Justice Committee

6th Report, 2013 (Session 4)

Public Bodies Act Consent Memorandum on the Public Bodies (Administrative Justice and Tribunals Council) Order 2013

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Justice Committee

Remit and membership

Remit:

To consider and report on:

a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and

b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Roderick Campbell
John Finnie
Christine Grahame (Convener)
Colin Keir
Jenny Marra (Deputy Convener)
Alison McInnes
David McLetchie
Graeme Pearson
Sandra White

Committee Clerking Team:

Irene Fleming
Joanne Clinton
Ned Sharratt
Christine Lambourne
The Committee reports to the Parliament as follows—

Public Bodies Act consent memoranda

1. The UK Public Bodies Act 2011\(^1\) gives UK Ministers the authority, via order-making powers, to abolish, merge or transfer the functions of public bodies listed in its schedules. As some of these public bodies operate within both reserved and devolved policy areas, Section 9 of the Act provides that those orders which affect public bodies that operate within devolved policy areas require the consent of the Scottish Parliament before they can be agreed by the UK Parliament.

2. This consent is secured via the Scottish Government laying a Public Bodies Act consent memorandum (PBACM) seeking the Scottish Parliament’s approval for the UK Order, in so far as it relates to devolved policy areas, to be agreed. A PBACM is considered by a lead committee, which must report to the Parliament. The PBACM will include a draft motion which the Scottish Government will lodge following the publication of the lead committee’s report.

3. Further information on the PBACM process is set out in chapter 9BA of Standing Orders.

4. The Public Bodies Act consent memorandum for the Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013 can be viewed on the Scottish Parliament’s website—

http://www.scottish.parliament.uk/LegislativeConsentMemoranda/PBCM_AbolitionofAJTC_rev.pdf (336KB pdf)

5. The PBACM contains the following draft motion—

“That the Parliament consents to the making of the Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013, a draft of which

was laid before the United Kingdom Parliament on 18 December 2012 and which makes provision which would be within the legislative competence of the Parliament if it were contained within an Act of that Parliament.”

Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013

6. The Order seeks to abolish the Administrative Justice and Tribunals Council (AJTC) and its Scottish Committee. The AJTC and its Scottish Committee provides advice to UK and Scottish Ministers on the administrative justice system and performs supervisory functions over specified tribunals.

7. The abolition of the AJTC’s Scottish Committee will remove the requirement on Scottish Ministers to consult it before making procedural rule changes to those specified tribunals and will remove the rights of Scottish Committee members to observe the proceedings of specified tribunals.

Scottish Government’s position

8. The Scottish Government has stated that it is content for the AJTC and its Scottish Committee to be abolished. In paragraph 10 of the PBACM, it states that—

“The Scottish Government considers that, since the Scottish Civil Justice Council and Criminal Legal Assistance Bill, the Tribunals (Scotland) Bill and forthcoming legislation to reform the tribunals landscape will be comprehensively reforming the administrative justice system in Scotland, there is no longer a requirement to retain the supervisory functions of the AJTC.”

9. The Scottish Government has also stated its intention to establish an interim non-statutory advisory committee, following the abolition of the Scottish Committee of the AJTC, in order to provide expert advice to Scottish Ministers in the short term. Paragraph 11 of the PBACM states that this “will allow time for full consideration of longer-term options to support the administrative justice landscape and the new tribunals system in Scotland”.

Issues raised in relation to the PBACM

Consideration by the Subordinate Legislation Committee

10. The Subordinate Legislation Committee (SLC) considered the draft Order associated with the PBACM under the same grounds as instruments laid before the Parliament at its meeting on 5 February 2013 and reported that it did not need to draw the attention of the Parliament to the memorandum. The SLC did, however, agree to draw the following to the attention of this Committee—

“…the explanatory document which accompanies the order does not explain how the statutory criteria in section 8 of the Public Bodies Act 2011 have been satisfied in relation to the effect of the order in its application to

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Scotland. The Justice Committee may therefore wish to explore with the Scottish Government how the order and any subsequent Scottish proposals will improve the exercise of public functions in Scotland."

11. Section 8(1) (purpose and conditions) of the 2011 Act provides that a Minister can only make an order if they consider that it improves the exercise of public functions, having regard to efficiency, effectiveness, economy and securing appropriate accountability to Ministers.

12. The explanatory document published with the Order sets out how the UK Government believes it satisfies section 8(1) (paragraph 7.16, pages 7-10).

**Consideration by the UK Parliament**

13. The Secondary Legislation Scrutiny Committee of the House of Lords raised concerns in relation to the draft Order in its 25th and 32nd Reports. Specifically, the Committee was concerned that the case for abolition had not been sufficiently made and questioned whether it met the key tests set out in the Public Bodies Act 2011 of efficiency, effectiveness, economy and accountability.

14. The Justice Committee of the House of Commons held a consultation for written evidence on the abolition of the AJTC and the proposed replacement arrangements. The Scottish Committee of the AJTC responded outlining its concerns in relation to the proposal and the Law Society Scotland (LSS) also wrote to state that it shared these concerns.

15. The Scottish Committee’s concerns are set out in paragraph 11 of its submission and, in summary, specifically argue that the proposed replacement arrangements will not be sufficiently independent, will not be sufficiently resourced to effectively carry out its role and will not sufficiently take into account Scottish interests.

16. The Justice Committee of the House of Commons reported on 15 March 2013. The Committee highlighted a number of concerns. In particular, the Committee questioned whether the draft Order met the key tests set out in the Act and also the extent to which the Ministry of Justice can or will monitor administrative justice in reserved areas in Scotland. The Committee concluded by

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5 House of Lords Secondary Legislation Scrutiny Committee, [32nd Report](http).


7 Scottish Parliament, Justice Committee. Letter from the Scottish Committee of the AJTC. Available at: [http://www.scottish.parliament.uk/S4_JusticeCommittee/General%20Documents/20130228_LSS_response.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/General%20Documents/20130228_LSS_response.pdf)


9 House of Commons Justice Committee, [8th Report](http).
suggesting that the UK Government should either reconsider its decision to abolish or consider giving it a more restricted, refocused role.

17. Parliamentary Under-Secretary for Justice, Helen Grant MP, wrote to the Justice Committee of the House of Commons on 15 April 2013 indicating that she would consider carefully the points raised by the Committee in its report but that it was her intention to proceed with the Order to abolish the AJTC.

18. After receiving Helen Grant MP’s letter, the Justice Committee of the House of Commons published a report on 25 April 2013. The report drew to the attention of both Houses “the reservations expressed in [its] original Report, none of which are addressed in the Government’s very brief Response.”

Issues considered by the Justice Committee

19. The Justice Committee provisionally considered the concerns raised by the Scottish Committee and the LSS when it agreed its approach to the PBACM at its meeting on 5 March 2013. It agreed to write to the Minister for Community Safety and Legal Affairs, ahead of her giving evidence on the PBACM, to ask for her response to the concerns.

20. The Committee is also currently considering a petition from Accountability Scotland relating to the replacement arrangements following the abolition of the AJTC and its Scottish Committee. The Committee agreed to write to the petitioners asking for their view on the PBACM and the concerns raised by the Scottish Committee and the LSS in advance of the Minister’s evidence.

21. The Committee considered the responses from the Minister and petitioners when it took evidence from the Minister at its meeting on 12 March 2013.

22. During her opening statement, the Minister re-stated her intention to create an interim advisory committee on administrative justice and tribunals following the abolition of the AJTC. She confirmed that the remit of the committee would be

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12 Scottish Parliament, Petition PE1449. Available at: http://scottish.parliament.uk/gettinginvolved/petitions/administrativejustice
“championing the needs of users of administrative justice” and that this would be done through—

“its keeping a strategic overview of the whole of the administrative justice system in Scotland, identifying to the Scottish ministers any issues that affect the administrative justice system in Scotland that might require Government attention, ensuring that users of the system are listened to and their interests are represented, and encouraging networks and the sharing of good practice among practitioners.”

23. The Minister also stated that there remains some uncertainty about the longer term arrangements to provide expert advice on administrative justice matters in advance of the introduction of the Tribunals (Scotland) Bill (expected to be introduced before summer recess and to be referred to the Justice Committee as lead committee at Stage 1). Discussions are also on-going with Ministry of Justice officials in relation to the transfer to Scotland of the administrative function of reserved tribunals and the mechanisms in place to ensure Scottish interests are represented on the Administrative Justice Advisory Group (the UK body which will replace the AJTC).

24. In response to questions, the Minister confirmed that there will be Scottish representation on the Administrative Justice Advisory Group and that the interim advisory group will be independent from Scottish Ministers.

25. Following the publication of the reports of the Secondary Legislation Scrutiny Committee of the House of Lords and the Justice Committee of the House of Commons on the draft Order, the Committee received responses to the concerns raised in those reports from the Minister for Community Safety and Legal Affairs and the petitioners.

**Recommendation**


27. In doing so, the Committee draws the attention of the Parliament to the point raised by the Subordinate Legislation Committee on the PBACM and the concerns of the Justice Committee of the House of Commons and the Secondary Legislation Scrutiny Committee of the House of Lords in relation to the Order.

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16 Scottish Parliament, Justice Committee. Letter from the Minister for Community Safety and Legal Affairs. Available at: [http://www.scottish.parliament.uk/S4_JusticeCommittee/General%20Documents/20130318_MCSL_A_to.CG2.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/General%20Documents/20130318_MCSL_A_to.CG2.pdf) (77KB pdf)

17 Scottish Parliament, Justice Committee. Letter from Accountability Scotland. Available at: [http://www.scottish.parliament.uk/S4_JusticeCommittee/General%20Documents/20130318_Accountability_Scotland2.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/General%20Documents/20130318_Accountability_Scotland2.pdf) (66KB pdf)
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