remedy may be by way of a complaint, is not a matter on which there is a ready reckoner. Nor, we suspect, do policy makers, in general terms, have a developed approach differentiating in what circumstances the remedy, if there is to be one, is to be by way of complaint or appeal, and in the case of the latter whether to a court or to a tribunal.

10. Users perception of courts – The Committee has not conducted research on the user response to courts as opposed to tribunals. However the AJTC conducted sufficient monitoring of tribunal users views to be able to form the provisional view that, in many cases, users prefer informality to formality and an investigative as opposed to an adversarial system. These are aspects of a tribunal approach which

make it distinctive.

11. **Courts and tribunals** – One of the key areas of debate in modern times in the administrative justice area is whether tribunal justice is in effect being swamped by the courts. The Bill does not directly address the relationship between courts and tribunals in Scotland, but it will be an important area in future. The Scottish Civil Justice Council (SCJC) will take on responsibilities in relation to Tribunals under the Bill, and that in itself presents issues if the identity of tribunal justice is to be protected and developed.

12. As courts and tribunals become the responsibility of the Lord President and the SCJC then issues may well arise which will touch on the distinctiveness of tribunals as opposed to courts. This is not simply an issue of seeking to preserve tribunals as they are, but ensuring that as they develop so the core characteristics, if they continue to be relevant, can be safeguarded. Having said that it is appreciated that the courts themselves are moving to achieve changes in their own approach. But experience of, for example, small claims does not suggest that changing the culture of courts is an easy process. There is also some basis for believing that a process of judicialisation of tribunals is already in train in England and Wales where courts and tribunals administrations are linked in HM Courts and Tribunals Service (HMCTS). Linkage, as is proposed in the Bill in particular through the conferring of powers on the SCJC could therefore present a challenge for the distinctive characteristic of tribunals. If therefore retention of that distinctive characteristic was as indicated in the Scottish Government’s consultation an objective of Scottish Government in this matter, then it may be appropriate to consider how that distinctive character can be safeguarded.

13. **The distinctive character of tribunals** – In any event if Government is inviting Parliament to legislate on tribunals, as opposed to courts, then it is fair to ask whether the Bill might usefully contain some indication of what is meant by a tribunal, beyond simply referring for example to the listed tribunals. The Committee firmly believes that if there is to be coherent structure within a civil justice legislative framework, then at some point, whether in this Bill or elsewhere, some effort will be required to identify the characteristics which distinguish tribunals from courts.

14. In Para 4.1 of *Tribunal Reform in Scotland; A Vision of the Future*, the Committee defined a tribunal as:

   ‘A body which resolves disputes between citizen and state and between private parties by making binding decisions according to law, does so by a process of adjudication which is specialised, relatively informal and less adversarial as compared to the model of adjudication applied by the courts and is independent of both the executive and the legislature and of the parties appearing before it.’

15. Although there is a considerable amount of variation between courts, and likewise a considerable amount of variation between tribunals, and although there is a degree of overlap between them in that some tribunals have characteristics associated with courts and some courts have characteristics associated with tribunals, the Committee believes that the following factors in large measure are

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what distinguish most tribunals from most courts:

i. the specialist nature of the tribunal judges’ and tribunal members’ jurisdiction as compared with the generalist experience of judges in the courts − tribunal judges and tribunal members are expected to be experts in the law and policy of the subject matter of the dispute;

ii. the relative informality of tribunal hearings as compared to court proceedings − tribunal procedures are simpler and more flexible than court procedures, parties are not required to take the oath, the rules of evidence are less demanding, the parties often appear in person and, where they are represented, the representatives tend to be lay experts rather than lawyers;

iii. a less adversarial and more inquisitorial approach than that encountered in the courts − tribunal judges and members frequently take a more active and interventionist role in the proceedings than judges in the courts and, instead of listening passively to the arguments advanced by the representatives of the parties, take the initiative in putting questions to the parties that elicit facts which they consider to be relevant to the case;

iv. a more enabling approach than is typically encountered in the courts which is intended to facilitate the direct participation of the parties in the proceedings, especially when they are unrepresented;

v. in many but no longer in all tribunals, the fact that parties do not have to pay to raise an action and that costs are not awarded against the losing party.

The Scottish Committee of AJTC believes that, in the context of the proposed merger of the Scottish Tribunals Service and the Scottish Courts Service, these characteristics are important and worth preserving and that they should be given statutory protection in the Bill.

16. The Committee also believes that a core factor distinguishing courts from tribunals is the position of the tribunal user, and the recognition of the user’s position by the Tribunal. Leggatt emphasised the importance of remembering that “tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases. .... tribunals should do all they can to render themselves understandable, unthreatening, and useful to users ....” (para. 6)\(^5\).

17. It can be a difficult point to make to suggest that in effect the user’s position is a differentiating factor. The Committee does not suggest that the position of the court user is less important to courts; we are aware for example of the Scottish Court Service Court User’s Charter. But the tribunal user differs from the civil court user. For the most part the latter are legally represented; court users tend to be lawyers, and individual court users, if parties as opposed to witnesses, will tend to deal with courts through their legal representatives. This means that the nature both of the conversation and the contact in general will be significantly different between court and tribunal users. Legal representatives almost by definition are used to the experience and, through their professional bodies and the like, will be involved in shaping the processes and procedures of courts. For the individual tribunal user, the contact with a tribunal may be a one-off experience where the user may well have no previous experience and only limited resources.

\(^5\) para 4.21 – Vision for the Future
18. The Committee believes therefore that consideration should be given to inclusion of some statement in the Bill touching on the distinctive characteristics of Tribunals which differentiate Tribunals from the ordinary courts, and which should be maintained. In making this proposal the Committee is mindful of the objectives set out by Scottish Government in its consultation on Tribunal Reform. In particular at 1.7 of that consultation Scottish Government indicated that an objective was ensuring the ‘distinctiveness of different tribunals, including continuing specialisation’.

19. The Committee believes that status of the Scottish Tribunals Service (STS) should be protected in the Bill - The Committee is concerned that this Bill is silent on the status of the STS. In its report ‘Vision for the Future’ in 2011 the Committee had recommended that the STS should be a statutory body entirely independent of the Scottish Government and chaired by a Senior President of Scottish Tribunals. The Committee firmly believes that failure to accord similar status for tribunals administration to that accorded to courts administration from the outset risks fostering unfortunate misconceptions as to the general status and standing of administrative justice as a whole.

20. The Committee has noted the proposal that STS and SCS should be merged. The Committee recognizes that complex restructuring as in the case of the Scottish Courts and Tribunals does have to be subdivided into manageable projects, but it is nonetheless regrettable that the proposal was not included in the original consultation on tribunal reform. The Committee will respond to the consultation by Scottish Government, but it should say at this stage that it believes that, overall, a merger at this stage, while providing the status argued for, presents real problems for the maintenance of the separate tribunal identity referred to above.

Comments on the Bill

21. Objectives - In its consultation prior to the Bill the Scottish Government identified five main objectives to be secured:
   a. Effectiveness in securing just and speedy outcomes;
   b. Efficiency in the administration of justice;
   c. Distinctiveness of different tribunals including continuing specialization;
   d. Centrality of tribunal users, and
   e. Potential for future developments of the wider system of Scottish justice.

22. The Scottish Committee notes that the Justice Committee has requested comment on the first three and the fifth of those objectives as set out by Scottish Government. It is disappointed that the objective of recognition of the centrality of the

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6 1.7 This proposal seeks to balance five key objectives:
   - effectiveness in securing just and speedy outcomes;
   - efficiency in the administration of justice;
   - distinctiveness of different tribunals, including continuing specialisation;
   - centrality of tribunal users; and
   - potential for future developments of the wider system of Scottish justice.

7 para 4.35 Vision for the Future
user, which was a cornerstone of the Leggatt tribunal reform proposals does not appear to be a dominant policy aim in the provisions of the Bill.

23. In its consultation on civil courts reform the Government expressed the hope that the Tribunals Bill ‘will create a more user-focused and coherent system for devolved tribunals, providing a more efficient way of resolving citizen to state and party to party disputes.’ The Committee regrets that the language of that consultation did not readily appear to refer elsewhere to a user focus. In the absence of that expression the philosophical basis for courts and tribunals may continue to diverge rather than converge, although at the same time a convergence between courts and tribunals in the Scottish Civil Justice Council, and under the judicial leadership of the Lord President could result in the erosion of the current user focus of tribunals. The Committee does not have the impression that the language of the Bill contributes to confidence that the user focus is indeed central to the thinking behind the Tribunals Bill. There are some isolated references to user perspective as for example [ref to policy memorandum] but the Committee believes that more needs to be done on the face of the Bill.

24. The Committee recommends, therefore, that the Justice Committee consider the Bill in the light of the perspective of users of the Tribunals system, and that if possible it might seek to reinforce the proposition that the user must be seen as central to the tribunal process and accordingly also in the consideration of the structural and other issues for which provision is made in the Bill.

25. An improvement on the existing structure? - The Committee considers that the provisions of the Bill represent a significant improvement on the existing structure of tribunals in Scotland. A single Tribunal divided into Chambers will enable a more coherent and flexible approach to Tribunal Justice in Scotland. Smaller Tribunals should be able to modernise while theoretically, and where appropriate, retaining and developing their own ethos and character. As Leggatt said

‘Combining the administration of different tribunals will provide the basis for a relationship between them. But that association cannot properly be called a Tribunals System until true coherence has been established by bringing within one organisation without discrimination all those tribunals which are concerned with disputes between citizen and state (in the guise of either central or local government) and those which are concerned with disputes between parties. Only so will tribunals acquire a collective standing to match that of the Court System and a collective power to fulfil the needs of users in the way that was originally intended.’

The new structure provides the first steps in achieving such a system, and the Committee welcomes that.

26. Guarantee of openness, fairness and impartiality in tribunal procedures, and whether it will allow for sufficient specialisation? – The Committee believes

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8 Leggatt Report – ‘Tribunals for Users, One System, One Service’ – para 31 – ‘In a Tribunals System properly so-called there should be a new culture, starting with improved recognition of just how daunting the tribunal experience usually is for first-time users, as most are.’

that provisions in the Bill in relation to appointment, training etc of members of Tribunals cannot but enhance the standing of the Tribunals. The guarantee of independence in s3 serves to underline the principles which Leggatt was trying to establish. A single system will enable leadership to be developed and thereby to ensure that specialism ethos and desirable distinctiveness can be ensured\(^{10}\).

27. However, the Committee is concerned that seeking to achieve Tribunals modernization at the same time as securing convergence between courts and tribunals may result in those aspects – specialism, ethos and desirable distinctiveness - being swamped by the demands of the Courts system. It is noteworthy that the convergence process was not attempted in England and Wales until almost seven years after the start of the Tribunals modernisation process, following the TCE Act.

28. **Rules relating to Appeals** The Committee welcomes the provisions of the Bill as they relate to appeals and in particular in relation to review.

29. **The rules relating to appointments/membership** –
   a. *Restrictions on appointment as President* - The Committee had recommended\(^ {11}\) that the post of President of Tribunals should be open and in particular should not be confined to judges of the Court of Session. The Committee had also noted in its responses to the consultation that it considered it essential to the development of the tribunals judiciary in Scotland that appointment to the office of President of Tribunals should be open to the tribunals judiciary at large and not restricted simply to judges of the Court of Session. The Committee is therefore disappointed both that s4(5) effectively restricts appointment as President to Judges of the Court of Session, and further that such appointment is by way of assignment rather than appointment through a process under the supervision of the Judicial Appointments Board for Scotland to the specific post of President.
   b. *Judiciary eligible to sit.* The Committee has some concerns about ss 16, 17 and 18 insofar as they may be seen as allowing an automatic eligibility for the judiciary to sit as members of tribunals. The Committee appreciates that members of the judiciary may only sit if authorized to do so by the President of Tribunals\(^ {12}\). However the Committee believes that there might usefully be some further refinement of that requirement on the face of the Bill. For example the President of Tribunals might be required to consult with the President of the Chamber within which the judge is to sit before authorizing the judge concerned – see s20. It is unlikely that the President would act without so consulting but including a statutory requirement could bolster the proposition that the expertise of the membership of particular tribunals was being maintained.
   c. *Differentiating between the status of Tribunal members and court judges* – The Committee has some concerns about the status of tribunal members under the Bill. It is fairly clear from Part 2 Chap 1 of the Bill that members of the Tribunal on the one hand and court judges on the other are not to be seen in the same light; the latter may readily qualify for membership of the

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\(^{10}\) see eg Policy Memorandum para 14  
\(^{11}\) Vision for the Future  
\(^{12}\) In coming to this view the Committee has noted the terms of the Policy Memorandum, especially paragraph 21
former, but not vice versa. The Committee has consistently preferred that the distinctiveness of tribunals be maintained – see 13 to 18 above. It would for example deprecate practices such as wholesale adoption of an adversarial style in Tribunals or sharing accommodation with criminal courts, the latter being for example the practice in some areas in England and Wales. We believe that certain tribunals in Scotland may have been uncomfortable with the introduction of judicial titles within the reserved tribunals. Equally however and in particular so far as the reserved tribunals in Scotland are concerned, the convergence in status between tribunals and court judiciary has been welcomed in some quarters. For the avoidance of any doubt, the Committee’s preferred position is that the less formal structure of ordinary and legal members of a Tribunal should be adopted as it is in the Bill. But the Committee also recognises that the issue may require to be finessed especially if the reserved tribunals are to be inserted into the new Tribunal structure at some point, given our understanding of the position of the reserved judiciary that the status of judge which they currently enjoy should carry across into any new devolved arrangements.

d. Developing and maintaining the informality which is part of the distinctive approach of tribunals can, we think, best be achieved by practical measures such as for example through the absence of court dress, the avoidance of dais-type court rooms, avoiding adversarial styles and avoiding the use of judicial titles as a matter of practice as well as other similar measures. The Committee recognises that establishing a tribunals membership which sits apart from the courts judiciary may well make convergence more difficult in the longer term. Whilst, on a practical level it may perpetuate perceptions about a multi-tier judiciary in which the tribunals are of lesser value, we do not believe that this will be the perception of the citizen user of tribunals.

e. The Committee does not believe that it is in the interests of users of tribunals that the members of the tribunal may perceive that they in turn are seen as of lesser status than judges. The Committee firmly believes however that ensuring the maintenance of the ethos of tribunals is primarily a matter of judicial leadership rather than statutory prescription. An approach based on ss 4 to 6 of TCEA might allow also for Chamber Presidents to determine whether members in any particular Chamber used judicial titles, or, as many would prefer, including most users, something less elevated and more accessible. What most users would wish to avoid would be the introduction of practices which distance the tribunal membership unnecessarily from those appearing before them. It would be possible for tribunals to maintain informality including eg an absence of judicial titles, even in such a structure.

f. Involvement of Judicial Appointments Board - The Committee welcomes the fact that appointments of Tribunals ordinary and legal members will be within the responsibility of the Judicial Appointments Board for Scotland – see Sch 9 para 11 amending s10 of Judiciary and Courts (Scotland) Act 2008. This meets the points argued for in 4.13 of “Tribunal Reform – a Vision for the Future”. It would have been preferable however had the involvement of the Board been explicit on the face of the Bill rather than a matter of inference from a textual amendment. The Committee accordingly
recommends that the involvement of the Judicial Appointments Board for Scotland in the process for appointment be enshrined in the Bill.

The rule-making power granted to the Scottish Civil Justice Council

30. The Committee is concerned about the rule making power. That concern derives mainly from the composition of the Scottish Civil Justice Council. Even though the Bill makes express provision for the Tribunals Committee it does not deal with that in the same level of detail as applied to the arrangements for the Tribunal Procedures Committee under paragraph 21 of Sch 5 (Part 2) of TCE Act\textsuperscript{13}. The Committee are concerned that Tribunal Rules will be made with little or no user input; this would represent a retrograde step from the system which obtains in relation to the reserved jurisdictions.

31. Accordingly the Committee recommends that provision be made in the Bill to specify the composition of and arrangements for the Tribunals Committee, along the lines set out in Sch 5 of the TCE Act.

Any other aspects of the Bill

32. The Committee welcomes the Bill in general terms but would draw attention to the General comments it makes at paragraphs 3 to 20 above.

Scottish Committee, AJTC
July 2013

\textsuperscript{13} Lord Chancellor’s appointees

21(1) The Lord Chancellor must appoint—
(a) three persons each of whom must be a person with experience of—
(i) practice in tribunals, or
(ii) advising persons involved in tribunal proceedings, and
(b) one person nominated by the Administrative Justice and Tribunals Council.