Justice Committee

Tribunals (Scotland) Bill

Written submission from the Child Poverty Action Group in Scotland

About CPAG in Scotland and scope of the evidence

Child Poverty Action Group in Scotland provides advice, information and training to frontline advisers on social security and related devolved financial support. In terms of appeals, our work is primarily concerned with social security appeals. As such, we operate within the UK’s HM Courts and Tribunals Service system by supporting advisers who are making appeals. Although the Bill is concerned with devolved tribunals, in none of which do we have any expertise, the proposed structure of Scottish Tribunals is sufficiently like the UK system that we feel able to offer some comment.

1. Is the new structure an improvement?

Except in broad outline, we are not familiar with the existing system of devolved tribunals. However, the UK unified tribunal system commands broad respect, works well overall, and is a good model for the Scottish system. We would therefore welcome such a unified structure for Scottish Tribunals.

Within the UK unified system, placing jurisdictions such as social security into separate chambers allowed for a smooth transition and for the needs of the different jurisdictions to be accommodated appropriately eg, for separate procedural rules, separately identified caselaw, appropriate publicity for users.

2. Openness and fairness

2.1. Tribunal Rules. The Bill provides for the Court of Session to produce Tribunal Rules governing tribunal practice and procedure (clauses 62 to 67). We suggest that the Bill explicitly requires this power to be exercised with a view to securing that the tribunal system is accessible and fair, and that the rules are both simple and simply expressed. Similar provisions are included in the Act setting up the UK tribunal system.\(^1\) The Tribunal Rules for the UK system are indeed simple and clear and underpinned by an overriding objective to deal with cases fairly and justly, avoiding unnecessary formality and ensuring that parties are able to participate fully in the proceedings. This helps lay representatives and appellants understand their role and duties.

While procedural rules can go some way to guaranteeing openness and fairness for the user, as important is the culture of the system and how welcoming it is for users.

2.2. Relative informality. One of the successes of the social security tribunal system, particularly at first-tier level, has always been the relative informality. They manage to be authoritative without being overly intimidating. It would be

\(^1\) s22(4) Tribunals, Courts and Enforcement Act 2007
important to retain this in the transition to a unified system and not import features from the court system. For example, hearings should be heard round a table, with judges called Mr/ Mrs/ Ms/ Miss, with no robes and wigs worn, venues should not be in court buildings, and there should be no strict rules of evidence or need to give evidence on oath.

2.3. **User communications.** All information for users must be in plain English and avoid jargon. The court system is so weighed down with jargon that it often struggles to express itself plainly to users.

2.4. **Public awareness of tribunals.** Making an appeal is a daunting prospect for most people. Most have never been involved in legal proceedings of any sort and are likely to think in terms of the more forbidding end of court proceedings rather than the less formal and more approachable setting of tribunals. There is an opportunity to improve access to justice by promoting awareness and improving the image of tribunals.

2.5. **Lay representatives.** In UK social security appeals, the attendance of a representative makes a significant difference to success rates (on average 63% compared to 47% unrepresented). This is perhaps not a surprise given the complexity of social security law. However, a representative helps in other ways: helping to assess whether an appeal has a reasonable prospect of success, encouraging an appeal when there is a strong case, helping to gather evidence, supporting the person in knowing what to expect at a hearing and to attend the hearing itself. All of this is can be of critical importance, even in those cases where because of the inquisitorial nature of the tribunal hearing, there is less scope for advocacy. Although CPAG’s expertise does not lie in the areas of jurisdiction with which the tribunals in the new structure are dealing, we would urge that Scottish Tribunals should actively welcome and encourage lay representatives, both at first-tier and upper tribunal level, while at the same time adopting an enabling approach to the unrepresented person.

2.6. **Tribunal user forums.** Having user groups meet regularly with members of the judiciary and tribunals administration is an important way to gather feedback on the user perspective of the appeals process. In social security, advice agencies, advocacy organisations and other groups providing lay representation and support are invited to regular meetings.

3. **Retaining specialisms**

3.1. **Recruitment.** In the Bill (clause 30), responsibility for assigning tribunal members to chambers and divisions rests with the President of Tribunals. We would suggest that, in practice, appointment of tribunal members is chamber based, with recruitment being specifically to a particular chamber. In the UK tribunal system, judicial appointments for social security appeals are specifically to the Social Entitlement Chamber. This ensures not only that

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recruitment can require lawyers to demonstrate existing knowledge of that area of law, but also that those appointed can gain enough experience of similar tribunals to develop their expertise in that area of law and practice.

3.2. Training. A unified administration allows for a central induction and training programme for tribunal members to develop and maintain skills in, for example, effective evidence gathering from appellants in oral hearings, equality awareness, as well as updating in the relevant law.

4. Appointments and membership

For the First-tier Tribunal, it is not always the case that the judge has any particular skills in showing empathy with people. Many people struggle to present their situation fully under the stress of a tribunal hearing, and having tribunal members who are alert to that and able to draw out a person effectively is obviously very important, particularly for people who are unrepresented. For that reason, the importance of having lay members on the panel from the community with an understanding of the social background of the people appealing should not be underestimated. The policy memorandum relating to the Bill does not pick up this point, but rather concentrates on the value of non-legal ‘expertise’.³ We would recommend that it would enhance a user-centred approach if attention is also given to the value of lay members from the community.

5. Other issues

5.1. Delays. There remain obstacles to justice, even under the unified tribunal system. Perhaps unsurprisingly given the level of welfare reforms, the number of appeals in the UK social security system is higher than ever.⁴ The tribunals service has struggled to keep up with the volume and delays have been increasing. It now takes on average 18 weeks to deal with a case compared with 13 weeks in 2009. This doesn’t include the time it takes for the case to reach the tribunals service, which can add further weeks or months when there is an initial dispute stage to negotiate. This is too long. While we appreciate that some jurisdictions are more time critical for the people appealing than others, Scottish Tribunals should consider how to minimise delays. We would suggest the following based on our experience of social security appeals.

- Ensure people can appeal directly to the tribunal service and that the decision making body is required to respond within a specific time limit. In social security, people have had to lodge their appeals with the decision making body (local authority, Department for Work and Pensions or HMRC). There are no time limits on these bodies to conduct a review, produce a submission or forward on the appeal to the tribunals service, and consequently appeals can get stuck at this

³ Para 20, SP Bill 30-PM
⁴ Increase of 52% in Jan-March 13 compared to previous year
point. The system is about to change with direct lodgement being introduced widely from October 2013.

- Set challenging targets for clearing appeals, monitor and publish statistics.

5.2. **Appeals process.** The procedural rules introduced following the introduction of the unified appeal system in the UK paved the way for a real improvement in people’s experience of the system. The new rules meant that some 1,200 people won their appeals who under the old rules would have had their appeal struck out for failure to return an enquiry form.\(^5\) Drawing up new procedural rules for Scottish Tribunals gives an opportunity to identify and overcome any similar blockages or barriers in the system. We would also suggest that there is consultation on draft Tribunal Rules with a view to avoiding inadvertently introducing new barriers, for example, by setting fixed time limits for people to make an appeal without allowing for extending the time limit where there are special circumstances.

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30 July 2013

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\(^5\) Memorandum submitted by HH Judge Robert Martin, September 2009, [http://www.publications.parliament.uk/pa/cm200809/cmselect/cmworpen/memo/decision/ucm2702.htm](http://www.publications.parliament.uk/pa/cm200809/cmselect/cmworpen/memo/decision/ucm2702.htm)