



Options for the Future Administration and Supervision of Tribunals in Scotland

A report by the administrative justice steering group

About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors' clients, public transport users, or simply shoppers in a supermarket.

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Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

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Chairman's Foreword

This report comes at a crucial time for administrative justice in Scotland. Tribunals are now a vital part of Scotland's justice system, but the current tribunal system is complex and fragmented, particularly since the advent of devolution. Policy responsibility is split between the Scottish and Westminster governments, and there are significant differences in the way the various tribunals are administered and run. This lack of coherence and consistency does not fit with the vision set out in Sir Andrew Leggatt's report on the UK tribunals system, which led to the establishment of the independent Tribunals Service to support GB tribunals.

Coupled with concerns about a perceived lack of independence in the operation of some Scottish tribunals, this lack of coherence within the system could potentially disadvantage tribunal users in Scotland. This report considers some of the possible future ways of tackling these concerns.

The Administrative Justice Steering Group (AJSG) was established in 2006 by the Scottish Public Services Ombudsman (SPSO), in conjunction with the former Scottish Committee of the Council on Tribunals and with the support of the then Scottish Executive. The group's remit was to commission research and act in an advisory capacity in the preparation of a final report to the Scottish Government on the administrative justice framework in Scotland taking account, among other things, of the likely impact of the Tribunals, Courts and Enforcement Act 2007.

I was invited to chair the group, which includes representatives from a number of key stakeholder organisations. A list of members is at Appendix 1.

This report is the result of the first stage of work carried out by the Administrative Justice Steering Group. The purpose of the report is to:

- outline in a clear way the current arrangements for the administration and supervision of the complex system of tribunals operating within Scotland;
- explore a range of possible options for the future administration arrangements;
- consider the future role of the Administrative Justice and Tribunals Council and its Scottish Committee in relation to the various options identified.

I would like to express my thanks to the members of the Steering Group for their valuable contributions to this report. I would like in particular to thank Professor Alice Brown, the Scottish Public Services Ombudsman and Fiona Paterson of the SPSO for providing administrative support to the group. I would also like to thank Martyn Evans, Director of the Scottish Consumer Council (SCC) and Sarah O'Neill, Legal Officer at the SCC, who wrote this report, for providing policy support to the Group.

This report was produced by the AJSG, and its contents are based primarily on principle and on the informed opinion of both the members of the group and other key stakeholders, based on their collective experience of Scotland's administrative justice system. It also draws on an earlier unpublished paper produced for the Steering Group by Dr Richard Whitecross of the University of Edinburgh.

While this report has been produced with the consensus of the entire AJSG, its contents do not necessarily reflect the views of any particular individual or organisation represented on the Group.

This report does not draw any firm conclusions, but sets out a number of possible future options and considers the pros and cons of each. It will be for Ministers to decide how they might wish to take this matter forward, and we hope that this report will be of assistance to them in doing so.

This report will be followed by a second stage of work by the AJSG: a more detailed report on the administrative justice system in Scotland. That report will:

- define and scope administrative justice;
- set out the aims and objectives of administrative justice;
- evaluate existing redress mechanisms;
- set out conclusions and a possible way forward.

A handwritten signature in black ink, appearing to read 'A. Shier', is centered on the page. The signature is written in a cursive style with a large initial 'A' and a period at the end.

The Right Honourable Lord Philip
September 2008

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Executive Summary

Tribunals are a vital part of Scotland's justice system, handling considerable volumes of cases in comparison with the courts. At present, tribunals in Scotland fall into three broad categories:

- GB-wide tribunals
- Scottish tribunals existing before 1998
- Devolved Scottish tribunals established post-1998

The current arrangements

The present tribunals system in Scotland is extremely complex and fragmented, with policy responsibility for tribunals operating in Scotland split between the UK and Scottish Governments and significant differences in how the various tribunals are administered and run.

Policy responsibility for **GB-wide tribunals** lies with the UK Government. Many of those which operate in Scotland are currently supported by the GB Tribunals Service, but the administration of some GB tribunals is devolved to the Scottish Government. Members of tribunals within the remit of the Tribunals Service are appointed by the independent Judicial Appointments Commission, while the Lord President and Scottish Ministers also have a number of functions relating to appointments to reserved tribunals. While the larger tribunals all develop and deliver their own training, the aim is to ensure a systematic and effective approach to judicial training, development and appraisal, and to promote consistent standards and the sharing of good practice across tribunals.

Although **Scottish tribunals existing before 1998** were set up by UK legislation, most of these operate in relation to devolved issues, and policy responsibility for them lies with the Scottish Government. Each was set up under a specific piece of legislation, and each one is organised on an individual basis, with its own administrative structure and funding arrangements. Some are set up and administered by local authorities in individual local authority areas. Members of most Scottish tribunals are appointed by Scottish Ministers under public appointments procedures. Most of these tribunals provide training, or have arrangements in place for their members to receive training, but there are no minimum standards for training.

Policy responsibility for **devolved Scottish tribunals established post-1998** lies with the appropriate directorate of the Scottish Government. Each of these tribunals is funded by the Scottish Government, but has an independent tribunal administration or secretariat, sponsored by the relevant Scottish Government directorate. Tribunal members are appointed by Scottish Ministers under Scottish public appointment rules, but the appointment procedures vary between tribunals. There are no agreed training standards for tribunal members across these tribunals.

All tribunals operating in Scotland, within each of the three categories, are overseen by the Administrative Justice and Tribunals Council (AJTC) through the work of its Scottish Committee.

Concerns about the current system

The current system does not meet the key principles of independence and coherence set out by the Leggatt review of the UK tribunals system in a number of respects. These principles might be summarised as:

- independent and impartial processes
- an independent and skilled judiciary
- a coherent system.

There is a clear argument that many Scottish tribunals are not sufficiently independent of the Scottish Government. The administration of some devolved tribunals, while provided by an independent secretariat, is funded and sponsored by directorates within the Scottish Government.

There is no consistent system of appointment of tribunal chairs and members in Scotland. Many tribunal members are appointed by Scottish Ministers, and where tribunals are paid for by sponsoring departments, chairs and members cannot be seen to be wholly independent. Scotland therefore seems to be using appointment procedures of a lesser standard than those applied at GB level, and there is a strong argument that Scottish tribunal appointments should be made by the Judicial Appointments Board for Scotland. Although some individual Scottish tribunals have put in place regular, high quality training programmes for their members, there is no single body responsible for overseeing tribunal training in Scotland.

In contrast to the GB position, all of Scotland's tribunals work in isolation. This can lead to a narrowness of outlook and a duplication of effort, and almost certainly means a variation of standards and performance across the system. Such fragmentation and lack of consistency can also inhibit the coherent development of substantive and administrative law and lead to inconsistencies in procedural rules. It can also be argued that the current myriad of different administrative structures do not provide good value to the taxpayer.

Scotland may therefore be seen to have a system of administrative justice which is at risk of applying lower standards and appearing less coherent in respect of devolved matters than Great Britain as a whole.

Possible future options

Given these concerns, the time is now right to consider potential future options for the administration and supervision of tribunals in Scotland. There are five possible options:

1. Retain the status quo.
2. Put mechanisms in place to ensure better integration and co-operation between the Tribunals Service and wholly Scottish tribunals.

3. Bring all Scottish tribunals within the remit of the existing Tribunals Service.
4. Establish a new Scottish Tribunals Service to support all Scottish tribunals.
5. Establish a new Scottish Tribunals Service to support both GB tribunals within Scotland and all Scottish tribunals.

Option 1 cannot be viewed as a satisfactory option, as the current situation does not meet any of the Leggatt principles.

Option 2 would go some way towards addressing the current fragmentation and lack of coherence within the tribunals system in Scotland, and would be quicker and cheaper to put in place than any more radical proposal. However, it would not adequately address the issues of independence and impartiality, in relation to both the appointment of tribunals members and the administration of tribunals. It is also likely that there would continue to be confusion between devolved and non-devolved jurisdictions, and it must also be asked whether retaining the existing separate secretariats for Scottish tribunals would be cost efficient and represent value for money.

Option 3 would meet the need for independent administration of devolved tribunals, but would not of itself address concerns about the current appointments system for members of devolved tribunals. As with Option 2, it would therefore need to be accompanied by some form of independent appointments system. It would seem logical that this function should be carried out by the Judicial Appointments Board for Scotland. This option undoubtedly has scope for greater consistency and cost effectiveness by centralising administration and generic training and, if accompanied by a new independent appointments system, appointment of tribunal members. However, it may also bring difficulties in practice.

The primary argument against this option is that it is clearly inconsistent with the concept of devolution to devolve responsibilities to the Scottish Parliament on one hand, while centralising administration at a GB level on the other.

Option 4 would satisfy the core principle of independence central to Leggatt's view, assuming that the administration of tribunals were entirely independent of the Scottish Government. The most appropriate home for the new body might be within the Scottish Court Service. The same issues would arise in relation to tribunal appointments as in Options 2 and 3. There would also be a need to consider how centralised training might best be provided, including looking at the scope for working together with the existing Tribunals Service to provide more integrated training where appropriate. This option should provide much greater coherence than the status quo in relation to Scottish tribunals. Fragmentation would remain to some extent, however, as regards integration between Scottish and GB tribunals. It would therefore be vital that any Scottish Tribunals Service should work closely with the existing Tribunals Service, which would retain responsibility for GB tribunals operating in Scotland.

Option 5 would, as with Option 4, meet the requirement of independence, assuming that the Scottish Tribunals Service was independent of the Scottish Government. The same issues would arise in relation to tribunal appointments as in Options 2, 3 and 4. There would also be a need to consider how centralised training might best be provided, and in the absence of any formal relationship with the GB Tribunals Service, there would be issues in relation to how members of GB tribunals operating in Scotland would be appointed and trained. This option should result in a much more joined-up system of administration than at present, with all tribunals within Scotland being centrally administered by the same organisation. It would also allow for tribunals policy to be considered as a coherent aspect of devolved civil justice policy. There is a strong argument in favour of this from a purely legal perspective, given that justice, both civil and criminal, is almost entirely devolved in Scotland. Such a reform may, however, bring practical difficulties in terms of access to shared resources, training and premises. There would also be complex policy issues to address, and any such reform would require agreement between the UK and Scottish Governments.

The future role of the Scottish Committee of the Administrative Justice and Tribunals Council

In considering the various possible options, it is also necessary to consider what the future role of the AJTC and its Scottish Committee might be. If Option 2 were taken up, the Scottish Committee would continue to have a vital role in encouraging greater co-ordination between the two systems. Were all Scottish tribunals to be brought within the existing Tribunals Service (Option 3), the Scottish Committee would perhaps have an even more crucial role, given the complexities involved in a GB organisation taking over responsibility for devolved tribunals. Another possibility in relation to both Options 2 and 3 could be to set up a separate Administrative Justice and Tribunals Council for Scotland.

Were either Option 4 or 5 to be pursued, the majority of administrative justice would become devolved in Scotland, and it would make little sense to maintain the present structure. Any new Scottish body would have a very different role to the current Scottish committee, and the logical consequence of pursuing Option 5 in particular would be that the new body would need to take over responsibility for supervising all tribunals and administrative justice processes within Scotland.

1. Introduction

1. Tribunals are a vital component of the justice system in Scotland. The vast majority of tribunals are designed to provide individuals with the means to challenge decisions made by government officials. Originally viewed as part of the state administration rather than as independent judicial bodies, tribunals became firmly established as part of the UK civil justice system following the Franks Report in 1957.¹
2. Tribunals were intended to provide a less formal forum than the courts for dealing with disputes, and they have increased in number and importance over the years. While most focus on disputes between individuals and the state (e.g. social security, tax and immigration matters), some 'party to party' tribunals, such as employment tribunals, deal with disputes between private individuals and/or businesses. Tribunals are now a significant part of Scotland's civil justice system, handling considerable volumes of cases in comparison with the courts.² Every day hundreds of decisions affecting people are made by tribunals, ranging from the provision of co-ordinated support plans for a child's education to whether an individual is entitled to claim incapacity benefit.
3. The growth of tribunals in Scotland has been largely unplanned, and the present arrangements are complicated by recent UK-wide tribunal reforms and the implications for a devolved Scotland.
4. In March 2001, Sir Andrew Leggatt published his report to the Lord Chancellor on his wide-ranging review of the UK tribunals system.³ The report recommended that there should be a more independent and coherent system, with an increased focus on the interests of tribunal users. It was vital that there was a clear separation between those responsible for tribunals policy and/or their administration and those whose policies or decisions were considered by those tribunals. Core to this was the establishment of an independent coherent Tribunals Service to support GB tribunals.⁴

1 *Report of the Committee on Administrative Tribunals and Enquiries*, Cmnd.218; July 1957

2 In 2002, the last year for which statistics are available, a total of 120,385 cases were initiated in the sheriff courts and the Court of Session. Source: *Civil Judicial Statistics 2002*, Scottish Executive. In the same year, 35,904 cases were received by the Appeals Service in Scotland, 44,278 by Children's Panels, 13,112 by Employment Tribunals in Scotland and 16,353 by Valuations Appeals Committees, for example. Source: *Council on Tribunals Annual Report 2002-3*

3 *Tribunals for Users: One System, One Service*, 2001

4 Note: While a small number of non-devolved tribunals do operate in Northern Ireland, the term 'GB tribunals' rather than 'UK tribunals' is used throughout this paper, as most operate only in England, Scotland and Wales

The Tribunals Service

5. Following the Leggatt review, the UK Department for Constitutional Affairs (now the Ministry of Justice) took the lead on co-ordinating tribunal reform across government in reserved areas. In 2004, it published a White Paper taking forward the Leggatt proposals,⁵ and in April 2006 a new Tribunals Service, an executive agency of the Ministry of Justice, was launched.
6. The Tribunals Service provides independent administrative support to 30 UK government tribunals and organisations, which are listed in Appendix 2. It is intended that further existing tribunals will be brought within the Tribunals Service over time,⁶ while all new, non-devolved government tribunals will be established with support from the Tribunals Service. The scope of the Tribunals Service is currently limited to non-devolved government tribunals, many of which have a GB-wide jurisdiction.
7. The UK Government has recently consulted on proposals to further reform the tribunal system,⁷ focusing particularly on the introduction of first-tier and upper-tier tribunals, as created by the Tribunals, Courts and Enforcement Act 2007. It is proposed that the first-tier tribunal will be the first instance tribunal for most cases. It will be divided into five proposed 'chambers' dealing with particular subject areas, such as social entitlement and health, education and social care. The first two of these chambers, the Social Entitlement chamber and the Health, Education and Social Care chamber, are due to become operational on 3 November 2008.
8. The upper tribunal is intended to rationalise the current variety of tribunal appeal routes. Its main function will be to hear appeals from tribunals within the Tribunals Service and some other tribunals, and it will be divided into three chambers. The first of these, the Administrative Appeals Tribunal, will start work on 3 November 2008.
9. Employment Tribunals and the Employment Appeal Tribunal, and the Asylum and Immigration Tribunal, are treated as separate 'pillars' within the Tribunals Service, and are outwith the remit of the first-tier and upper tribunals.
10. In March 2006, the Secretary of State for Northern Ireland announced that a unified tribunal service for Northern Ireland would be created under the Northern Ireland Court Service. Work is currently underway to allow for a phased transfer of the administration of tribunals to the new service. Then on 30 January 2008, in his statement on delivering more effective government, the First Minister stated that the Scottish Government would consider the case for an integrated tribunals service for Scotland.

5 *Transforming Public Services: Complaints, Redress and Tribunals*, Department for Constitutional Affairs, July 2004

6 The Estate Agents Appeal Service was, for example, brought within the Tribunals Service on 1 April 2008, and there are plans to transfer a further six tribunals in 2008/9. Source: *Tribunals Service Business Plan for 2008-9*, April 2008

7 *Transforming Tribunals: Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007*, Ministry of Justice and the Tribunals Service, November 2007

The Administrative Justice and Tribunals Council (AJTC) and its Scottish Committee

11. The Franks Report proposed the creation of a Council on Tribunals for England and Wales and another for Scotland. However, this recommendation was not followed, and the Council on Tribunals was established with a separate Scottish Committee. The Council on Tribunals was an advisory non-departmental public body set up to keep under review and report on the constitution and working of tribunals under its supervision and, where necessary, to consider and report on the administrative procedures of statutory inquiries. It sought to ensure that tribunals and inquiries met the needs of users through the provision of an open, fair, impartial, efficient, timely and accessible service.
12. On 1 November 2007, the Tribunals, Courts and Enforcement Act 2007 came into force. The Act established the Administrative Justice and Tribunals Council (AJTC), which replaced the Council on Tribunals.⁸ The Scottish Committee of the AJTC similarly replaced the Scottish Committee of the Council on Tribunals.⁹ The AJTC has a wider role than its predecessor: while it retains the role of overseeing tribunals and inquiries, it is also tasked with keeping the administrative justice system overall under review.
13. The stated purpose of the AJTC is to help make administrative justice and tribunals increasingly accessible, fair and effective by:
 - playing a pivotal role in the development of coherent principles and good practice;
 - promoting understanding, learning and continuous improvement;
 - ensuring that the needs of users are central.¹⁰
14. The situation in Scotland is complicated, particularly in relation to devolved tribunals. The AJTC was set up by the UK Government, and through its Scottish Committee it oversees those GB tribunals which operate in Scotland, but for which policy responsibility lies with Westminster. Through its Scottish Committee, the AJTC also oversees devolved tribunals, for which the Scottish Government has policy responsibility.
15. The Scottish Committee has a powerful statutory role in highlighting the distinctive nature of the Scottish legal system and ensuring that administrative justice policies of both the UK Government and the Scottish Government take account of it. Under the 2007 Act, the AJTC must consult its Scottish Committee when scrutinising and commenting on legislation relating to tribunals with jurisdiction in Scotland, and when making any report on matters relating to Scotland.¹¹

8 Tribunals, Courts and Enforcement Act 2007 sections 44-5

9 Tribunals, Courts and Enforcement Act 2007 Schedule 7, which also established a Welsh Committee of the AJTC

10 *Administrative Justice and Tribunals Council Framework Document*, Ministry of Justice, November 2007

11 Tribunals, Courts and Enforcement Act 2007, Schedule 7 Paragraphs 14 and 18

16. The Scottish Committee also has its own powers to make reports to the AJTC on matters relating to tribunals and the wider administrative justice system in relation to Scotland.¹² Where the AJTC does not report on matters dealt with in a report by the Scottish Committee, or does not adopt one of its reports without modification, the Scottish Committee has power to submit its report to Scottish Ministers, who must lay any such report before the Scottish Parliament.¹³ The Scottish Committee also has a duty to make an annual report to Scottish Ministers, which they must lay before the Scottish Parliament.¹⁴

12 Tribunals, Courts and Enforcement Act 2007, Schedule 7 Paragraph 18(3)

13 Tribunals, Courts and Enforcement Act 2007, Schedule 7 Paragraph 18(4) and (6)

14 Tribunals, Courts and Enforcement Act 2007, Schedule 7 Paragraph 21(1) and (5)

2. The current arrangements

17. The current system of tribunals in Scotland is, as the Leggatt report noted, ‘exceedingly complicated’.¹⁵ This paper does not attempt to describe in detail every tribunal which exists in Scotland. It would be difficult to draw up an exhaustive list, as there are numerous bodies set up by a variety of pieces of legislation, some of which have very narrow and specific remits, and may meet only rarely. This report therefore concentrates on the major tribunals which operate in Scotland.
18. Many of the larger tribunals operating in Scotland derive from a GB-wide jurisdiction. There are a number of anomalies in how they operate. The VAT & Duties Tribunals for Scotland, for example, is governed by UK rules, which specify that its President and Chairs are appointed by the Lord President, subject to consultation. However by arrangement it is financed (aside from the President) by the Scottish Government, which provides staff and premises. It does have in terms of its rules an exclusively Scottish jurisdiction but cases can be transferred to or from England. Other tribunals, notably Employment Tribunals, are supported by the GB-wide Tribunals Service, but have an exclusively Scottish jurisdiction.
19. There have long been a number of exclusively Scottish tribunals, even prior to devolution in 1998, reflecting Scotland’s separate legal tradition and distinct system of administration by the former Scottish Office, and by local government in Scotland. A number of new Scottish tribunals were also established post-devolution by the previous Scottish Executive. All Scottish tribunals are currently overseen by the AJTC through the work of its Scottish Committee.
20. References to ‘tribunals’ throughout this report are to those tribunals operating in Scotland with a statutory framework, which are subject to the oversight of the AJTC through the work of its Scottish Committee. While the vast majority of these are ‘citizen versus public authority’ tribunals, this also encompasses a small number of ‘party-party’ tribunals, principally Employment Tribunals and Private Rented Housing Panels.
21. It should be noted that there are some statutory tribunals operating in Scotland which are not included within the scope of this report, because they are not subject to the supervision of the AJTC. These include the Scottish Solicitors’ Discipline Tribunal, the Parole Board for Scotland and Social Work Complaints Review Committees.
22. Appendix 3 lists the GB tribunals which operate in Scotland, while Appendix 4 lists Scottish tribunals, both pre- and post-devolution. Each appendix also reflects the supervisory and administrative arrangements for each individual tribunal.

¹⁵ *Tribunals for Users: One System, One Service*, 2001, at paragraph 1.26

23. The caseload and costs associated with the various tribunals listed differs significantly, ranging from over 50,000 cases brought each year before Children’s Hearings at an annual cost of almost £26 million to only two cases so far brought before the Scottish Charity Appeals Panel since it came into existence, at a cost of less than £300,000. Some costs and staff are shared by different tribunals, and are difficult to disaggregate, including the cost of accommodating six different tribunals in George House, Edinburgh. In the case of some UK tribunals, it is difficult to disaggregate the cost and volume of Scottish cases from the cost and volume of all other cases.

Appeals and the upper tier

24. The forthcoming introduction of an upper-tier tribunal for GB tribunals is likely to further complicate the arrangements within Scotland. The UK Government has proposed the establishment of a permanent base for the upper tier tribunal in Edinburgh, presided over by judges from existing second-tier tribunals and the Court of Session.¹⁶ Given the likelihood that Scotland will not generate significant numbers of cases, however, it is not clear how this will work in practice, or whether there will be scope for more than one subject chamber.

Categories of tribunal in Scotland

25. At present, tribunals in Scotland fall into three broad categories:
- GB wide tribunals
 - Scottish tribunals existing before 1998
 - devolved Scottish tribunals established by the previous Scottish Executive post-1998¹⁷
26. The policy responsibility, administration and supervision arrangements for each of these categories of tribunal currently vary considerably, and are summarised below.

GB-wide tribunals

27. More than half of all tribunals operating in Scotland are GB tribunals dealing with reserved matters. There are 25 of these, as set out in Appendix 3. They include major GB tribunals such as the Social Security and Child Support Appeals Tribunal and the Asylum and Immigration Tribunal. They also include a number of smaller tribunals, some of which may not even sit in Scotland in a particular year.
28. Policy responsibility for GB tribunals lies with the UK Government. Under the Scotland Act 1998, the UK Parliament continues to legislate for Scotland on reserved matters. While the Scottish Parliament may not make laws on reserved matters, all tribunals in Scotland must, when making decisions, take into account any modifications to Scots law made by the Scottish Parliament. As Sir Andrew Leggatt noted in his review of the UK tribunal system:

¹⁶ *Transforming Tribunals: Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007*, Ministry of Justice and the Tribunals Service, November 2007

¹⁷ Note: the new Scottish Government has not to date established any new Scottish tribunals

'Where legislative competence is reserved, the result is generally that ministerial functions are reserved unless there is specific provision to the contrary. Usually the Minister responsible for the subject area has power in respect of tribunals; some functions are vested in the Lord Chancellor or the Lord President of the Court of Session. The divisions of responsibility are not entirely clear. There are some anomalies, some of which arose before devolution'.¹⁸

Administration of GB tribunals

29. Of the 30 tribunals and organisations currently supported by the Tribunals Service, eleven operate in Scotland, as set out in Appendix 3.¹⁹ The administration of some GB tribunals sitting in Scotland is, however, devolved to the Scottish Government, as detailed in Appendix 3.
30. The Tribunals Service is moving towards a regional management structure, which divides its operations into two regions. Scotland is included within the 'North' region, alongside Northern Ireland, North-east and North-west England and the Midlands. Within that region, there is an area manager responsible for Scotland and Northern Ireland, who liaises with tribunal judiciary, primarily through bi-monthly Area Liaison Forum meetings. The Tribunals Service is also planning the establishment of an administrative support centre in Glasgow, which will provide integrated administrative support for GB tribunals in Scotland, and is expected to become operational in 2009-10.²⁰

Supervision arrangements for GB tribunals

31. All of the GB tribunals sitting in Scotland—such as the Social Security and Child Support Appeals Tribunal and the Asylum and Immigration Tribunal—are overseen by the AJTC through the work of its Scottish Committee.

Appointments to GB tribunals

32. The Constitutional Reform Act 2005 established an independent Judicial Appointments Commission for all judicial appointments in England and Wales. Chairs and both legal and non-legal members of tribunals within the remit of the Tribunals Service are now appointed by the Commission. Many individuals hold several tribunal appointments on a fee-paid basis and many salaried tribunal judges also hold appointments in other jurisdictions. It is proposed that future recruitment will be to a 'tribunal ticket' in a specific geographic area to avoid duplication of appointment competitions. Those appointed to these tribunals as legal members are known as 'tribunal judges'.
33. Both the Lord President and Scottish Ministers also have a number of functions relating to appointments to reserved tribunals.

¹⁸ *Tribunals for Users: One System, One Service*, 2001 at paragraph 11.11

¹⁹ Note: the Employment Tribunal for Scotland is categorised in Appendix 2 as a Scottish tribunal, as it has exclusively Scottish jurisdiction, although it is supported by the Tribunals Service

²⁰ *Tribunals Service Business Plan for 2008-9*, April 2008

Training of members of GB tribunals

34. The Judicial Studies Board for England and Wales has a tribunals committee that advises on, develops and monitors training for tribunal chairmen and members. The committee also provides some direct training for chairmen and members of smaller tribunals and for those involved in delivering training. The AJTC is represented on the tribunals committee and works in close collaboration with the committee in supporting the Senior President and jurisdictional Presidents, both within and outside the remit of the Tribunals Service, who have responsibility for judicial training, appraisal and mentoring.
35. The larger tribunals all develop and deliver their own training, but the aim is to ensure a systematic and effective approach to judicial training, development and appraisal, and to promote consistent standards and the sharing of good practice across tribunals. The tribunals committee has recently undertaken an evaluation of training, mentoring and appraisal offered by the various tribunal systems to inform further work in this area.

Scottish tribunals existing before 1998

36. There are a number of uniquely Scottish tribunals - such as the Lands Tribunal for Scotland and Children's Hearings - which existed before devolution (see Appendix 4). Although they were set up before 1998 by UK legislation, most of these operate in relation to devolved issues, and policy responsibility for those tribunals therefore lies with the Scottish Government.

Administration of (pre-1998) Scottish tribunals

37. None of these tribunals fall within the remit of the Tribunals Service.²¹ Each was set up under a specific piece of legislation, and each one is organised on an individual basis, with its own administrative structure and funding arrangements. Some, notably Education Appeal Committees, are set up and administered by local authorities in individual local authority areas.

Supervision arrangements for (pre-1998) Scottish tribunals

38. All of these tribunals are overseen by the AJTC through the work of its Scottish Committee.

Appointments to (pre-1998) Scottish tribunals

39. Members of most Scottish tribunals are appointed by Scottish Ministers under public appointments procedures, sometimes on the advice of an advisory committee, such as a Children's Panel Advisory Committee. The Lord President is responsible for the appointment of employment tribunal judges in Scotland.

²¹ Note: employment tribunals, however, which are categorised here as Scottish tribunals, are supported by the Tribunals Service

Training of members of (pre-1998) Scottish tribunals

40. Most of these tribunals provide training, or have arrangements in place for their members to receive training. A few systems, such as the NHS Discipline Committees in Scotland, have only recently taken steps to provide training. While the training provided by some tribunals, such as Children's Panels, is widely viewed as being of a high standard, there are currently no minimum standards for training across these tribunals. In relation to those tribunals which are administered by local authorities, such as Education Appeal Committees, each individual authority makes its own decisions on the provision of training for members. Some local authorities provide training, while others do not, leading to a fragmented approach.

Devolved Scottish tribunals

41. Since devolution, three tribunals have been created under devolved Scottish legislation:
- Additional Support Needs Tribunals for Scotland
 - Mental Health Tribunal for Scotland
 - Scottish Charities Appeals Panel.²²

Given their devolved nature, policy responsibility for each of these tribunals lies with the appropriate directorate of the Scottish Government.

Administration of devolved Scottish tribunals

42. Each of these tribunals is funded by the Scottish Government, but has an independent tribunal administration or secretariat. These are sponsored by the relevant directorate within the Scottish Government – the education, health and justice directorates respectively.

Supervision arrangements for devolved Scottish tribunals

43. Each of these tribunals is overseen by the AJTC through the work of its Scottish Committee.

Appointments to devolved Scottish tribunals

44. Tribunal members are appointed by Scottish Ministers under Scottish public appointment rules, but the appointment procedures vary between tribunals. While there was no legal or judicial member on the interview board for convener appointments to the Mental Health Tribunal for Scotland, for example, a 'legal assessor' – a sheriff - was involved in making the initial appointments to the Additional Support Needs Tribunals for Scotland. Moreover, while the President of the latter tribunals has been a member of the interview board for subsequent appointments, the board has been chaired by the head of the relevant sponsoring department.

²² Note: the Scottish Government is currently consulting on a draft Arbitration (Scotland) Bill, which would establish new Scottish arbitration tribunals

Training of members of devolved Scottish tribunals

45. While the former Scottish Committee of the Council on Tribunals praised the high standard of training for both the Additional Support Needs Tribunals and the Mental Health Tribunal,²³ there are no agreed standards of induction training or minimum refresher training commitment for tribunal members across these tribunals. Neither is there any systematic process for the sharing of good practice across the tribunals.

²³ *Annual Report of the Scottish Committee of the Council on Tribunals, 2006-7*

3. Concerns about the current system

46. It is clear that the current system is extremely complex and fragmented, with policy responsibility for tribunals operating in Scotland split between the UK and Scottish Governments and significant differences in how different tribunals are administered and run. This lack of cohesion and consistency within the system is contrary to the vision set out by the Leggatt report which, while recognising that the functioning of devolved tribunals is a matter for the Scottish Government and the Scottish Parliament, indicated a desire that its recommendations should be followed cross-border where possible.

The impact on users

47. The inconsistencies identified could potentially disadvantage tribunal users in Scotland. 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.
48. The proposals contained in the 2004 White Paper, which led to the establishment of the Tribunals Service, were explicitly based on the assumption that potential users want and are entitled to:
- manifest independence of the new system from those whose decisions are being reviewed;
 - appropriate waiting times;
 - cases resolved without formal hearings if possible;
 - when hearings are necessary, accessible hearing centres with modern facilities;
 - easily navigable, comprehensive and comprehensible information about the process;
 - hearings which are not daunting or legalistic;
 - an independent and skilled judiciary;
 - authoritative, consistent and comprehensible decisions which command the respect of those affected; and
 - a cost efficient service that provides good value to the taxpayer.²⁴
49. It is important that tribunal users in Scotland should have access to tribunal performance and delivery that is equivalent to, or better than, that available to users elsewhere. The current system does not meet the key principles of independence and coherence set out by the Leggatt review in a number of respects. These principles might be summarised as:

²⁴ *Transforming Public Services: Complaints, Redress and Tribunals*, Department for Constitutional Affairs, July 2004 at Chapter 5.1

- independent and impartial processes
- an independent and skilled judiciary
- a coherent system

The current system does not accord with these principles for the reasons set out in more detail below.

The Leggatt principles

i: Independent and impartial processes

50. Firstly, there is evidence of a lack of independence in the operation of some existing tribunals. Systems of redress for the citizen should be independent of the machinery of administration of government. This important principle was recognised over fifty years ago by the Franks report,²⁵ which stated that tribunals were established intentionally by Parliament to make decisions independently of any government department.
51. More recently, the Leggatt Report also addressed the question of the *'uneasy relationship between most tribunals and the departments whose decisions they are adjudicating'*.²⁶ Leggatt was concerned that *'tribunals administered by departments with policy responsibilities or whose decisions are tested in the tribunal, are not sufficiently independent.'*²⁷ He also made reference to Article 6 of the European Convention on Human Rights, which states that:
- 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'*.
52. The Human Rights Act 1998 provides that tribunals must apply Article 6. Leggatt recommended an independent tribunal system responsible to the Lord Chancellor, who would make all of the appointments to tribunals. The UK Government accepted the recommendations, resulting in the independent Tribunals Service.
53. In Scotland, however, these principles of independence and impartiality have not been followed. There is a clear argument that many Scottish tribunals are not sufficiently independent of the Scottish Government. Many tribunal members are appointed by Scottish Ministers, and the administration of some devolved tribunals, while provided by an independent secretariat, is funded and sponsored by directorates within the Scottish Government.²⁸ Scotland may therefore be seen to have a system of administrative justice which is at risk of applying lower standards and appearing less coherent in respect of devolved matters than Great Britain as a whole.

²⁵ *Report of the Committee on Administrative Tribunals and Enquiries* Cmnd.218; July 1957

²⁶ *Tribunals for Users; One System One Service* at paragraph. 1.19

²⁷ *Ibid*, at paragraph 2.1

²⁸ For example, the Additional Support Needs Tribunals for Scotland and the Mental Health Tribunal for Scotland.

54. The former Scottish Committee of the Council on Tribunals pointed out instances where there has been a lack of impartiality and independence in relation to the processes used by certain Scottish tribunals in reaching a decision, some tribunal appointments and the premises used for some tribunal hearings.²⁹

ii: An independent and skilled judiciary

Appointments

55. There is no consistent system of appointment of tribunal members and chairs in Scotland. Most of those appointed to tribunals outwith the Tribunals Service are appointed by Scottish Ministers or by local authorities. These appointments are made as public, rather than judicial, appointments. This gives rise to similar concerns to those raised above in relation to the independence and impartiality of the tribunals themselves. Where tribunals are paid for by sponsoring departments, chairs and members cannot be seen to be wholly independent, however impartial they might be, and however scrupulous the sponsoring department might be. Questions of ethical conduct in relation to the functioning of the tribunal may also arise, which may be more clearly resolved where an appointment is judicial rather than public.
56. The independence of the judiciary within the Tribunals Service is guaranteed by statute, and appointments are made by the Judicial Appointments Commission. In relation to appointments outwith the Tribunals Service, Scotland therefore seems to be using procedures of a lesser standard than those applied at GB level.
57. Given the importance of independence as emphasised throughout the Leggatt Review, and the move towards an independent appointments system for reserved tribunals and also for the court judiciary in Scotland through the Judicial Appointments Board for Scotland, there is a strong argument that Scottish tribunal appointments should also be made by the Board. This would, however, have significant implications for the Board's workload and resources.
58. The former Scottish Committee of the Council on Tribunals expressed the view that one centralised process for recruiting members for all devolved tribunal systems, as is being put in place for lay justices, would be open, transparent and cost effective.³⁰
59. There are also currently inconsistencies between the terms and conditions of tribunal members. There is a need to ensure consistency of terms and conditions across tribunals, as currently exists for members of the judiciary in the courts.

29 See for example the Committee's Special Report on Tribunal Premises, 2005 and its Annual Report, 2006-7

30 *Annual Report of the Scottish Committee of the Council on Tribunals, 2006-7*

Training

60. In order to ensure a skilled tribunal judiciary which makes fair, consistent, authoritative and comprehensible decisions, appropriate and consistent training is essential. Although some individual Scottish tribunals have put in place regular, high-quality training programmes for their members, Leggatt noted that there was no single body responsible for overseeing tribunal training in Scotland, and this remains the case.
61. Smaller tribunals in Scotland do not have in-house facilities to provide training for tribunal chairmen and members. Much of the training required is generic in nature and has wide application across the range of tribunals. In 2003, the former Scottish Committee of the Council on Tribunals organised a meeting chaired by Lord Wheatley and attended by a number of tribunal presidents and civil servants. It was agreed that all tribunals would find a national training organisation valuable. Such a central organisation could supervise the sharing of training materials between tribunals, and could also inform the public about tribunals and the services they provide.
62. The former Scottish Committee of the Council on Tribunals highlighted the excellent centralised training provided in England and Wales by the Judicial Studies Board:

*'We firmly believe that there should be an equivalent service in Scotland to promote and coordinate local training. It is our view that the lack of a national training resource in Scotland is hindering the proper development of tribunals north of the border, particularly those who do not benefit from GB-wide resources.'*³¹
63. Following the creation of the Tribunals Service, which has a dedicated budget for training for reserved tribunals, it has been recognised by the Scottish Tribunals Forum that there is a need for increased centralised provision of training opportunities for devolved tribunals in Scotland. In 2004 the former Scottish Committee of the Council on Tribunals issued a tribunal training register for Scotland, which it updated in 2006-7 as a stop-gap measure.
64. Recognising these concerns about training, the Scottish Government recently commissioned research to examine the current provision of training and the training needs of tribunal members. This research will compare current training provision in Scotland with that in other jurisdictions, particularly England and Wales. It will analyse the strengths and weaknesses of the existing system of training in Scotland, assess the training needs of tribunal members and identify ways in which effective training might be provided for tribunal members in Scotland to ensure consistency across all tribunals.

iii: A coherent system

65. While the establishment of the Tribunals Service has not solved all of the problems relating to the resolution of administrative justice disputes, as a significant number of tribunals remain outside it, it has begun to enable a more efficient and rational approach than before, improving the experience

³¹ *Annual Report of the Scottish Committee of the Council on Tribunals, 2003-2004*

of users. Common services, shared use of accommodation, 'cross-ticketing' of tribunal judges and improved feedback mechanisms are among the advantages which the Tribunals Service has brought.

66. In contrast, all of Scotland's tribunals work in isolation. Each uses its own internal processes and its own IT system, and has its own training programme, some of which meet training needs better than others. This situation can lead to a narrowness of outlook and a duplication of effort, and almost certainly means a variation of standards and performance across the system.
67. Such fragmentation and lack of consistency can inhibit the coherent development of substantive and administrative law. The law relating to disability is relevant to social security and pensions, for example, but the tribunals with responsibility for these matters may interpret that law in different ways.
68. Fragmentation may also cause difficulties in other respects: for example, procedural rules may be drafted differently by different sponsoring departments, leading to inconsistencies.
69. There may also be concerns that better and more modern premises are available to tribunals falling within the Tribunals Service than to Scottish tribunals, although ensuring convenience and accessibility for users should of course be paramount.
70. It can be argued that the myriad of different administrative structures which currently exist cannot be seen to provide good value to the taxpayer. There are many overlaps as well as inconsistencies between the various structures, and economies of scale could be achieved by greater co-ordination between the various administrations. The Tribunals Service is intended to address these issues, but the additional complexities in Scotland suggest that something more is required north of the border.
71. Moreover, there has not to date been sufficient consideration of complaints mechanisms within the public sector in Scotland. Following the Crerar review of regulation, audit, inspection and complaints handling in the public sector, published in September 2007,³² a report to Scottish Ministers on this issue was recently published by the Fit for Purpose Complaints System Action Group.³³ The report makes recommendations for simplifying public service complaints-handling processes and streamlining complaints-handling structures. Its emphasis is on improving internal complaints processes to 'get it right first time', and should in time result in fewer complaints requiring to be dealt with more formally by tribunals or other parts of the administrative justice system.

32 *The Crerar Review: the Report of the Independent Review of Regulation, Audit, Inspection and Complaints Handling of Public Services in Scotland*, Scottish Government, September 2007

33 *Fit for Purpose Complaints System Action Group: Report to Ministers*, published 21 July 2008
<http://www.scotland.gov.uk/Resource/Doc/923/0063564.doc>

4. Possible future options

72. Given the divergence between GB and Scottish tribunals and the concerns outlined in Chapter 3, the time is now right to consider potential future options for the administration and supervision of tribunals in Scotland. The establishment of a minority Scottish National Party government has changed the political context within which the future administration of tribunals in Scotland must be considered. The new Scottish Government is developing its policies in this area, and has indicated that it may now view administrative justice as a higher policy priority than it has been in the past.
73. This report identifies five possible options for the future administration of tribunals in Scotland. These are:
1. Retain the status quo.
 2. Put mechanisms in place to ensure better integration and co-operation between the Tribunals Service and wholly Scottish tribunals.
 3. Bring all Scottish tribunals within the remit of the existing Tribunals Service.
 4. Establish a new Scottish Tribunals Service to support all Scottish tribunals.
 5. Establish a new Scottish Tribunals Service to support both GB tribunals within Scotland and all Scottish tribunals.
74. The pros and cons of each of these options are outlined in turn below. Each option is considered in relation to how well it meets the Leggatt principles set out in Chapter 3:
- independent and impartial processes
 - an independent and skilled judiciary
 - a coherent system

Option 1 Retain the status quo

75. It is suggested that this cannot be viewed as a satisfactory option. As set out in detail in Chapter 3 of this report, the current situation does not meet any of the three principles set out above.

Option 2 Put mechanisms in place to ensure better integration and co-operation between the Tribunals Service and wholly Scottish tribunals

76. For many years the heads of the main Scottish tribunals met quarterly to discuss matters of mutual interest, but there was no mechanism for any formal structure. The non-statutory Scottish Tribunals Forum, established in its present form in 2005 and currently chaired by Lord Philip, allows the heads of all tribunal systems in Scotland, whether reserved or devolved, to meet regularly, and also includes representation from the AJTC Scottish Committee. Minutes are kept by the Secretary to the Lord President.

77. The Forum has established a dialogue with those responsible for justice policy within the Tribunals Service and the Scottish Government. There is therefore already co-operation between GB and Scottish tribunals to an extent, through the Forum.
78. In the 2004 White Paper, the UK Government undertook to review with the then Scottish Executive the implications for Scotland of the establishment of the new Tribunals Service. Following this, a concordat between the Scottish Executive and the Department for Constitutional Affairs was published in July 2005. This committed the two governments to work together to try to achieve a common approach to providing services in the interests of users, including the sharing of premises where this is practical and cost-effective, and the interchange of staff. The concordat, which remains applicable, also provided that where any tribunal for which Scottish Ministers are responsible sits in Scotland and requires assistance, the Scottish Government will help to make arrangements so far as it is able.

Independent and impartial processes

79. This solution would not address the concerns identified in Chapter 3 of this report. Many Scottish tribunals would continue to be viewed as not being sufficiently independent of the Scottish Government, for the reasons outlined in Chapter 3.

An independent and skilled judiciary

80. While there might be scope for increased sharing of training to some extent, it is likely that there would remain questions over the inconsistency of training of the members of Scottish tribunals, as discussed in Chapter 3. This option would not, moreover, address the current concerns in relation to the procedures for appointment of Scottish tribunal members. There would therefore also need to be some form of independent appointments system in Scotland, possibly through the Judicial Appointments Board for Scotland.

A coherent system

81. Improved integration and co-operation between the Tribunals Service and wholly Scottish tribunals should lead to greater consistency, efficiency and reduced costs.
82. The Tribunals Service believes that it would be in the interests of both reserved and devolved tribunals to work together by sharing ideas and resources such as tribunal premises, and has therefore undertaken to look at working closely with the devolved administrations to make the best use of facilities available to both.
83. There is currently informal co-operation between devolved and reserved tribunals in relation to sharing of premises and facilities, for example, although the scope for this is limited by availability as reserved tribunals take precedence. It is possible that some sort of centralised booking system for venues would assist in this.

84. In summary, therefore, this option should go some way towards addressing the current fragmentation and lack of coherence within the tribunals system in Scotland. While it would be quicker and cheaper to put in place than any more radical proposal however, it would not adequately address the issues of independence and impartiality, in relation to both the judiciary and the administration of tribunals. Moreover, it is likely that there would continue to be confusion between devolved and non-devolved jurisdictions, and it must also be asked whether retaining the existing separate secretariats for Scottish tribunals would be cost efficient and represent value for money.

Option 3 Bring all Scottish tribunals within the remit of the existing Tribunals Service

85. It may be possible, subject to negotiation and agreement between the Scottish and UK governments, to bring all devolved Scottish tribunals within the existing Tribunals Service. The Tribunals Service could be made accountable jointly to the UK and Scottish governments.

Independent and impartial processes

86. While policy responsibility for devolved tribunals would presumably remain with the Scottish Government, this option would meet the need for independent administration of devolved tribunals, which would no longer be the responsibility of sponsoring departments.

An independent and skilled judiciary

87. Bringing Scottish tribunals within the remit of the Tribunals Service would not of itself address the concerns identified with the current appointments system for members of devolved tribunals. As with Option 2, this option would therefore need to be accompanied by some form of independent appointments system, as is the case for existing GB tribunals supported by the Tribunals Service. Given that such appointments are dealt with by the Judicial Appointments Commission south of the border, it would seem logical that this function should be carried out by the Judicial Appointments Board for Scotland.
88. As regards training for tribunal members, this option may bring scope for more integrated generic training, although more specialised training would still be required in relation to the specific processes and subject matter of individual tribunals.

A coherent system

89. This option undoubtedly has scope for greater consistency and cost-effectiveness by centralising administration and training and, if accompanied by a new independent appointments system, appointment of tribunal members. However, this option may also bring with it difficulties in practice. Given the overall size of the Tribunals Service, and of the 'North' region within which Scotland sits, it could be difficult to develop a system of tribunals appropriate for a distinct jurisdiction with the unique geographical challenges of a sizeable rural and island population.
90. It is also possible that difficulties would arise as a result of a GB body having responsibility for devolved issues and for matters peculiar to the Scottish legal system and its traditions. Experience of this in relation to Employment Tribunals suggests, however, that while such problems inevitably arise, they can generally be resolved by ensuring that there is Scottish representation within the appropriate governing structures.
91. The primary argument against this option, however, is that it does not make sense for aspects of the legal system of Scotland to be administered in England and Wales, given that the Scottish legal system is generally devolved. It is clearly inconsistent with the concept of devolution to devolve responsibilities to the Scottish Parliament on one hand, while centralising administration at a GB level on the other, making accountability for performance to the Scottish Government very difficult. At a time when there is an ongoing public policy debate about whether more powers should be devolved to Scotland than at present, this option is likely to be controversial.

Option 4 Establish a new Scottish Tribunals Service to support all Scottish tribunals

92. One way of co-ordinating the administration of all Scottish tribunals, both those established post-devolution and those which existed prior to that time, would be the establishment of a new separate Scottish Tribunals Service. On 30 January 2008, in his statement on delivering more effective government, the First Minister stated that the Scottish Government would consider the case for such an integrated tribunals service for Scotland.

Independent and impartial processes

93. It could be argued that the Scottish Government Justice Directorate would be the most suitable place for such a body, rather than responsibilities and personnel being spread across various Scottish Government directorates. However, this would not satisfy the core principle of independence central to Leggatt's view. While policy responsibility for Scottish tribunals would remain with the Scottish Government, their administration would need to be entirely independent of the Scottish Government.

94. Given the current Scottish Government's policy of rationalising public bodies, the most appropriate home for the new body might be within the Scottish Court Service (SCS). This would satisfy the need for independence of tribunals from their sponsoring departments, and would provide relevant expertise as well as central co-ordination of premises, training and administrative support, leading to greater consistency and cost savings.
95. While the current SCS management has no objection in principle to such a development, taking on this responsibility would involve a considerable expansion of its scale and remit. At present, the SCS is facing a number of other organisational challenges, such as taking on responsibility for the district courts, its impending new status under the current Judiciary and Courts (Scotland) Bill as a judicially led public body and the current review of the civil courts. Before any decision could be made on the appropriateness of SCS taking on this potential new role and on the timing and funding of this, there would accordingly be a need for considerable discussion to take place with the new SCS governing body, at a time when the impact of any recommendations by the civil courts review are clearer.

An independent and skilled judiciary

96. The same issues would arise here in relation to tribunal appointments as in Options 2 and 3. There would also be a need to consider how centralised training might best be provided, including looking at the scope for working together with the existing Tribunals Service to provide more integrated training where appropriate.

Coherence

97. This option should provide much greater coherence than the status quo in relation to Scottish tribunals. Fragmentation would remain to some extent, however, as regards integration between Scottish and GB tribunals. It would therefore be vital that any Scottish Tribunals Service should work closely with the existing Tribunals Service, which would retain responsibility for GB tribunals operating in Scotland.

Option 5 Establish a new Scottish Tribunals Service to support both GB tribunals within Scotland and Scottish tribunals

98. A more radical extension of Option 4 would be a Scottish Tribunals Service to oversee all three categories of tribunals within Scotland: GB tribunals within Scotland, Scottish tribunals existing before devolution and the new devolved Scottish tribunals. There is a strong argument in favour of such a solution from a purely legal perspective, given that justice, both civil and criminal, is almost entirely devolved in Scotland.

99. At present, non-devolved tribunals deliver justice to users in Scotland, often applying Scots law, but are administered by a UK body. This is inconsistent with the position in relation to the Scottish courts, which are of course administered in Scotland. It could be argued that GB tribunals are primarily tasked with applying law in reserved areas, and should therefore be reserved. Yet the Scottish courts also apply and interpret UK laws every day, and it is accepted that they are entirely Scottish.
100. Although it did not make a specific recommendation about this, the Leggatt report recognised the strength of these arguments, stating that:
- ‘If the key consideration is to preserve the coherence of the Scottish legal system the most logical way to deal with tribunals in Scotland would be for the Scottish Minister for Justice to have responsibility for delivery of justice through tribunals as he does for civil justice through the courts’.*³⁴
101. Such a reform would, of course, require agreement between the UK and Scottish Governments in order to amend the devolution settlement. Such a possibility was clearly envisaged in the 2005 concordat between the UK Government and the then Scottish Executive:
- ‘In reforming and unifying the administrative structure for the tribunals administered by central government, the DCA will as far as possible avoid making decisions which would have the effect of precluding new and different arrangements being created in the future for Scotland, including the possibility that at some future date the Scottish Ministers may wish to create a unified tribunal administration in Scotland embracing both central government and devolved tribunals. The creation of such an administration would require the agreement of the Lord Chancellor and the Scottish Ministers.’*³⁵

Independent and impartial processes

102. Assuming that the Scottish Tribunals Service was independent of the Scottish Government, this principle would be met. The same considerations would apply here as in relation to Option 4 above.

An independent and skilled judiciary

103. Again, similar considerations arise here as in relation to Option 4. In the absence of any formal relationship with the GB Tribunals Service, however, there would be issues to be resolved in relation to how members of GB tribunals operating in Scotland would be appointed and trained.

³⁴ *Tribunals for Users: One System, One Service*, 2001 at paragraph 11.21

³⁵ *Concordat between the Scottish Executive and the Department of Constitutional Affairs*, July 2005, Annex A

A coherent system

104. This option should result in a much more joined-up system of administration than at present, with all tribunals within Scotland being centrally administered by the same organisation. It would also allow for tribunals policy to be considered as a coherent aspect of devolved civil justice policy. This would be a significant development in relation to the current situation, where a major review of the civil courts in Scotland is underway, but administrative justice is excluded from its remit.
105. Such a reform would, however, also bring difficulties as Scottish tribunals may no longer have the same access to shared resources, training and premises as GB tribunals, although agreement might be reached between the UK and Scottish Governments on these matters. There would also be complex policy issues to address. If reserved tribunals in Scotland were to come within the remit of a devolved Scottish Tribunals Service, where would policy responsibility for tribunal procedure lie, for example? Would the Scottish Government be able to depart from the current structure of a tribunal in relation to Scotland, for example - such as providing for single, rather than three member tribunals?

5. The future role of the Scottish Committee of the Administrative Justice and Tribunals Council

106. In considering the various options set out above, it is also necessary to consider what the future role of the AJTC and its Scottish Committee might be, depending on which option is preferred. If Option 2 (maintaining the present system while better integrating the Tribunals Service and Scottish tribunals) was taken up, the Scottish Committee would continue to have a vital role in encouraging greater co-ordination between the two systems.
107. Were all Scottish tribunals to be brought within the existing Tribunals Service (Option 3), the Scottish Committee would perhaps have an even more crucial role, given the complexities involved in a GB organisation taking over responsibility for devolved tribunals.
108. Another possibility in relation to both Options 2 and 3 might be to set up a separate Administrative Justice and Tribunals Council for Scotland. A separate Scottish AJTC would have oversight of the entire administrative justice system in Scotland, both reserved and devolved, which might lead to an increased awareness of the importance of administrative justice. The former Scottish Committee of the Council on Tribunals recognised that there may be a case for creating a separate Council for Scotland, which could be 'beneficial in providing for administrative justice to be put on a par with civil and criminal justice and thus receive some necessary priority.'³⁶ This may, however, be less of a concern now than was previously the case, given the current Scottish Government's commitment to taking forward administrative justice policy.
109. However, there are a number of arguments against creating a separate AJTC for Scotland. Primary UK legislation would be required and there would be long lead times involved. The former Scottish Committee of the Council on Tribunals itself did not see the need for such change, stressing the importance of its relationship with the former Council on Tribunals and the influence which the Council was able to exert overall. Moreover, while GB tribunals continued to operate in Scotland, this body would still need to work closely with the existing Administrative Justice and Tribunals Council, and might continue to have some overlapping membership. This raises questions as to the real benefits of setting up a separate Scottish AJTC, if either Option 2 or 3 were to be taken up.

36 Scottish Committee of the Council of Tribunals, letter to Richard Whitecross dated 13 June 2007

110. Were either Option 4 or 5 to be pursued, however and a separate Scottish Tribunals Service established, the current situation would clearly have to be reviewed. Were all tribunals to be devolved, the majority of administrative justice would become devolved in Scotland, and it would make little sense to maintain the present structure. Any new Scottish body would have a very different role to the current Scottish Committee, which has an important function in highlighting the distinctive nature of the Scottish legal system and ensuring that UK policies take account of this. The logical consequence of pursuing Option 5 in particular would be that the new body would have to take over responsibility for supervising all tribunals and administrative justice processes within Scotland.
111. A further issue which might be considered here is the extent of the remit of the current AJTC and its Scottish Committee, and that of any successor body. As noted in Chapter 2 of this report, there are some statutory tribunals operating in Scotland which are not subject to the supervision of the AJTC, such as the Scottish Solicitors' Discipline Tribunal, the Parole Board for Scotland, and Social Work Complaints Review Committees.

Appendix 1

ADMINISTRATIVE JUSTICE STEERING GROUP MEMBERSHIP

Lord Philip	Chairman
Alice Brown	Scottish Public Services Ombudsman (SPSO)
Martyn Evans	Scottish Consumer Council
Jane Irvine	Scottish Legal Services Ombudsman
George Jamieson	Law Society of Scotland
Colin McKay	Constitution, Law and Courts Directorate, Scottish Government
Professor Alistair McLeary	Scottish Committee of the Administrative Justice and Tribunals Council
Ewan Malcolm	Scottish Mediation Network
Lindsay Montgomery	Scottish Legal Aid Board
Gerry Moynihan QC	Faculty of Advocates
Professor Tom Mullen	University of Glasgow
Sarah O'Neill	Scottish Consumer Council
Annabelle Ridley	Citizens Advice Scotland
David Robb	SPSO Director of Policy and Development
Alastair Sim	Scottish Court Service
Lachlan Stuart	Constitution, Law and Courts Directorate, Scottish Government
Fiona Paterson	(Secretary) SPSO

Appendix 2

UK GOVERNMENT TRIBUNALS /ORGANISATIONS SUPPORTED BY THE TRIBUNALS SERVICE

- Adjudicator to HM Land Registry
- Asylum & Immigration Tribunal
- Asylum Support Tribunal
- Care Standards Tribunal
- Claims Management Services Tribunal
- Charity Tribunal
- Consumer Credit Appeals Tribunal
- The Commissioners Office
- Criminal Injuries Compensation Appeals Panel
- Employment Tribunals
- Employment Appeal Tribunal
- Estate Agents Appeal Panel
- Financial Services and Markets Tribunal
- Gambling Appeals Tribunal
- Gender Recognition Panel
- General Commissioners of Income Tax
- Information Tribunal
- Immigration Services Tribunal
- Lands Tribunal
- Mental Health Review Tribunal
- Pathogen Access Appeals Commission
- Pensions Appeal Tribunal
- Pensions Regulator Tribunal
- Proscribed Organisations Appeals Commission
- Social Security and Child Support Appeals Tribunal
- Special Commissioners of Income Tax
- Special Educational Needs and Disability Tribunal
- Special Immigration Appeals Commission
- Transport Tribunal
- VAT and Duties Tribunal

List obtained from Tribunals Service website:
<http://www.tribunals.gov.uk/index.htm>

Appendix 3

GB TRIBUNALS OPERATING IN SCOTLAND

TRIBUNAL	SUPPORTED BY TRIBUNALS SERVICE	SUPPORTED BY SCOTTISH GOVERNMENT	OVERSEEN BY AJTC SCOTTISH COMMITTEE
Asylum and Immigration Tribunal	<input type="checkbox"/>		<input type="checkbox"/>
Asylum Support Tribunal	<input type="checkbox"/>		<input type="checkbox"/>
Child Support Commissioners in Scotland		<input type="checkbox"/>	<input type="checkbox"/>
Civil Aviation Authority			<input type="checkbox"/>
Competition Appeal Tribunal			<input type="checkbox"/>
Copyright Tribunal			<input type="checkbox"/>
Criminal Injuries Compensation Appeal Panel	<input type="checkbox"/>		<input type="checkbox"/>
Financial Services and Markets Tribunal	<input type="checkbox"/>		<input type="checkbox"/>
Forestry Committees			<input type="checkbox"/>
Gender Recognition Panel	<input type="checkbox"/>		<input type="checkbox"/>
General Commissioners of Income Tax	<input type="checkbox"/>		<input type="checkbox"/>
Horse Betting Levy Appeal Tribunal for Scotland			<input type="checkbox"/>
Information Tribunal	<input type="checkbox"/>		<input type="checkbox"/>
Information Commissioner			<input type="checkbox"/>
Insolvency Practitioners Tribunal			<input type="checkbox"/>
National Savings Adjudicator			<input type="checkbox"/>
Patents, Designs, Trademarks and Service Marks (Comptroller General)			<input type="checkbox"/>
Pensions Appeal Tribunal for Scotland		<input type="checkbox"/>	<input type="checkbox"/>
Police Appeals Tribunal for Scotland			<input type="checkbox"/>
Reserve Forces Appeal Tribunal			<input type="checkbox"/>
Social Security and Child Support Appeals Tribunal	<input type="checkbox"/>		<input type="checkbox"/>
Social Security Commissioners in Scotland		<input type="checkbox"/>	<input type="checkbox"/>
Special Commissioners of Income Tax	<input type="checkbox"/>		<input type="checkbox"/>
Transport Tribunal	<input type="checkbox"/>		<input type="checkbox"/>
Value Added Tax and Duties Tribunals for Scotland	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Appendix 4

SCOTTISH TRIBUNALS

TRIBUNAL	OVERSEEN BY AJTC SCOTTISH COMMITTEE	SET UP BY SCOTTISH EXECUTIVE/ GOVERNMENT
Additional Support Needs Tribunal for Scotland	<input type="checkbox"/>	<input type="checkbox"/>
Children's Hearings	<input type="checkbox"/>	
Crofters Commission	<input type="checkbox"/>	
Education Appeal Committees	<input type="checkbox"/>	
Employment Tribunal for Scotland*	<input type="checkbox"/>	
Lands Tribunal for Scotland	<input type="checkbox"/>	
Mental Health Tribunal for Scotland	<input type="checkbox"/>	<input type="checkbox"/>
NHS Discipline Committees	<input type="checkbox"/>	
NHS National Appeal Panel for Entry to the Pharmaceutical Lists	<input type="checkbox"/>	
NHS Tribunal	<input type="checkbox"/>	
Panel of Agricultural Arbiters	<input type="checkbox"/>	
Police Pensions Appeal Tribunal	<input type="checkbox"/>	
Private Rented Housing Panels	<input type="checkbox"/>	
Scottish Charities Appeal Panel	<input type="checkbox"/>	<input type="checkbox"/>
Scottish Parking Appeals Service	<input type="checkbox"/>	
Traffic Commissioner for Scotland	<input type="checkbox"/>	
Valuation Appeal Committees	<input type="checkbox"/>	

*Supported by the Tribunals Service

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