

Scottish Parliament Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance 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 Scottish Civil Justice Council and Criminal Legal Assistance Bill ('the Bill'). The AJTC is a statutory body created by the Tribunals Courts and Enforcement Act 2007 ('the 2007 Act')¹, and its remit² requires it to scrutinise and comment on legislation, existing and proposed, relating to all aspects of administrative justice in Scotland.

General comment – the need for independent monitoring of administrative justice

2. The Committee's interest in the Bill arises from the reference in the accompanying Policy Memorandum to the possibility that the functions of the Committee might at some point be transferred to the proposed Council³. The UK Government currently proposes abolition of the AJTC and the Committee at the end of 2012 under powers conferred by the Public Bodies Act 2011. In its response to the Scottish Government's consultation paper⁴ the Committee noted *the need for a continuing and independent review function in the field of administrative justice*. The Consultation had specifically raised the question of whether the remit of the Scottish Civil Justice Council should include administrative and tribunal justice. The Committee's view was and remains that, in the event of its abolition, and in the absence of appropriate relocation of its functions, there would be a serious gap in the strategic overview of civil justice in Scotland. The Committee took the view in its response that inclusion of its functions in the remit of the Council might be appropriate in the absence of any body with a specific remit for administrative justice. The Committee's preferred position however is and always has been that its functions are best discharged by such a body.

¹ The Committee took the place of the Scottish Committee of the Council on Tribunals.

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.

³ Policy memorandum - Para 29 - Respondents generally supported transferring the functions of the Scottish Committee of the Administrative Justice and Tribunal Council. The Scottish Committee itself was supportive in principle, but expressed concerns that the proposed focus of the Council was weighted too heavily towards issues of the civil courts and of rule-making. The judiciary generally took the opposite view, having concerns about conferring this responsibility on a body which will initially concentrate on civil rules revision. It is therefore proposed that the Council should take over functions in this regard, once judicial leadership for tribunals is transferred to the Lord President.11

⁴ Consultation on the Creation of a Scottish Civil Justice Council – 29 September 2011.

3. The Scottish Committee does not believe that the structure of the proposed Council as set out in the Bill would be suitable for the discharge of such functions, and it would be concerned if it were proposed to simply tack on those functions to the Council at some indeterminate point in the future. The administrative justice sector of the justice system, as exemplified by the tribunals sector, is distinct from other sections of the civil justice system. Thus for example the approach of tribunals is less formal and is more focused on the user's interests than is that of the ordinary courts. By far the greatest number of tribunals proceedings concern disputes between the citizen and the state, and the nature of administrative justice is that it concerns the relationship of the citizen with the state. The Franks Committee (1957) said that tribunals should be independent, accessible, prompt, expert, informal, and cheap. The Leggatt Report⁵ built the foundations of the modern tribunals system⁶ and its recommendations were the basis also for the tribunals reform programme currently being consulted on by the Scottish Government⁷. A key feature, found in Leggatt's prescription for tribunals, related to the position of users. Thus Leggatt considered that no matter how good tribunals may be, they would not fulfill their function unless they were accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases. Leggatt also considered that tribunals were intended to provide a simple, accessible system of justice where users can represent themselves, and that every effort should be made to reduce the number of cases in which legal representation is needed.

4. If it was to be suggested that the Council should at some point discharge functions in relation to administrative justice as well as civil justice more generally, then the Committee believes that the structure and nature of the Council should from the outset be apt to accommodate that development. The Committee does not believe that at present the Council is so apt. Accordingly the Committee would suggest the following issues need to be considered, and that the Bill amended accordingly.

Specific comments

5. The following paragraphs assume that the Committee is to be abolished (and that no provision has been made by the UK Government for relocation of the Committee's functions). In them the Committee suggests issues to be addressed and discusses possible changes to the Bill. There are three main issues which the Committee considers should be addressed:

- a. *First:* the first issue is how the Committee's functions might become the functions of the proposed Council and which functions should be included;
- b. *Second:* the second question is whether the Council as proposed in the Bill should to any extent be modified to enable it to carry out such functions, and

⁵ Tribunals for Users; One System One Service – Report of the review of Tribunals by Sir Andrew Leggatt;

<http://webarchive.nationalarchives.gov.uk/+http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm>

⁶ as implemented for England and Wales and for UK tribunals in Scotland in the Tribunals Courts and Enforcement Act 2007

⁷ Consultation on the Scottish Government's Proposals for a New Tribunal System for Scotland - Friday, March 23, 2012.

- c. *Third:* there may be transitional issues to be considered arising from the United Kingdom Government's proposal to abolish the Committee along with the AJTC in accordance with the provisions of the Public Bodies Act 2012.

First issue – ensuring that the functions of the Committee can become the functions of the proposed Council

6. Along with the AJTC, the Committee does not agree with the decision by the UK Ministry of Justice to promote its abolition. It has noted the conclusion of the Report of the House of Commons Public Administration Select Committee (PASC) that 'the Government's rationale for winding up the AJTC was questionable, and that the Ministry of Justice may not have either the resources or the expertise to take on its functions.'

7. The Committee believes that it is appropriate and necessary that there should be a body, outside of government, charged with the functions with which the Committee has been charged for monitoring and keeping under review both administrative justice and tribunals.

8. The Committee believes that there should be explicit power on the face of the Bill for the transfer of the Committee's functions to the proposed Council in the event that AJTC and the Committee were to be abolished. It recommends that s2 should include specific power for Scottish Ministers, by order, to add to the functions of the proposed Council. The Committee does not have a view on whether the power under s 24 of the Bill is sufficient for that purpose.

9. Separately, the Committee believes that in any exercise of such power, the functions transferred should include functions in relation to both administrative justice and tribunals⁸ and in particular must not be restricted to tribunals alone.

Second issue – Would the proposed Council as provided for in the Bill be apt to discharge the Committee's functions if transferred?

10. The proposed Council should so far as possible be capable of taking on the Committee's functions from the outset; alternatively there must be a clear process by which the structure, composition or other aspects of the Council can be adjusted in order to allow it to take on such functions. The Committee believes that the Bill should include specific power for Scottish Ministers to amend s4 of the Bill where s 2 is to be amended.

11. *Administrative justice perspective* - The proposed Council must include an administrative justice as well as a tribunals perspective. The Committee does not believe that the structure for the proposed Council as set out in the Bill would be suited to dealing with the Committee's functions should they be taken over at some point in the future. In particular, the Committee believes that the proposed structure does not sufficiently reflect the interests of users in the areas of administrative justice and tribunals. The interests of the users of tribunals should be central in the

⁸ fn 2 above ;

arrangements which apply in relation to a modern Tribunals system, including in any successor to the AJTC.

12. *Experience of administrative justice* - The Committee considers that a significant proportion of the Lord President and consumer representative members should have experience of administrative justice and tribunals. The proposed Council⁹ includes two consumer representative members along with up to six other members determined by the Lord President as being fit. There is no specification of the qualifications of those six. Criteria for appointment of those six should be set out and should include a requirement, in the case at least 3 of those persons, to have experience of administrative justice and/or tribunals.

13. *Lay membership* - The proposed Council would comprise at least 9 lawyers and judges, as against a maximum of 8 non-lawyers, discounting government related appointees. The Committee believes that, if the Council is to have the functions of the present Committee then it is preferable that the majority of the membership should be comprised of non-lawyers.

14. *Representation of tribunals judiciary* - The Committee believes that the proposed Council should include representatives of the tribunals judiciary, and in particular, that the President of Scottish Tribunals¹⁰ should be a member of the proposed Council. In addition, of the judicial appointments to the proposed Council at least one other should be of a member of the tribunals judiciary.

15. *Public appointments* - The Committee agrees that appointment to posts listed in s7(2)(c) and (d) should be the responsibility of the Lord President, but considers that the Lord President's power in that regard should only be exercised in accordance with the advice of the Public Appointments Commissioner for Scotland.

16. *Committees* - There should be an Administrative Justice Committee of the Council to deal with the functions of the Committee to be transferred. Formation of such a Committee should be a statutory requirement. The membership of such an Administrative Justice Committee should include representatives of users as well as members of the Tribunals Judiciary and academics. This could be achieved by the power to amend s2 including power to amend s13 also.

17. *Chairing the Council* - The Committee is not aware of the thinking behind s11(2) and (4) which restricts chairing of the Council to judicial members. The Committee considers that a more flexible and responsive structure could be achieved by removing such a restriction.

Third issue – transitional matters

18. While no date for abolition of AJTC and the Committee has yet been settled the Committee understands that it may be intended for a date later in 2012. There is at present no stated intention on the part of UK Government to transfer the functions

⁹ s 6

¹⁰ Consultation on the Scottish Government's Proposals for a New Tribunal System for Scotland - Friday, March 23, 2012.

of the AJTC, or of the Committee, to any other body¹¹. In the event of abolition the Committee's functions under the 2007 Act will, accordingly, disappear. Arguably this creates the possibility of a transitional issue if the intention of the Scottish Government were to be that there should be a 'seamless' transfer of functions from the Committee with coverage of those functions being substantially unbroken.

19. The Committee does not have a recipe for addressing the transitional matters. Such matters, which arise from the abolition of the Committee, at present arise only, so far as tribunals are concerned, in relation to devolved tribunals since the Committee would understand that the Parliament does not yet have competence in relation to tribunals whose jurisdiction concerns reserved areas of law.

20. As a further issue, if the AJTC and the Committee are abolished in advance of the coming into force of the Bill then the Committee's records and archives might, as the property of the UK Government, be returned to the Ministry of Justice notwithstanding that they might relate to devolved tribunals and administrative justice generally in Scotland. The Parliament may wish to consider what options there may be to avoid that situation arising.

Conclusions

21. The Committee considers that the optimum solution for addressing the requirement for an independent body to monitor and keep administrative justice and tribunals under review, would, under current circumstances, be to retain the AJTC and the Committee. However it recognizes that this may not be possible given the current position of the UK government in seeking the abolition of both the AJTC and the Committee.

22. In those circumstances the Committee believes that the proposed Council may be the best vehicle that can be achieved for the monitoring and review of administrative justice and tribunals, subject to the proposals advanced by the Committee in this paper. Accordingly the Committee's welcome for the Bill is qualified.

Scottish Committee, AJTC
19 July 2012

¹¹ For a statement of the Ministry of Justice intentions in that regard see <http://www.justice.gov.uk/downloads/publications/policy/moj/response-pasc-report-administrative-justice.pdf>