Justice Committee

Tribunals (Scotland) Bill

Written submission from the Mental Health Tribunal for Scotland

The Mental Health Tribunal for Scotland

The Mental Health Tribunal for Scotland (“the Tribunal”) was established by section 21 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) and became operational in October 2005. The Tribunal is responsible for making and reviewing decisions concerning the compulsory care, treatment and detention in hospital of people in Scotland with mental disorder.

Background

In March 2012, the Scottish Government published its consultation on the Scottish Government’s Proposals for a New Tribunal System in Scotland. The Tribunal was concerned by a number of issues raised in the consultation document, in particular the statement that the Scottish Government’s proposal—

“…will create two new, generic tribunals, the First-tier Tribunal and the Upper Tribunal, with first-tier chambers into which existing tribunal jurisdictions can over time be transferred”.

The Tribunal, which is an expert tribunal in the area of mental health, was concerned that after its creation by the 2003 Act with the specific intention of removing mental health cases from the jurisdiction of the “generic” public courts in Scotland and transferring them into an expert jurisdiction, the proposal appeared to envisage the return of the mental health jurisdiction to a “generic” First-tier Tribunal.

The Tribunal made a detailed response to the consultation on the Scottish Government’s Proposals for a New Tribunal System in Scotland, and thereafter engaged with the Scottish Government to seek to have its concerns addressed.

The Tribunals (Scotland) Bill

The Tribunal has considered carefully the terms of the Tribunals (Scotland) Bill, its accompanying Explanatory Notes, the Policy Memorandum and the Delegated Powers Memorandum. In light of the Scottish Government’s engagement with the Tribunal after receipt of the Tribunal’s response to the consultation on the Scottish Government’s Proposals for a New Tribunal System in Scotland, and consideration of the Bill, Notes and Memoranda, the Tribunal welcomes and supports the Tribunals (Scotland) Bill.

The Tribunal warmly welcomes the fact that the Bill will designate the Lord President of the Court of Session as the Head of the Scottish Tribunals (section 2 of the Bill), thus bringing the Scottish Tribunals directly under the judicial leadership of the Lord President and so strengthening the perception of the independence of the Scottish Tribunals.
The Tribunal also warmly welcomes the statutory duty on various individuals, including the First Minister, the Lord Advocate, the Scottish Ministers, members of the Scottish Parliament, and all other persons with responsibility for matters relating to the members of the Scottish Tribunals or the administration of justice, to uphold the independence of the members of the Scottish Tribunals (section 3 of the Bill).

The Tribunal also warmly welcomes the establishment of the office to be known as Resident of the Scottish Tribunals, being a judge of the Court of Session assigned to that office by the Lord President (section 4). This appears to the Tribunal to be a valuable measure ensuring that the Scottish Tribunals are provided with direct leadership by a member of the senior judiciary.

The Tribunal welcomes the undertaking given at paragraph 43 of the Policy Memorandum that “The Scottish Government has made a commitment that initially mental health will be in a chamber on its own”. The Tribunal notes that paragraph 43 continues “At the moment there are no other tribunals covering a similar subject matter as mental health. It therefore makes sense to do this for now. The Scottish Government recognises the uniqueness of the Mental Health Tribunal for Scotland and is committed to ensuring that all of its distinctive and valued characteristics can be protected and maintained in the new structure”.

The Tribunal also welcomes the undertaking given at paragraph 44 of the Policy Memorandum that:

“The Scottish Government is committed to ensuring that safeguards in the new structure in relation to the Mental Health Tribunal for Scotland will:

- continue to keep the patient at the centre of everything it does;
- retain the eligibility criteria for non-legal members which ensures that new members have the knowledge, experience and expertise to hear mental health cases;
- retain the tailored and specific training provided to members of the Mental Health Tribunal for Scotland which recognises the patient-centred culture developed by this jurisdiction;
- have a Chamber President who recognises the patient-centric culture and ethos of the Mental Health Tribunal for Scotland and is committed to safeguarding this;
- keep the bespoke rules currently used by the Mental Health Tribunal for Scotland (subject to appropriate modification);
- use, so far as is possible, the same venues for hearings that have been particularly appreciated and uniquely adapted for patients;
- retain the membership of the Mental Health Tribunal for Scotland (including the President) at the time at which its functions are transferred, who have been specifically trained to understand the sensitivities surrounding these particular cases though the provisions in the Bill providing for the transfer-in of members;
- continue to adhere to the Millan Principles – which the Scottish Government believes are a key strength of this jurisdiction; and
- continue to receive a specialist and dedicated administrative support.

The Tribunal has three categories of members: legal, medical and general. In making its decision, the Tribunal sits as three-member tribunal panels comprising a
general member and medical member and convened by a legal member. Accordingly, the Tribunal welcomes the commitment given at paragraph 24 of the Policy Memorandum that “When sitting in tribunals all members, whether ordinary\(^1\) or legal, have the same status and capacity as the judiciary, as they are all making judicial decisions”.

**Key issues**

The Tribunal responds to the key issues identified in the call for evidence on the Tribunals (Scotland) Bill by the Scottish Parliament’s Justice Committee as follows:

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

The Tribunal is an independent judicial body which makes decisions that directly impact on the liberty of certain individuals in Scotland. The Tribunal recognises that its important functions (important because they impact directly on the liberty of individuals in Scotland) can be discharged effectively within the context of a structure other than the existing structure.

The Tribunal is satisfied that it can continue to discharge its functions in the context of a differently configured institution. The Tribunal’s concerns are to ensure that its expertise (i.e. having the knowledge of general and medical members with the convenership of a legal member), its ethos (i.e. keeping the patient at the centre of all that it does while having appropriate regard to the views of others) and the substantive law (i.e. the provisions of the 2003 Act) are not compromised by the transfer of the Tribunal into a new structure.

In light of the undertakings given at paragraphs 43 and 44 of the Policy Memorandum, the Tribunal is satisfied that the new structure of the First-tier Tribunal, made up of various distinct chambers, will not compromise its expertise, ethos or the substantive mental health law. The Tribunal notes that the Scottish Government’s commitment is “…that initially mental health will be a chamber on its own” and “It therefore makes sense to do this for now”. The Tribunal’s only concern in respect of this matter is, should in future the Scottish Government seek to amalgamate the mental health jurisdiction with any other jurisdiction, that this should be done only after appropriate consultation.

Subject to the foregoing, the Tribunal recognises that there are potential benefits inherent in taking numerous disparate tribunal bodies and amalgamating them into one single institution, not least the benefit of having these disparate jurisdictions all brought under the judicial leadership of the Lord President and the President of the Scottish Tribunals.

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\(^1\) paragraph 20 of the Policy Memorandum states that “ordinary members” are “those not considered to be legally qualified”.
(2) Whether the Bill will guarantee openness, fairness and impartiality in tribunal procedures, and whether it will allow for sufficient specialisation?

Given the leadership provided by the Lord President as Head of the Scottish Tribunals, the establishment of the office of President of the Scottish Tribunals, and that the Mental Health Tribunal for Scotland will (“initially” at least) be a chamber on its own and that nothing in the Bill appears to the Tribunal to impact on its expertise, ethos or substantive law, and given the terms of section 3 (upholding independence) of the Bill, the Tribunal is satisfied that the Bill will guarantee openness, fairness and impartiality as currently exercised in the mental health jurisdiction. Further, given the clear commitment of the Scottish Government at paragraph 43 of the Policy Memorandum that:

“The Scottish Government recognises the uniqueness of the Mental Health Tribunal for Scotland and is committed to ensuring that all of its distinctive and valued characteristics can be protected and maintained in the new structure”

and the terms of the Bill itself, the Tribunal is satisfied that the Bill will not impact on the openness, fairness and impartiality as currently exercised in the mental health jurisdiction and will allow for specialisation.

(3) The rules relating to appeals

Section 41 of the Bill makes provision for appeals from the First-tier Tribunal. Such an appeal can be made by a party in the case on a point of law only with the permission of the First-tier Tribunal or of the Upper Tribunal. However by virtue of section 41(5)(b), section 41 does not apply in relation to an excluded decision.

Decisions of the Mental Health Tribunal for Scotland can be appealed to the sheriff principal or, in cases where the patient is subject to a compulsion order and restriction order, a hospital direction or a transfer for treatment direction, to the Inner House of the Court of Session.

The Tribunal understands that the Scottish Government’s intention is that appeals against decisions of the Tribunal which can currently be taken to the sheriff principal will be able to be taken to the Upper Tribunal in accordance with section 41 of the Bill. While the Tribunal’s view is that the route of appeal to sheriffs principal has worked well and that the Tribunal has received useful judgements and guidance from sheriffs principal, given the provisions in the Bill concerning the structure of the Upper Tribunal (at sections 22 to 25) and the provisions concerning membership of the Upper Tribunal (at sections 15 to 17), the Tribunal is content that appeals to the Upper Tribunal will continue the robust scrutiny of decisions of the Tribunal which are appealed against.

The Tribunal notes at paragraph 61 and footnote (9) of the Policy Memorandum that decisions of the Tribunal which are currently taken to the Inner House of the Court of Session will continue to be taken direct to the Inner House, and not to the Upper Tribunal. The Tribunal’s view is that the route of appeal to the Inner House of the Court of Session has worked well and that the Tribunal has received useful judgements and guidance from the Inner House.
(4) The rules relating to appointments/membership

The Tribunal notes that section 28 (transfer-in of members) provides that schedule 2 contains provision for the transfer of certain persons from the listed tribunals (including the Mental Health Tribunal for Scotland) into the Scottish Tribunals to hold (a) particular named positions or (b) ordinary or legal membership generally.

Paragraph 1(1) of schedule 2 to the Bill provides 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 specified in paragraph 4(1) or (2)". Paragraph 4(1) provides that in relation to the First-tier Tribunal, the particular positions are Chamber President in the Tribunal and Deputy Chamber President in the Tribunal, and the other positions are ordinary member of the Tribunal and legal member of the Tribunal.

It appears to the Tribunal that these provisions may allow the Scottish Ministers a discretion as to which of the current members of the Mental Health Tribunal for Scotland may be transferred into the First-tier Tribunal. However, the Tribunal notes the undertaking given by the Scottish Government at paragraph 51 of the Policy Memorandum that "The functions of listed tribunals along with their members and caseload will transfer-in separately to the new structure by regulations (which are subject to the affirmative procedure)". Accordingly, the Tribunal's understanding is that at the time of transfer-in of the Mental Health Tribunal for Scotland to the First-tier Tribunal, its President and all of its general, medical and legal members will be transferred in to the First-tier Tribunal.

The Tribunal notes that section 14 of the Bill provides that a person may be an ordinary or legal member of the First-tier Tribunal either by transfer-in under section 28 or by appointment under section 29(1). This response has addressed the transfer-in of members in the three foregoing paragraphs. With regard to appointment under section 29(1), the Tribunal notes that section 29(1) provides that in terms of schedule 3, the Scottish Ministers may make regulations setting out criteria for membership as an ordinary or legal member. See paragraph 1(2) and 6(1) of schedule 3. The Tribunal notes the undertaking given at paragraph 44 of the Policy Memorandum that the Scottish Government is committed to retaining the eligibility criteria for non-legal members, i.e. the Tribunal’s general and medical members, which are currently set out in the Mental Health Tribunal for Scotland (Appointment of General Members) Regulations 2004 (SSI 2004/375) and the Mental Health Tribunal for Scotland (Appointment of Medical Members) Regulations 2004 (SSI 2004/374) respectively.

With regard to legal members, the eligibility criteria are currently set out in the Mental Health Tribunal for Scotland (Appointment of Legal Members) Regulations 2004 (SSI 2004/286). The Tribunal notes that paragraph 5(1) of schedule 3 to the Bill requires a legal member to be a solicitor, advocate or barrister who has practiced for

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2 paragraph 20 of the Policy Memorandum states that "ordinary members" are “those not considered to be legally qualified”.
3 paragraph 20 of the Policy Memorandum states that "ordinary members" are “those not considered to be legally qualified”.
4 as amended by SSI 2005/359
a period of not less than 5 years, or if s/he falls within a description specified by the Scottish Ministers in regulations made under paragraph 5(2) of schedule 3. The Tribunal understands from paragraph 95 of the Explanatory Notes that the purpose of paragraph 5(2) of schedule 3 is to enable the Scottish Ministers to make provision for persons who have previously practised law for a period of not less than 5 years as a solicitor, advocate or barrister, but who have then gone on to engage in another law related activity such as legal teaching or researching.

The Tribunal would expect the Scottish Government to consult on any proposals it had to make regulations under paragraph 5(2) of schedule 3.

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

The Tribunal notes the terms of sections 62 to 67 of the Bill concerning the making of Tribunal rules. The Tribunal notes from paragraph 72 of the Policy Memorandum that “… as there is a clear distinction between courts and tribunals, the Bill provides for the SCJC to use the powers provided in the 2013 Act (section 13(1)) to constitute a ‘tribunals committee’ to deal with tribunal rules” and that the committee “would be composed of persons with tribunal experience in the area for which the rules were being made” and that the tribunals committee “would be chaired and panel members would be selected by the President of Tribunals”. The Tribunal agrees with the view of the Scottish Government expressed at paragraph 72 of the Policy Memorandum that this “would ensure that the distinctiveness and ethos of tribunals is protected in the new structure…”.

(6) Any other aspects of the Bill

The Tribunal has no comment to make on any other aspects of the Bill in this written response.

Mental Health Tribunal for Scotland
31 July 2013