Citizens Advice Scotland (CAS) welcomes the opportunity to comment on the
Tribunals (Scotland) Bill. The Citizens Advice Service in Scotland continues to
support and represent users of the civil justice system and strongly advocates the
principle of access to justice. Citizens Advice Bureaux (bureaux) across the country
contribute an enormous effort in advice, support and representation in almost all
areas of civil justice, but predominantly in housing, debt and welfare benefits.

Specifically funded projects and wider advice work undertaken by the bureaux in
Scotland in 2011/2012 recorded 380,000 new issues where the resolution had
the potential to involve formal legal methods and systems. This included almost 23,000
issues relating to civil legal process, almost 35,000 housing issues and more than
118,000 debt issues. However, many of these problems were solved before the
need to engage with formal legal processes (courts and tribunals).

In assisting some of the most vulnerable clients to resolve their problems, bureaux
undertake an invaluable role in preventing issues escalating into the legal system (for
example in negotiating a payment plan between a landlord and tenant who is in
arrears which stops the landlord bringing an action for eviction).

If an issue does reach the stage of tribunal or Sheriff court, bureaux then undertake
vital work to support and represent clients. In 2011/2012, bureaux represented
clients in over 5,500 civil court and tribunal cases – this included providing
representation in housing, debt and small claims work in Sheriff courts as well as in
welfare and employment tribunals.

Introduction

“It should never be forgotten 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.”

Leggatt

In 2010, there were over 650,000 applications made to tribunals across the UK and
this number continues to rise. In 2015-16, applications to the first tier of the Social
Entitlement Chamber alone are expected to reach over 800,000. Based on past
figures, it is reasonable to predict that 96,000 (12%) of these applications will be in
Scotland. In comparison, in 2011-2012 there were just over 85,000 civil cases

---

1 Sir Andrew Leggatt, Tribunals for Users, One System One Service: Report on the Review of Tribunals (August 2001)
initiated in Scotland (including cases initiated in both the Sheriff Court and the Court of Session)\(^4\) and case numbers have fallen over past years.

The delivery of administrative justice through tribunals can, in volume, be considered the largest part of the contemporary legal system. Tribunals are the outlet of justice which people are most likely to access and with the rising number of applications to tribunals, this is increasingly the case.

Tribunals are, for users, a forum which facilitates the pursuit of their rights and are often accessed at times of crisis in a user’s life. It is essential that the framework for tribunals is effective, efficient and capable of ensuring consistent access to justice: both now and in the changing civil justice landscape ahead.

**Key Points**

- Citizens Advice Scotland (CAS) believe that the proposed structure is an improvement on the existing structure.

- In achieving the new structure, CAS are firmly of the view that the spirit of tribunals and the individual and distinctive nature of tribunals should be safeguarded and maintained.

- Without prescription of the Tribunal Rules, fairness, openness and impartiality cannot be said to be guaranteed.

- Process is fundamental to the user experience and it is essential that Tribunal Rules are sensitive to and aware of the needs of users in order to produce rules which place the user at the core of the process.

- By including express principles on the face of the Bill in a similar way to those governing the operation of the Tribunals Courts and Enforcement Act 2007, ss2(3) and 22(4), consumers can be protected and tribunals safeguarded.

- While allowing Tribunal Rules to be written without prescription does provide a degree of flexibility, this flexibility should not be unchecked. Tribunal Rules should be subject to public consultation to ensure unintended consequences are avoided.

- The independent review of tribunals must be safeguarded in light of the abolition of the Administrative Justice and Tribunals Council (AJTC). The Bill makes provision for the Scottish Civil Justice Council to review process and procedure in relation to proceedings, but it does not expressly confer on the Council the duty to keep the whole system under review. There are many questions about the proposed Scottish Government Interim Committee and so consideration must be given to who will help to review tribunals in the same user-focused spirit as the AJTC.

More consideration should be afforded to Alternative Dispute Resolution. Tribunals, as Courts, should be regarded as forums of last resort and CAS strongly advocate that disputes should be resolved in a forum most proportionate to the dispute.

Response to key Issues

(1) Whether the new structure is an improvement on the existing structure?

CAS believes that the proposed structure has the potential to be an improvement on the existing structure. We welcome the development of a structure which is in line with the framework provided for in the Tribunal, Courts and Enforcement Act 2007 (TCEA).

From a user perspective, it matters little whether a matter is devolved or reserved and so the consistency created through echoed structures between the tribunals which administer reserved and devolved issues is positive. This should ensure a consistent experience for consumers in Scotland who may access tribunals on either reserved or devolved matters. This was also the position of the Administrative Justice Steering Group (ASJG) chaired by Lord Philip, “users are unlikely to be concerned with whether a tribunal is reserved or devolved, or by whom it is administered. However, they should be able to expect a clearly independent and impartial system, within which they will receive the same level of treatment and service, regardless of where a tribunal is located or where responsibility lies for its administration.”

In achieving the common structure however, CAS are firmly of the view that the individual character or tribunals should not suffer as a result, nor should the centralisation of administration lead to the centralisation of outlets. We welcome the flexibility which s56(1) allows in convening tribunals any place in Scotland and would hope that this flexibility is not greatly restricted by virtue of rules as described at s56(2).

While the system of tribunals is undoubtedly fragmented at present, the ad hoc nature in which tribunals have been allowed to develop has allowed for an evolution of specialism which is invaluable to the user experience and should be protected. The aim of the new structure should be to promote continued development within 1st tier chambers to the maximisation of specialist operation, at the same time encouraging and allowing the sharing of best practice between chambers.

In assuring this, CAS would recommend that principles are expressly included on the face of the Bill in a similar way as guiding principles are enshrined in the TCEA:

s2(3): A holder of the office of Senior President of Tribunals must, in carrying out the functions of that office, have regard to—

(a) the need for tribunals to be accessible,
(b) the need for proceedings before tribunals—
   (i) to be fair, and

5 Administrative Justice Steering Group, Options for the Future Administration and Supervision of Tribunals in Scotland (Glasgow: Scottish Consumer Council, 2008)
(ii) to be handled quickly and efficiently,
(c) the need for members of tribunals to be experts in the
subject-matter of, or the law to be applied in, cases in which they
decide matters, and
(d) the need to develop innovative methods of resolving disputes
that are of a type that may be brought before tribunals.

s22(4): Power to make Tribunal Procedure Rules is to be exercised with a view
to securing—

(a) that, in proceedings before the First-tier Tribunal and Upper
Tribunal, justice is done,
(b) that the tribunal system is accessible and fair,
(c) that proceedings before the First-tier Tribunal or Upper
Tribunal are handled quickly and efficiently,
(d) that the rules are both simple and simply expressed, and
(e) that the rules where appropriate confer on members of the
First-tier Tribunal, or Upper Tribunal, responsibility for ensuring
that proceedings before the tribunal are handled quickly and
efficiently.

In setting out the principles in this way, users are placed at the centre of
consideration of structure and process: the Senior President of Tribunals has
responsibility for the organisation of the chamber structure and the character of how
rules should be constitutionalised is clearly framed. A ‘whole system’ approach is
adopted which centres on the user. While much emphasis is given in the Bill to
structure, the importance of process must not be forgotten.

In the context of this Bill the framing of principles is especially important when
thinking of the possible changes to the tribunal landscape which may lie ahead. In
the proposed merger of the Scottish Tribunals Service (STS) with the Scottish Court
Service (SCS), a concern is that in housing the STS within the SCS, the judicial
auspices of SCS may influence tribunals. It is vital that tribunals retain their
distinctive operational style and continue to provide consumers with a less formal,
more accessible and more specialised alternative to courts.

Express principles would help to safeguard the general character of tribunals and
further, could help in the safeguarding of the individual character of tribunals. In the
possible development of a housing tribunal, for example, a legislated principled
framework would greatly assist in developing a forum with the needs of users as its
core concern.

---

6 Scottish Government, Consultation on the Proposed Merging of the Scottish Tribunals Service
and the Scottish Court Service closing September 2013.
7 As raised in the Scottish Government Consultation Better Dispute Resolution in Housing:
Consultation on the Introduction of a New Housing Panel for Scotland which closed in April
2013.
(2) Whether the Bill will guarantee openness, fairness and impartiality in tribunal procedures, and whether it will allow for sufficient specialisation?

Openness and fairness

Established by the Franks Report – the 1957 report which was published as the outcome of an inquiry into tribunals and chaired by Sir Owen Franks - the principles of openness, fairness and impartiality in relation to tribunal procedures are keystone principles by which tribunals should operate. The report provided guidance on the scope of the principles:

- Openness: publicity of proceedings and reasoning underlying the decisions;
- Fairness: adoption of a clear procedure which enables parties to know their rights, to present their case fully, and to know which case they have to meet;
- Impartiality: freedom of tribunals from influence, real or apparent, of departments concerned with the subject-matter of their decisions.

As an individual instrument, the Bill does not currently guarantee openness, fairness and impartiality. Neither the Bill nor the Explanatory notes mention the principles expressly, and the provisions of the Bill as they stand cannot be seen to provide assurances that the principles will be met through the fulfilment of their characteristics as outlined by Franks.

In assuring openness, CAS would like to see tribunals subject to an express duty to publish decisions in clear and plain English. As the Bill currently stands, s67(4) directs that the Tribunal Rules may make provisions about the recording and publication of tribunal decisions but framed like this there is no requirement to make such provisions. There is therefore no guarantee of openness as characterised by Franks.

Such a provision would be similar to the duty outlined in s10 of the Tribunals and Enquiries Act 1992, but we would like to see provision for Scottish Tribunals go further in requiring the information to be accessible and easy to understand. Without a requirement under openness to publish the reasons for decisions, fairness is also impacted in parties appealing decisions made – if a party does not know the reasons for the decision made they cannot know the case which they have to meet.

In terms of fairness, again the Bill offers no guarantee that this principle will be fulfilled. With no procedure detailed except mention of what may be drafted (ss62-68), there can be no assurance that the rules as written will offer clear procedure which allows parties to know their rights and present their case. Nor is there any guarantee that other characteristics of tribunals outlined by Franks will be achieved: accessibility of procedure, freedom from technicality, and expedition.

The Bill is not prescriptive enough to offer guarantee that rule-drafters are compelled to undertake any specific rules, or to write rules with any specific principles of guidance in mind. Although this will allow for flexibility in the rules writing process, and the Scottish Civil Justice Council (SCJC) are themselves bound by overarching
principles in composing rules\textsuperscript{8}, the lack of guidance affords a significant power to those composing the rules and takes those rules out of the domain of the legislature. In mitigating this delegation, CAS would again recommend that principles similar to those on the face of the TCEA are included on the face of the Bill.

Process is fundamental to the user experience. It is vital that the process of tribunals holds the interest of users at its core and in including similar principles to those outlined above, there will be an assurance that the principles of openness and fairness in process are guaranteed.

**Impartiality**

Although impartiality was notarised as a principle of tribunals alongside openness and fairness by Franks, it was built upon and taken forward as a core principle of the Leggatt report.\textsuperscript{9} Leggatt identified the three ideals of tribunals as having:

1. Independent and impartial process
2. An independent and skilled judiciary
3. A coherent system

It is vital that the last of the Franks principles and the first of the Leggatt principles – impartiality – is upheld. It is also key that the relationship between impartiality and independence is understood. In *Gillies*, Lady Hale set out the distinction: “Impartiality is the tribunals approach to deciding the cases before it. Independence is the structural framework which secures this impartiality, not only in the minds of the tribunal members but also in the perception of the public.”\textsuperscript{10}

Impartiality then requires clear rules to facilitate the impartiality of decisions as well as an independent body to oversee the operation of tribunals as a whole: it is a term of both process and structure. Setting out clear principles on the face of the Bill to guide the writing of procedural rules will greatly assist in ensuring impartiality of process. CAS would again recommend that this is considered.

In ensuring impartiality of structure, the emerging picture in Scotland is complicated. The pending abolition of the Administrative Justice and Tribunals Council, including the Scottish Committee, leaves a gap in terms of overseeing the operation of tribunals in Scotland. Currently charged with keeping under review the constitution and workings of tribunals, reporting on any matter which may relate to tribunals or reporting on any matter referred to the Council by Scottish Ministers, the functions of the AJTC are wide. Further, their position is motivated by promoting the needs of users as of paramount importance:

The Administrative Justice and Tribunals Council keeps under review the administrative justice system as a whole with a view to making it accessible, fair and efficient. We seek to ensure that the relationships between the

\textsuperscript{8} Scottish Civil Justice Council and Criminal Legal Assistance Bill, s2(3)


\textsuperscript{10} *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2 at paragraph 38.
courts, tribunals, ombudsmen and alternative dispute resolution providers satisfactorily reflect the needs of users.\textsuperscript{11}

The gap left by their abolition will be significant. Partial function for reviewing the practice and procedure followed in proceedings in Scottish Tribunals will fall to the SCJC.\textsuperscript{12} CAS welcomes this as review of procedure will be essential in ensuring the tribunal rules are operating effectively and efficiently. However, this function is a significantly limited function in the context of all the AJTC undertook. There is no provision made for the SCJC to keep the administrative justice system under review as it is charged to keep the civil justice system under review.\textsuperscript{13} The provision to keep civil justice under review is explicit and so it is implied that the function to keep administrative justice under review will fall elsewhere.

The Minister for Community Safety and Justice in Scotland has expressed her commitment to “an expert independent advisory committee for administrative justice and tribunals in Scotland”\textsuperscript{14} but as yet, the constitution and remit of this body has not been confirmed. It is also not clear what, if any, interaction there may be between the Interim Committee and the SCJC.

These may be answered in the detail which emerges about the Interim Committee but CAS believes that any body assuming the broad functions of the AJTC should not apply lower standards, including the standard of independence. Such a body should also have the same power to convey their opinions and reports to Ministers. The functions of the AJTC were of significant importance to the consumer interest and their functions should not be allowed to fall through the gaps of change.

As it stands, the Bill does not guarantee impartiality: of process or structure. In not being explicit about rules, impartiality of process cannot be guaranteed as the processes are currently unknown. In only charging the SCJC with the obligation to review practice and procedure, impartiality of structure cannot be guaranteed. The unknowns about the Interim Committee compound this, and there are still many questions to be addressed.

**Specialisation**

CAS welcomes the intention that specialisation will continue to be a key feature of the tribunals system. We also welcome the consistency in training which s31 should bring in training and review. A consistent and organised programme of training will greatly help the development of specialism and the achievement of Leggatt’s \textsuperscript{2nd} ideal of an independent and skilled judiciary.

We would also welcome that as part of that training, experience was gained in environments other than academic ones, to give ordinary, legal and judicial members

\textsuperscript{11} AJTC website, available at http://ajtc.justice.gov.uk/ (last accessed 23\textsuperscript{rd} July 2013)
\textsuperscript{12} By virtue of Schedule 9 s12(2)(a) amending s2(1) of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013
\textsuperscript{13} Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, s2(1)(a)
\textsuperscript{14} Reiterated at http://www.scottish.parliament.uk/S4_J usticeCommittee/General%20Documents/20130307_MCSLA_to_CG.pdf
a consistent grounding in the subject matter they are dealing with. For example, although non-judicial members of the Additional Support Needs Tribunal will come from on-the-ground practice, it would be desirable that judicial members of the tribunal were familiar with the whole additional support needs environment. For example, part of their training could involve spending time in a school or project dedicated to additional support needs.

To ensure the principle of specialism is upheld CAS feel strongly that where a member is cross-ticketed between chambers, that member should have the same degree of specialism in both chambers. To ensure this, it would be preferable if the appointments process was individual to a chamber which would ensure that if a member is cross-ticketed, they have been appointed on their merits for an individual subject.

To further ensure specialisation CAS believes that part-time appointments should be allowed and encouraged. This could allow a member to continue working in the field in which they have established a specialist knowledge. Consideration could also be given to increasing the flexibility of tribunals to sit in various locations at times not necessarily restricted to office hours which could widen the pool of potential candidates.

(3) The rules relating to appeals.

The introduction of new measures allowing tribunals to review their own decisions could be a positive step in proportionate dispute resolution where decisions do not have to be escalated to be reviewed. This could certainly be to the benefit of users who do not experience a more daunting appeal situation but there are safeguards to the provision of justice which should be adhered to.

The most prominent of these is that the constitution of a tribunal (whether one member or more) should be entirely different to the original constitution. Accessibility for users should not suffer, in terms of location or procedure relating to review of decisions, and the degree of specialism of the members should remain consistent.

As with other Tribunal Rules which are not prescriptive, s38(3)(b) gives very wide powers to those writing the rules. While this does provide flexibility, this flexibility should not be unchecked. Tribunal rules such as this should be the subject of public consultation to ensure that rules do not bring unintended consequences – in this case relating to excluded decisions.

s43(1) highlights the route of appeal from the Upper Tribunal to the Court of Session, which is in line with appeals under the TCEA s13(12)(b) but in terms of the user experience in both situations, this represents a fundamental difference. Tribunals are designed to be user-friendly, accessible in process and venue and inquisitorial. If a case is appealed to the Court of Session the venue is set in Edinburgh and an advocate must be instructed. If an appeal or second appeal is raised by the State party (particularly in resolving clarity on a point of law) there is a risk that the individual will face real financial hardship or will not be capable of continuing in an action as a result of being swept into the legal process.
At each point in the process, but particularly in the leap between tribunal and Court of Session, there should be far more consideration given to the use of alternative dispute resolution. The Court of Session, Upper Tribunal and First Tier Tribunal should be forums of last resort but when they are necessary forums for dispute resolution, the accessibility of the user should be of paramount importance.

(4) **The rules relating to appointments/membership.**

CAS welcomes the introduction of a consistent system of appointment of tribunal members in Scotland. We acknowledge the duty placed on the Lord President at s30 to publish a document outlining the appointments process for judicial and non-judicial members and would expect this document to outline a process of appointment which is fair, open and transparent.

CAS also thinks that there should be opportunity for part-time appointments of judicial and non-judicial members to be made. This has the potential to further specialism through on-going practise in the area of specialism, could increase the pool of candidates and could greatly help to ensure the continuation of hearings in a wide series of geographical locations and venues across Scotland.

(5) **The rule-making power granted to the Scottish Civil Justice Council.**

*At the outset of comments made in relation to the Scottish Civil Justice Council, CAS should declare an interest as a consumer representative of the SCJC. Any comments made reflect the independent views of CAS.*

Process is fundamental to the user experience and it is vital that the Tribunal Rules devised are sensitive to the needs of users. Rules should be guided by principles of openness, fairness, impartiality and go further to ensure affordability, accessibility – both in location and in procedure, freedom from technicality, expedition and specialism. These principles should facilitate an accessible system with the needs of users at the core.

As discussed above, CAS would recommend that in guiding the development of Tribunal Rules, such principles are enshrined on the face of the Bill in a similar way to the principles expressly included on the face of the Tribunals Courts and Enforcement Act 2007, ss2(3) and 22(4).

In the delegation to the SCJC, CAS recognises the benefit in terms of consistency between civil and administrative justice which the remit creates. However, in this consistency there is a danger which should also be recognised in the need to ensure the unique and individual characteristics of tribunals is maintained and allowed to develop. The freedom which tribunals have been allowed until now has led to an ad hoc system, but it has also led to a system which has allowed the organic development of characteristics suited to the varying topics which tribunals govern.

We welcome the intention to increase the membership of the SCJC to accommodate the specialism needed to inform work in relation to tribunals. We would also recommend that consideration is also given to extending membership to a consumer member who specialises in tribunals.
As discussed above, CAS welcomes the provision in schedule 9 to keep the practice and procedure followed in proceedings under review but it is key to note that this provision does not replace the function of keeping the administrative justice system under review. The whole review function must be taken up by an independent body.

If this body is not to be the SCJC, consideration should be given to who this body should be, the scope of their function, and their interaction with the SCJC. Also under schedule 9, CAS welcomes the establishment of a Committee of the SCJC on Tribunals. We do note however that other Committees of the SCJC are left to the Council to establish and this Committee will be the only prescribed Committee.

An on-going monitoring function of the rules as well as how the tribunals system is functioning is essential. With a prescribed Tribunals Committee and a duty to review practice and procedure, perhaps the Bill should include express provision for the SCJC to become the monitoring body for administrative justice as well as civil justice.

Lauren Wood, Policy Officer
July 2013