

# Options for Tribunal Reform in Scotland

Discussion Paper  
June 2010





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A discussion paper from the Scottish Committee of the Administrative Justice and Tribunals Council.

June 2010



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# Contents

<b>Glossary of Abbreviations</b> .....	<b>v</b>
<b>Executive Summary</b> .....	<b>1</b>
<b>Summary of Discussion Questions</b> .....	<b>5</b>
<b>Chapter 1: Introduction</b> .....	<b>9</b>
Scope .....	10
The Philip Report .....	10
<b>Chapter 2: Background</b> .....	<b>13</b>
Franks Report .....	14
Leggatt Report .....	14
2004 White Paper .....	15
The Tribunals Service .....	15
The Tribunals, Courts and Enforcement Act 2007 .....	16
Implementation of the 2007 Act .....	17
Scotland Act 1998 and Development of Scottish Tribunals Post-1999 .....	18
<b>Chapter 3: The Tribunal Landscape in Scotland</b> .....	<b>21</b>
The Concept of a Tribunal .....	22
Tribunal Functions .....	23
Territorial Jurisdiction .....	24
UK Tribunals Service .....	24
First-tier and Upper Tribunals .....	24
Employment Tribunals and the Employment Appeal Tribunal .....	26
Other UK/GB Tribunals .....	26
Scottish Tribunals .....	27
<b>Chapter 4: Philip Recommendations – Progress Towards Implementation</b> .....	<b>31</b>
<b>Chapter 5: Scottish Civil Courts Review</b> .....	<b>35</b>
The Review’s Proposals .....	36
Implications of the Gill Recommendations for Tribunals .....	38
<b>Chapter 6: Arguments for Reform</b> .....	<b>41</b>

<b>Chapter 7: Principles</b> .....	<b>47</b>
<b>Chapter 8: Tribunals System – Models For Discussion</b> .....	<b>55</b>
Scottish Tribunals System Models .....	56
Model A: Unified Administrative Support Service Only .....	57
Model B: Adoption of Reserved Tribunals Structure in Scotland .....	58
Model C: Unified Administration, Collegiate Structure for Devolved Tribunals, Retention of Reserved Tribunals in the UK Tribunals Service .....	59
Model D: Unified Administration and a Collegiate Structure for all Devolved and Reserved Tribunals .....	60
Model E: Merger of all Tribunals in Scotland with the Scottish Courts .....	65
<b>Annex 1: Group Membership</b> .....	<b>71</b>
<b>Annex 2: Background to the Reform of Tribunals at GB level</b> .....	<b>73</b>
<b>Annex 3: Administrative Structure of Tribunals in Scotland</b> .....	<b>83</b>
<b>Annex 4: Tribunals with Jurisdiction in Scotland</b> .....	<b>85</b>
<b>Annex 5: Appeal Routes of Tribunals in Scotland</b> .....	<b>89</b>

## Glossary of Abbreviations

AJSG – ADMINISTRATIVE JUSTICE STEERING GROUP

AJTC – ADMINISTRATIVE JUSTICE AND TRIBUNALS COUNCIL

ASNTS – ADDITIONAL SUPPORT NEEDS TRIBUNAL FOR SCOTLAND

DCA – DEPARTMENT FOR CONSTITUTIONAL AFFAIRS

EAT – EMPLOYMENT APPEAL TRIBUNAL

ECHR – EUROPEAN CONVENTION ON HUMAN RIGHTS

ETS – EMPLOYMENT TRIBUNAL SCOTLAND

JABS – JUDICIAL APPOINTMENTS BOARD FOR SCOTLAND

MHTS – MENTAL HEALTH TRIBUNAL SCOTLAND

MoJ – MINISTRY OF JUSTICE

PRHP – PRIVATE RENTED HOUSING PANEL

SCAJTC – SCOTTISH COMMITTEE OF THE ADMINISTRATIVE JUSTICE  
AND TRIBUNALS COUNCIL

SCS – SCOTTISH COURT SERVICE

STA – SCOTTISH TRIBUNALS ADMINISTRATION

STS – SCOTTISH TRIBUNALS SERVICE



# Executive Summary



## Introduction

- i. The tribunal landscape in Scotland is complex and disjointed. As in the rest of Great Britain, tribunals have been created over the years in an ad hoc fashion and with no overarching structure bringing them together. The situation in England and Wales and in respect of reserved tribunals with a jurisdiction in Scotland has been remedied to a large extent by the creation of the UK Tribunals Service and implementation of the Tribunals, Courts and Enforcement Act 2007.
- ii. The devolved Scottish tribunals, however, mostly remain separate entities operating largely in isolation and with little connection to those reserved tribunals that have a jurisdiction in Scotland. The Leggatt Review of tribunals in England and Wales found that they lacked independence, coherence and user friendliness and while the review did not extend to Scotland, it is reasonable to assume that some of the same criticisms apply in Scotland. On this basis, reform of tribunals in Scotland to bring them into a coherent, independent structure that sits within a clear governance framework is overdue. In this discussion paper we set out the background to how we got to the current position, we look at the tribunal landscape in Scotland and outline the progress that has been made to date in implementing the recommendations of the Philip report. We consider the implications for tribunals of Lord Gill's recommendations on civil justice, the problems of unreformed tribunals and suggest the principles that should govern a coherent tribunals system. In the final chapter we identify six potential models for creating a Scottish tribunals system that is coherent, independent and user friendly. The last two chapters of the paper contain a series of discussion questions which are intended to stimulate debate on what a Scottish tribunals system might look like.

## Background

- iii. In 2008 the Administrative Justice Steering Group, chaired by Lord Philip, identified five options for tribunal reform in Scotland but indicated that it did not think three of them were sufficient to create a coherent Scottish system of administrative justice that adheres to the key principles of independence and impartiality. The Scottish Committee of the Administrative Justice and Tribunals Council, in responding to a request to submit advice on these options to the Scottish Government, also concluded that only two of the options were acceptable, these being:
  - Option 4 – Establish a new Scottish Tribunals Service to support all Scottish tribunals; and,
  - Option 5 Establish a new Scottish Tribunals Service to support both GB tribunals within Scotland and the Scottish tribunals.
- iv. The weight of the Committee's advice favoured Option 5 but it recognised that getting there would be a complex and potentially lengthy process and that Option 4 offered a sensible staging post on the journey to achieving Option 5.

## Influencing Factors

- v. Following receipt of this advice, Scottish Ministers announced that they would proceed with the creation of a unified administration, initially for devolved Scottish tribunals but ultimately for all tribunals operating in Scotland. This unified administration, which will take the form of a Scottish Government Delivery Unit, is in the process of being established and we have taken its creation as the starting point for all of our proposed system models.
- vi. A number of the recommendations of the Scottish Civil Court Review, published in September 2009, have implications for tribunals. The proposed Sheriff Appeal Court is of the greatest significance as, if implemented, it would offer a route for the rationalisation of appeals from tribunals. Gill's proposals for increased specialisation, simplified procedures and the creation of a third-tier of judiciary all potentially have implications which could lead to a re-allocation of jurisdiction between the courts and tribunals.
- vii. Of greatest significance is the announcement made by the Ministry of Justice on 24 March 2010 that it is to merge the UK Tribunals Service with HM Courts Service. The details of this merger, and the position within it of the reserved tribunals operating in Scotland, are not yet clear. Once the details have been agreed, however, it is possible that Philip Option 4 – a new Scottish Tribunals Service to support all Scottish tribunals – will become largely redundant. If the reserved tribunals operating in Scotland are not included in the merger they will require an alternative structure within which to be located, necessitating an acceleration in progress towards Philip Option 5 – a new Scottish Tribunals Service to support both GB tribunals within Scotland and the Scottish tribunals.

## Principles

- viii. In 1957 the Franks Committee identified the key characteristics of tribunals as being openness, fairness and impartiality and these continue to be the watchwords of tribunals today. A number of the tribunals operating in Scotland, however, are not able, for various reasons, to fully meet these principles. We suggest that in seeking to create a coherent Scottish tribunals system a number of core principles need to be established. These are:
  - Distinctiveness of the Scottish legal system – this should be recognised and protected in creating a structure for tribunals in Scotland;
  - Independence – changes should be made to the location of policy making responsibility and appointment processes to ensure independence, the existing statutory guarantee of judicial independence should be extended to tribunals judiciary and they should be afforded appropriate protection from dismissal; in addition,
  - remaining administrative and/or sponsorship links to Scottish Government Directorates should be severed;
  - the arrangements by which Local Authority tribunals (Education Appeal Committees and Valuation Appeal Committees) are established and operated should be reconsidered;

- a position on hybrid bodies – whether they should or should not be part of a coherent tribunals system or whether their tribunal functions should be separated from their administrative decision making functions – should be agreed;
- Distinctiveness of tribunals – the differences between tribunals and the ordinary civil courts, and the benefit this bestows on service users, should be acknowledged and safeguarded;
- Remuneration – all members of tribunals should be appropriately remunerated;
- Party to party tribunals – a decision needs to be taken on whether party to party tribunals should be incorporated into a Scottish tribunals system or whether they should be absorbed into the Scottish courts system;
- Right of appeal – all decisions made by public bodies that affect the rights of individuals should be subject to a right of appeal to a court or tribunal;
- Appeal routes – routes of appeal from tribunals should be rationalised and a consistent route of appeal created.

## Proposed System Models

- ix. Taking the creation of a unified administration as our starting point and bearing in mind the core principles of a coherent tribunals system, a number of possible models emerge for the creation of a Scottish Tribunals Systems that is independent, coherent and user friendly. These are:
- Model A:** A unified administrative support service for all devolved and reserved tribunals while all else remains the same;
- Model B:** Bringing together of all devolved and reserved tribunals operating in Scotland into a unified administration and structure led by a judicial head that parallels the reserved tribunals as they are currently constituted;
- Model C:** Bringing together of all devolved tribunals into a unified administration, creation of a collegiate structure led by a Tribunals Board or Committee for devolved tribunals and retention of reserved tribunals within the UK Tribunals Service judicial structure (Philip Option 4);
- Model D:** Bringing together of all tribunals in Scotland into a unified administration and the creation of a collegiate structure led by a Tribunals Board or Committee for both devolved and reserved tribunals (Philip Option 5);
- Model E:** Merger of all devolved and reserved tribunals operating in Scotland with the Scottish courts. This model could take two forms:
- Model E1** – merger only of the administration of the tribunals in Scotland with the administration of the Scottish courts; or,
- Model E2** – merger of both the administration and the structure of tribunals with the Scottish courts.
- x. We do not suggest that these proposed system models are exhaustive – there may be a variety of alternative options. However, we do believe that each model is, to a greater or lesser extent, achievable. Whether any of them is desirable is a matter for discussion amongst those with an interest in administrative justice. This discussion paper, and the questions posed in Chapters 7 and 8, are intended to stimulate that discussion which is essential before further progress can be made.

# Summary of Discussion Questions



## Chapter 7: Principles

### *Distinctiveness of the Scottish Legal System*

**Paragraph 7.7** Would you agree with the proposition that in creating a coherent tribunals system for Scotland the distinctiveness of the Scottish legal system should be preserved?

### *Independence*

**Paragraph 7.14** What changes should be made to the way in which Local Authority tribunals operate to make them properly independent and enable them to be fully incorporated into a coherent Scottish tribunals system?

### *Hybrid Bodies*

**Paragraph 7.16** How should hybrid bodies be dealt with?

**Paragraph 7.17** If the appeal functions of the hybrid bodies were to be incorporated into a coherent Scottish tribunals system what issues would need to be addressed to facilitate this?

### *The Distinctive Nature of Tribunals*

**Paragraph 7.19** Do you agree that the distinctive way in which tribunals operate should be safeguarded?

### *Remuneration*

**Paragraph 7.21** What would be the advantages and disadvantages of ensuring that all tribunal members are appropriately remunerated?

### *Party to Party Tribunals*

**Paragraph 7.23** Do you think party to party tribunals should be incorporated into any Scottish tribunals system or should become part of the structure of the Scottish courts?

### *Rights of Appeal*

**Paragraph 7.25** Do you agree that all decisions made by public bodies affecting the rights of individuals should be subject to a right of appeal?

**Paragraph 7.26** In what areas do you think a right of appeal needs to be established?

### *Routes of Appeal*

**Paragraph 7.30** Do you agree that routes of appeal against the decisions of tribunals in Scotland should be rationalised?

**Paragraph 7.31** What should a rationalised route of appeal look like?

## Chapter 8: Tribunals System Models

### ***Model A: Unified Administrative Support Service Only***

**Paragraph 8.7** Do you think a model in which the administration of all tribunals in Scotland is unified while all else remains the same could lead to a Scottish tribunal system that is properly independent, coherent and user friendly?

### ***Model B: Adoption of UK Tribunals Structure in Scotland***

**Paragraph 8.12** Do you think a structure mirroring the current structure for reserved tribunals but encompassing all devolved and reserved tribunals under the remit of a senior judicial head is appropriate in Scotland?

### ***Model C: Collegiate Structure for Devolved Tribunals, Retention of Reserved Tribunals in the UK Tribunals Service***

**Paragraph 8.16** Do you think the MoJ's intention to merge the Tribunals Service with HM Courts Service is likely to make Model C (creation of a unified structure only for devolved tribunals) redundant?

### ***Model D: Collegiate Structure for all Devolved and Reserved Tribunals***

**Paragraph 8.24** If a collegiate structure were to be created should the head of the governance body be a judicial head of a tribunal or a lay person? What would be the advantages and disadvantages of both?

**Paragraph 8.26** Do you think the creation of a Standing Conference or Council of Tribunal Presidents/Conveners is necessary or appropriate?

**Paragraph 8.39** Do you think a collegiate structure of the nature set out could work?

**Paragraph 8.45** How do you think Scottish cases, currently heard by reserved tribunals that do not have a physical presence in Scotland, should be handled in the context of an independent, coherent and user friendly Scottish tribunals system?

### ***Model E: Merger of all Tribunals in Scotland with the Scottish Courts***

**Paragraph 8.54** Do you think a model in which the administration of tribunals and courts in Scotland is merged, but their separate structures retained, will enable Scottish tribunals to retain their distinctive features?

**Paragraph 8.55** How do you think independence, coherence and user friendliness of tribunals could be assured in any such merger?

**Paragraph 8.59** Do you think that full integration of tribunals in Scotland with the administration and structures of the Scottish courts is desirable and workable?

**Paragraph 8.64** Which of the models outlined would best advance the interests of users of tribunals in Scotland?

*Other Models*

**Paragraph 8.65**

In your view is there any other model that would be more appropriate than those suggested?

# Chapter 1: Introduction



## Scope

- 1.1. This paper aims to generate discussion on the future administration and supervision of tribunals in Scotland, building both on the options identified by the Administrative Justice Steering Group (AJSG), Chaired by Lord Philip and which reported in 2008 (The Philip Report)<sup>1</sup>, and on the indications from Scottish Ministers that they wish to see a Scottish Tribunals Service established.
- 1.2. The Scottish Committee of the Administrative Justice & Tribunals Council (SCAJTC) has already advised Ministers that the optimal approach to the reform of tribunals in Scotland should be to move to a system of the nature set out as Option 5 of the Philip Report, moving towards that position via the proposals at Option 4 of that Report.
- 1.3. This paper is the next step in the process to the extent that it identifies a variety of possible system models and seeks to identify the issues which might arise in implementing Options 4 and 5.
- 1.4. In framing suggestions we have not attempted to be exhaustive in assessing the consequences of implementation of any particular model. Our aim has been primarily to identify the main issues associated with each model. The need to achieve efficiency savings will, of course, feature large in any future decisions on reform and the financial and operational implications of any preferred models will need to be carefully scoped. That detailed work is for a later stage.
- 1.5. Our thinking has, however, been informed by the responses submitted to the initial questionnaire that we issued in March 2010. We received approximately 40 responses and these were useful in informing our understanding of the issues and of the concerns of different tribunals.

## The Philip Report

- 1.6. In looking at the background to the matters to be considered we note the contribution of the Administrative Justice Steering Group (AJSG). The AJSG reported to the Scottish Government in November 2008 on the administrative justice framework in Scotland, taking into account the expected impact of the Tribunals, Courts and Enforcement Act 2007 which introduced a two tier tribunal structure and created the Administrative Justice and Tribunals Council (AJTC) in place of the Council on Tribunals and its Scottish and Welsh Committees. The report aimed to outline the current arrangements for the administration and supervision of the increasingly complex system of tribunals operating in Scotland, explore a range of options for the future administration of the system, and consider the future role of the SCAJTC. The report identified five possible options for the future administration of tribunals in Scotland. However, three of these options were dismissed by the AJSG as being insufficient to create a coherent Scottish system of administrative justice that adheres to the key principles of independence and impartiality. This left two options:
  - **Option 4: Establish a new Scottish Tribunals Service to support all Scottish tribunals; and**
  - **Option 5: Establish a new Scottish Tribunals Service to support both GB tribunals within Scotland and the Scottish Tribunals.**

1 Scottish Consumer Council (2008) – Options for the Future Administration and Supervision of Tribunals in Scotland. A Report by the Administrative Justice Steering Group. At: [http://www.ajtc.gov.uk/docs/Tribunals\\_in\\_Scotland.pdf](http://www.ajtc.gov.uk/docs/Tribunals_in_Scotland.pdf)

- 1.7. The Philip Report stressed that any tribunals system in Scotland should be coherent, leading to greater consistency, efficiency and reduced costs, should comprise independent and impartial processes and independent and skilled judiciary. Under both Options 4 and 5 Philip indicated that in order to create coherence all tribunals in Scotland should be centrally administered by the same organisation; independence and impartiality would be assured by removing administrative functions from the Scottish Government (although policy responsibility for Scottish tribunals would remain with the Scottish Government); and an independent and skilled judiciary would be assured by the introduction of independent appointment through judicial appointment processes and the provision of centralised training in generic tribunal skills. Philip suggests that one possible home for a centralised tribunal administration could be within the Scottish Court Service but the report makes no comment on either judicial structure or governance arrangements.
- 1.8. This discussion paper, then, is the first step in the process of defining what a coherent Scottish tribunals system might look like. In it we look first at the background and the circumstances in which we come to offer this paper, and we then look in general terms at the landscape in which tribunals operate in Scotland at present. We seek to extrapolate some principles before finally setting out options for consideration.
- 1.9. The SCAJTC established a working group to develop this paper. The content of the paper has been agreed by the SCAJTC. The membership of both of these groups is listed at Annex 1.



# Chapter 2: Background



2.1. The Philip Report sets out some of the background to the matters it considered and we would endorse their comments. There is no need to repeat all that was set out in that report but it is useful to identify in this paper those matters which we think are relevant as background. The majority of this material is contained in Annex 2 to this paper. Comments in this Chapter are confined to those issues which we consider to be of particular relevance.

2.2. The Philip Report noted that

“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”

2.3. This Chapter and Annex 2 look at how we got to the position in which those comments could be made and at the various measures over the past few years which have impacted on the situation.

## Franks Report

2.4. The starting point must be the Franks Report which led directly to the modern tribunal system across the UK. Where once tribunals had been regarded as an extension of the executive arm of government, Franks placed them firmly on the judicial side, with the Franks principles of openness, fairness and impartiality becoming the watchwords for how tribunals ought to operate.<sup>2</sup>

## Leggatt Report

2.5. The reforms brought about by Franks and the Tribunal and Inquiries Acts of 1958 and 1971, although far reaching, were not sufficient to create a coherent tribunals system, and as Lord Justice Carnwath, Senior President of Tribunals commented in 2010,<sup>3</sup>

“the problems of piecemeal development and lack of coherence remained uncorrected....”

2.6. That situation led directly to the appointment of Sir Andrew Leggatt in May 2000 to look at the delivery of justice through tribunals to ensure that there are fair, timely, proportionate and effective arrangements, which comply with the requirements of the European Convention on Human Rights (ECHR), for handling disputes within an effective framework and a coherent structure for the delivery of administrative justice.

2.7. The remit for the Leggatt Review did not extend to Scottish tribunals. Devolution in 1999 meant that responsibility for tribunals in devolved areas of law fell to the Scottish Executive, now the Scottish Government. The Leggatt Report did, of course, have a bearing on Scotland to the extent that it addressed the position of tribunals within GB or UK jurisdictions.

<sup>2</sup> Taken from Council on Tribunals website at <http://www.council-on-tribunals.gov.uk/about/origins.htm>

<sup>3</sup> Tribunals Service (2010a) – The Senior President of Tribunals’ Annual Report: *Tribunals Transformed*. At: [http://www.tribunals.gov.uk/Tribunals/Documents/Publications/SeniorPresidentReport\\_2010.pdf](http://www.tribunals.gov.uk/Tribunals/Documents/Publications/SeniorPresidentReport_2010.pdf)

2.8. Set in amongst the “bleak picture” which the Leggatt Report painted it is worth noting that he did suggest, in effect, a separate Scottish tribunals structure when he reported in 2001.<sup>4</sup>

## 2004 White Paper

2.9. The Leggatt proposals, which formed the basis for the UK Government’s 2004 White Paper – Transforming Public Services: Complaints, Redress and Tribunals<sup>5</sup> – led directly to the Tribunals, Courts and Enforcement Act 2007. Importantly, the White Paper set out that neither it nor the Leggatt Report was concerned with tribunals in Scotland dealing with devolved subjects, but it noted that a new Tribunals Service would include some tribunals administered by central government throughout the UK or Great Britain; so the Tribunals Service would have a presence in Scotland.

## The Tribunals Service

2.10. Chapter 5 of the Leggatt Report contained detailed proposals for the Tribunals Service, which was established in April 2006 in advance of legislation to carry out the other reforms recommended in the Report. The Tribunals Service is an executive agency of the Ministry of Justice (MoJ). It is not a statutory construct, and to that extent it and HM Courts Service differ significantly from the Scottish Court Service (SCS). It has since 2006 provided administrative support for the tribunals’ judiciary who hear cases and decide appeals. The centralised administration provided by the Tribunals Service undoubtedly forms a major element in the scheme of the reforms envisaged by Leggatt.

2.11. It is important to note that the expression ‘Tribunals Service’ has perhaps become a shorthand by which the reforms to tribunals at UK or GB level and in England and Wales are referred to. However, it must be remembered that the Tribunals Service is the administrative support structure and that the reforms to the judiciary and to tribunals themselves are separate, although linked to the Tribunals Service. Thus, there is a formal relationship between the Tribunals Service and the tribunals’ judiciary as personified by the Senior President. Chapter 5 of the Tribunals Service Framework Document sets out the basis of the relationship between the Chief Executive of the Tribunals Service and the Senior President.<sup>6</sup>

4 Leggatt, A. (2001) – Tribunals for Users One System, One Service. Report of the Review of Tribunals by Sir Andrew Leggatt para 11.11. At: <http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm>

5 Department for Constitutional Affairs (2004) – Transforming Public Services: Complaints, Redress and Tribunals. Cmnd 6243. At: <http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf>

6 Tribunals Service (2006) – Tribunals Service Framework Document. At: <http://www.tribunals.gov.uk/tribunals/Documents/Publications/TSframeworkdocENG.pdf>

# The Tribunals, Courts and Enforcement Act 2007

- 2.12. The Tribunals, Courts and Enforcement Act 2007<sup>7</sup> (hereafter referred to as ‘the 2007 Act’) implemented the proposals of the 2004 White Paper. While the present paper does not set out in detail the content of the 2007 Act, a brief overview of the provisions insofar as they affected the tribunals system is provided.
- 2.13. The key elements of the regime established by and around the 2007 Act are:
- a guarantee of independence;
  - a unified judiciary with common recruitment and training characteristics;
  - a unified structure of tribunals at both first instance and appellate levels, identified by subject specific chambers with substantially common rules of procedure;
  - centralised administration and support for tribunals in the form of the Tribunals Service.
- 2.14. **A guarantee of independence** – Section 1 of the 2007 Act specifically extends to the tribunal judiciary the statutory guarantee of judicial independence contained in the Constitutional Reform Act 2005.<sup>8</sup> The principle of independence of the judiciary is accordingly at the centre of the 2007 Act and, therefore, at the centre of the new tribunals system. The Judiciary and Courts (Scotland) Act 2008<sup>9</sup> provides a similar guarantee in respect of the Scottish courts but this has not been extended to the devolved tribunals’ judiciary.
- 2.15. **A unified judiciary – the Senior President** – One of the most important changes to the overall tribunals system is set out in section 2 of the 2007 Act in which the post of Senior President is specifically created.<sup>10</sup> While the role and functions of the post are not precisely defined in the Act the creation of the post signifies the development of the unified structure. As Lord Justice Carnwath has commented, the office of Senior President is a novel constitutional entity as an autonomous judicial office with UK wide responsibilities.<sup>11</sup> The 2007 Act did not contain a detailed “job description” for the office although some guidance was available through the Consultation paper *Transforming Tribunals*<sup>12</sup> which addressed the implementation of the 2007 Act (see below) and which drew together the Senior President’s functions.
- 2.16. **A unified structure of tribunals – First-tier and Upper Tribunals** – The third element in the reform package in the 2007 Act is the new structure of tribunals in which two new tribunals, which would effectively and progressively absorb all the pre-existing tribunals, are created.
- 2.17. The Act does not define the composition of the First-tier or Upper Tribunal in terms of subject areas etc. but concentrates on judicial composition and inter-relationship between the tiers. In the

7 At: [http://www.opsi.gov.uk/acts/acts2007/ukpga\\_20070015\\_en\\_1](http://www.opsi.gov.uk/acts/acts2007/ukpga_20070015_en_1) 2007 c 15

8 At: [http://www.opsi.gov.uk/acts/acts2005/ukpga\\_20050004\\_en\\_1](http://www.opsi.gov.uk/acts/acts2005/ukpga_20050004_en_1) 2005 c 4

9 At: [http://www.opsi.gov.uk/legislation/scotland/acts2008/pdf/asp\\_20080006\\_en.pdf](http://www.opsi.gov.uk/legislation/scotland/acts2008/pdf/asp_20080006_en.pdf) 2008 asp 6

10 2007 Act *Op. cit.*- s2

11 Tribunals Service (2010a) *Op. Cit.*

12 Tribunals Service (2007) – *Transforming Tribunals. Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007.* At: [http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/docs/tt\\_consultation\\_281107.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/docs/tt_consultation_281107.pdf)

event, the First-tier and Upper Tribunals have evolved respectively into seven and four separate chambers.

2.18. Following an agreement reached between the Lord Chancellor's Department and the Department for Trade and Industry, the Employment Tribunals and the Employment Appeal Tribunal remained outside the formal First-tier and Upper Tribunal structures, forming instead a separate pillar of the new organisation. The protocol in which this position was agreed recognised that there are differences between the needs of employment tribunals which deal with disputes between parties and administrative tribunals which deal with disputes between party and state.<sup>13</sup>

## Implementation of the 2007 Act

2.19. The process for implementation of the 2007 Act was the subject of consultation by the MoJ/Tribunals Service. The consultation paper '*Transforming Tribunals*' noted that in relation to Scotland a Tribunals Judges Forum had been established by the Lord President, consistently with the establishment of such a forum for Northern Ireland. It also commented on the deployment of judges through "ticketing" arrangements, setting out that it would be for the Chamber Presidents to decide how best to use the judges and members *within* a Chamber in order to match their experience and expertise to the needs of the Chamber.

2.20. The regime of the 2007 Act has been introduced progressively over the period from its enactment and is still on-going. On 24 March 2010 the MoJ announced that it will merge HM Courts Service and the Tribunals Service into a new, single organisation.<sup>14</sup> The precise timetable, processes for and consequences of this merger remain to be identified.

2.21. The merger will, however, be an administrative rather than a legislative change, merging two executive agencies into one. While it is possible that any such merger might create the circumstances for legislative change in future, the change is being driven by the need to seek efficiencies, and the intention is to take it forward very quickly – we understand that a timetable of as little as 12 months might be in prospect. It is certain that the merger will throw into sharp relief the present untidy arrangements in relation to Scotland. Some "reserved" tribunals are administered by the Tribunals Service, and some by Scottish Ministers. Devolved tribunals have a patchwork of administrative support. As the Philip Report says, these arrangements are not obviously consistent with the Leggatt principles. Nor is it clear that they offer the most effective system or the best value for money for the taxpayer. The fact that the Tribunals Service has a significant operation in Scotland is likely to present a problem for integration with HM Courts Service, which has no role in Scotland and answers to the Secretary of State for Justice. In any merger special governance arrangements would have to be made for the Scottish operations of the reserved tribunals and this may not offer the best value solution for these tribunals.

<sup>13</sup> *Ibid.* pg. 23

<sup>14</sup> At: <http://www.justice.gov.uk/news/announcement240310a.htm>

- 2.22. There is, we believe, therefore an opportunity to look at bringing together the administration of devolved and reserved tribunals to offer a more effective service and better value for money regardless of any other arguments based on the integrity of the Scottish justice system.
- 2.23. Leaving aside issues of value for money, the proposed merger of HM Courts Service and the Tribunals Service presents risks which argue for realignment of responsibility for reserved tribunals. Any such merger will require amendment of current governance arrangements and some convergence of tribunals and courts into a single structure is a reasonably foreseeable conclusion. It is also possible that inclusion of tribunals as, in effect a division of the Courts in England and Wales under the supervision of the Lord Chief Justice, is a possible outcome. In that event issues of the appropriateness of facets of the Scottish judicial landscape forming part of the structures of the English legal landscape take on significance.

## Scotland Act 1998 and Development of Scottish Tribunals Post-1999

- 2.24. While the Franks Report is the start of modern thinking on tribunals and the Leggatt Report is the starting point for the reforms flowing from the 2007 Act, intervening between the two is the Scotland Act 1998 which establishes the devolution settlement for Scotland within the United Kingdom. While it is clear that Leggatt, the Tribunals Service and the 2007 Act all have a UK or GB-wide incidence, it is also arguable that each of those and the new structures which emerged are most closely linked with English law and with the governance of the UK within England and Wales. Thus, for example, Leggatt is clear that the context in which his report is prepared is that of tribunals within England and Wales,<sup>15</sup> while the Tribunals Service as an Executive Agency is integrated into the MoJ. The Tribunals Service also comprises tribunals which have a uniquely England and Wales jurisdiction. The tribunals' reform programme has, therefore, had an incidence in Scotland different to that which it has had within England and Wales.
- 2.25. While there has not been any process in Scotland similar to that provided for in the 2007 Act for England and Wales, there has been development of tribunals within Scotland in relation to devolved areas. Several tribunals have been established under devolved powers since 1999.<sup>16</sup> However, those developments have to a large extent occurred in isolation from each other, and there has been no overarching strategy governing the development of tribunals or the administrative justice sector in Scotland.

<sup>15</sup> See paragraph 1.1. of Leggatt, 2001 *Op. cit.*

<sup>16</sup> Including the Additional Support Needs Tribunal for Scotland (2005) and the Mental Health Tribunal for Scotland (2005).

2.26. In 2005 the Lord President established the Scottish Tribunals Forum comprising the Presidents and Chairs of a number of the Scottish tribunals under the chairmanship of Lord Philip. The Forum, which is non-statutory, allows the heads of all tribunals in Scotland, whether reserved or devolved, to meet regularly. It includes representation from the SCAJTC and is the only structure within Scotland bringing together the Scottish tribunals on a regular basis.

2.27. In 2007 the Judicial Council for Scotland was established; a non-statutory body comprising representatives from across the judiciary. Scottish tribunals are represented on the Council with representation from both the Tribunals Service and devolved tribunals.

### ***The Administrative Justice Steering Group***

2.28. As implementation of the 2007 Act gathered pace there was an increasing awareness that the disparity in treatment of tribunals between the UK/GB and the Scottish levels required to be addressed. In October 2008 the AJSG published its first report<sup>17</sup> which set out the current arrangements for tribunals in Scotland, concerns about the current system, and posited five possible options for the future. Those options were:

- **Option 1:** retain the status quo
- **Option 2:** put mechanisms in place to ensure better integration and co-operation between the UK Tribunals Service and wholly Scottish tribunals
- **Option 3:** bring all Scottish Tribunals within the remit of the existing UK Tribunals Service
- **Option 4:** establish a new Scottish Tribunals Service to support all Scottish tribunals
- **Option 5:** establish a new Scottish Tribunals Service to support both GB tribunals within Scotland and all Scottish tribunals

2.29. The AJSG published a further report in June 2009 which focused on administrative justice in Scotland more broadly.<sup>18</sup> Its key concern was the importance of getting decisions right first time and the report concluded that too many of the initial decisions made by public sector organisations in Scotland are unsound; that citizens experience a number of barriers when seeking redress (including confusion about the options available); and that not enough is being done to ensure that learning from complaints is used to improve frontline services. The report drew specific conclusions in relation to tribunals, noting that, while there may be policy concerns about the independence of tribunals, in practice citizens regard tribunals to be independent forums. However, there is considerable concern around citizens' ability to access and use tribunals. Research shows that both representation and pre-hearing advice improve outcomes for tribunal users but free services offering advice and/or representation are not widely available and paid-for services can create a cost barrier. The report set out a number of possible ways forward for tribunals.

17 Scottish Consumer Council (2008) *Op. cit.*

18 Consumer Focus Scotland (2009) – Administrative Justice in Scotland – The Way Forward. The Final Report of the Administrative Justice Steering Group.



# Chapter 3: The Tribunal Landscape in Scotland



## The Concept of a Tribunal

- 3.1. One of the difficulties of describing the tribunal landscape is in defining the term 'tribunal'. The term has been applied to a disparate collection of bodies, and there are other bodies generally regarded as tribunals which have not been given that title. It is not possible to provide a general definition which encompasses all the bodies which have been given the title of 'tribunal' and all other bodies, however titled, which have been regarded as tribunals. However, many of the bodies concerned have certain common features from which a definition of the concept of a tribunal may be inferred. The assumption that a tribunal has these features has also structured key official reports including the report of the Franks Committee<sup>19</sup> and the Leggatt Review.
- 3.2. This Discussion Paper, therefore, proceeds on the assumption that a tribunal is a body which resolves disputes by making binding decisions according to law, and does so by a process of adjudication which is relatively informal and less adversarial as compared to the model of adjudication applied by the ordinary courts. Like the courts, tribunals are expected to be independent both of the executive and the legislature and of the parties appearing before them.
- 3.3. Many public bodies operating within the various UK legal systems satisfy this definition of a tribunal. However, this definition if applied rigorously, would exclude a number of bodies which fall under the supervision of the AJTC as 'listed tribunals' for the purposes of Schedule 7 to the 2007 Act. The Crofters Commission, for example, is an essentially administrative body which acts as a primary decision-maker. There is no dispute to resolve unless and until the Commission itself has made a decision adverse to a citizen's interests. Other bodies do not satisfy the definition because they are not sufficiently independent of the bodies against whose decisions they hear appeals, for example, the Education Appeal Committees which are convened by local authorities to hear appeals against decisions made by those local authorities themselves. A third group of bodies are hybrids which have both administrative and dispute resolution functions. The statutory functions of the Scottish Traffic Commissioner, for example, include licensing of operators of Heavy Goods Vehicles (HGVs) and of buses and coaches (PSVs), registration of local bus services, granting vocational licenses and taking action against drivers of HGVs and PSVs, these being administrative functions. However, the Traffic Commissioner for Scotland is also responsible for dealing with appeals against Scottish local authorities' decisions on taxi fares, and appeals against charging and removing improperly parked vehicles in Edinburgh and Glasgow. The proposals in this paper relate to conventional judicial tribunals and it follows that they may not be applicable to these hybrid bodies in their current form. However, it is necessary to decide the appropriate governance structure for such bodies and this is considered in Chapter 7.
- 3.4. Most tribunals in the UK resolve disputes between citizens and the state; others, such as the Employment Tribunals deal with disputes between private parties, while a third group including, for example, the Lands Tribunal for Scotland deal both with disputes between citizen and state and disputes between private parties. The geographical jurisdiction of tribunals reflects the complex relationships between the UK's legal systems. Some tribunals have jurisdiction in cases arising

<sup>19</sup> Report of the Committee on Administrative Tribunals and Enquiries (Chairman The Rt. Hon. Sir Oliver Franks, GCMG KCB CBE); Cmnd 218; July 1957.

across the whole of the UK (i.e. England, Wales, Scotland and Northern Ireland), others have jurisdiction in cases arising across the whole of Great Britain (i.e. England, Wales and Scotland) whilst others have a geographical jurisdiction limited to one of the following: England and Wales; England; Wales; Scotland; Northern Ireland.

- 3.5. Although the term is sometimes applied to non-statutory bodies, the tribunals with which this paper is concerned are statutory bodies. The structure and arrangements for all such tribunals are set out in legislation, but regard must also be had to the effect of ECHR. Under Article 6 of ECHR everyone is entitled to a fair hearing in the determination of his/her civil rights and obligations before a tribunal. This does not mean that all tribunals need to be fully Article 6-compliant. Rather, where questions of legal rights are at issue the remedies provided by the legal system as a whole must comply with Article 6. Consequently, if a particular tribunal is not fully Article 6-compliant, for example, because it is not independent, then some other measure is required to fill the gap, such as the provision of a further right of appeal on the merits to a higher tribunal or court which does comply with Article 6.

## Tribunal Functions

- 3.6. The basic function of tribunals is to resolve disputes according to law. This is essentially the same function as is performed by the ordinary courts. However, there are significant differences in the way tribunals perform this function. First, tribunals are relatively specialised in the subject matter with which they deal in contrast to the wide and varied jurisdiction of the ordinary courts. Secondly, many tribunals combine legal with other professional or special expertise in the judging panel. Thirdly, as noted above, they are intended to provide a less formal and less adversarial mode of justice compared to the ordinary courts.
- 3.7. The specific differences of tribunals compared to ordinary courts include: the absence of detailed written pleadings; simpler procedures; proof of fact is not usually restricted by rules of evidence; lay representation is permitted; evidence is not generally taken on oath; there are usually no fees charged for making an appeal/application; the tribunal does not have power to award costs; the role of adjudicator is more inquisitorial; and the atmosphere is relatively informal (hearings are not held in court rooms; formal court dress is not worn etc.). All of these characteristics contribute to tribunals being more user-focused than the ordinary courts. It should be noted, however, that these are generalisations and do not apply equally to all tribunals. Some tribunals have more of the features associated with the ordinary courts. In Employment Tribunals evidence is given on oath, the tribunal has power to award costs and proceedings are adversarial. Immigration tribunals, although a citizen v state tribunal rather than a party v party tribunal, are also relatively adversarial.<sup>20</sup> Moreover, it is important to realise that the observation that tribunals are generally less formal and adversarial is made in comparison to courts. Research suggests that users may view tribunals as relatively formal and stressful compared to other life experiences.<sup>21</sup>

20 Genn, H. and Genn, Y. (1989) – *The Effectiveness of Representation at Tribunals* (Lord Chancellor's Department.)

21 *Ibid.* and Adler, M. and Gulland, J. (eds.), *Tribunal Users' Experiences, Perceptions and Expectations: A Literature Review*, (Council on Tribunals, 2003).

## Territorial Jurisdiction

3.8. Tribunals can be classified according to the territorial scope of their jurisdiction. As indicated above, tribunals which have jurisdiction to deal with cases arising in Scotland may be operating on a UK, a GB or a Scotland only basis. Annex 3 shows the current administrative structure of the Scottish tribunals 'system'. The list at Annex 4 identifies those tribunals with a jurisdiction in Scotland – GB wide and devolved tribunals are identified separately. It is worth noting that some of the tribunals identified although still in existence are, in effect, moribund as cases have never arisen or have not arisen for many years.

## UK Tribunals Service

### First-tier and Upper Tribunals

#### **Structure and Organisation**

3.9. Before the 2007 Act reorganisation, each tribunal was a distinct entity with its own constitutive legislation. However, there was some overlapping of membership, as a number of chairs and other members sat on more than one tribunal. As a result of the 2007 Act reorganisation a number of formerly separate tribunals have been grouped together in the First-tier and Upper Tribunals. Both of these are divided into chambers which deal with cognate subject matter. The First-tier Tribunal is currently divided into six chambers:

- Social Entitlement Chamber
- War Pensions and Armed Forces Compensation Chamber
- Health, Education and Social Care Chamber
- Immigration and Asylum Chamber
- Tax Chamber
- General Regulatory Chamber.

3.10. It is intended to add a Land, Property and Housing Chamber although the timetable for that has not yet been announced. Neither the War Pensions and Armed Forces Compensation Chamber, nor the Health, Education and Social Care Chamber have jurisdiction to hear cases arising in Scotland and the Land, Property and Housing Chamber when established will not have jurisdiction in Scotland. The General Regulatory Chamber has jurisdiction in Scotland in respect of some of the subject areas with which it deals but not others. The Social Entitlement Chamber has jurisdiction in Scotland in respect of all of the subject areas in its remit.

3.11. The Upper Tribunal is divided into four chambers:

- Administrative Appeals Chamber
- Immigration and Asylum Chamber
- Tax and Chancery Chamber
- Lands Chamber

3.12. The Lands Chamber has no jurisdiction in Scotland and the Administrative Appeals Chamber has jurisdiction in Scotland in respect of some but not all of the subject matter with which it deals.

3.13. The new structure is intended to achieve a balance between the benefits of rationalisation and of specialisation. This is most obvious in relation to the deployment of judges and members. Judges and members do not automatically sit in all classes of case heard by a particular chamber. On first appointment a judge or member will have been recruited to a particular jurisdiction. Thereafter, the judge or member may be authorised to sit in other classes of cases within a chamber by the process of 'ticketing' and in another chamber by the process of assignment. The potential benefits of cross-ticketing and assignment include greater flexibility and efficiency in the deployment of judges and members whilst safeguarding the specialist expertise which has long been regarded as a virtue of the tribunal system. Thus far, however, the great majority of tribunal judges and members who were in post before the reorganisation have continued to sit exclusively in their former jurisdictions, and it is not yet clear whether, in the long run, the way judges and members are deployed within the unified tribunals will be very different from the way in which they were deployed under the former fragmented system.

### ***Appeals***

3.14. With limited exceptions, there is a right of appeal on a point of law from decisions of the First-tier Tribunal to the Upper Tribunal and a further appeal on a point of law to the Court of Appeal, the Court of Session or the Court of Appeal in Northern Ireland.

### ***Policy and Ministerial Responsibility***

3.15. Broadly speaking responsibility for policy on reserved tribunals generally has been unified in the MoJ. For this purpose, policy on tribunals refers to policy on the creation, abolition and restructuring of tribunals. It does not extend to the law applied by tribunals which remains the responsibility of the relevant department, for example, the Home Office in the case of immigration control.

### ***Appointment of Judges and Members***

3.16. Judges of the Upper Tribunal are appointed by the Queen on the advice of the Lord Chancellor. All members of both the First-tier and Upper Tribunals are appointed by the Lord Chancellor following standard judicial selection exercises run by the Judicial Appointments Commission.

3.17. The terms and conditions and remuneration of judges and members of the First-tier and Upper Tribunals are set by the Lord Chancellor. Attempts are being made to harmonise these.

### ***Independence***

3.18. The independence of the First-tier and Upper Tribunals is protected in various ways including: the extension of the guarantee of judicial independence in section 1 of the Constitutional Reform Act 2005 to the tribunal judiciary by section 1 of the 2007 Act; the designation of the Upper Tribunal as a superior court of record; the provision of judicial leadership by the Senior President of Tribunals and the fact that the MoJ has become the sponsor department so that tribunals are no longer dependent for funding on departments against whose decisions they hear appeals.

### ***Judicial Leadership***

3.19. Judicial leadership of the First-tier and Upper Tribunals is provided by the Senior President of Tribunals.

### ***Administrative Support***

3.20. The Tribunals Service, an executive agency of the MoJ, provides administrative support for the First-tier and Upper Tribunals. The Tribunals Service is divided into two regions, with each region having three areas, Scotland being one of the areas of the North region. However, not all jurisdictions are regionalised with some smaller jurisdictions sitting only in one location in the UK.

### ***Training***

3.21. The Senior President is responsible for making appropriate arrangements for training for judges and members of the First-tier and Upper Tribunals and is assisted by the Tribunals' Judiciary Training Group. Training is provided through the Tribunals Service and the Judicial Studies Board.

## **Employment Tribunals and the Employment Appeal Tribunal**

3.22. The Tribunals Service also provides administrative support to Employment Tribunals (Scotland) (ETS) and the Employment Appeal Tribunal (EAT). Appeals from ETS go to the EAT and from the EAT to the Court of Session. As judicial bodies both ETS and EAT were largely unaffected by the reorganisation arising from the 2007 Act as they remain outwith the First-tier and Upper Tribunal structures (although the 2007 Act did bring both bodies within the ambit of the Senior President for certain functions). ETS is a separate Scottish jurisdiction (there is also an Employment Tribunal in England and Wales for which the Tribunals Service also provide administrative support) but the EAT is a national court. Both ETS and the EAT continue to operate on the basis of the legislation by which they were created and this legislation remains the responsibility of the Department for Business Innovation and Skills (in particular that Department retains responsibility for ETS Rules of Procedure although the MoJ has responsibility for EAT Rules of Procedure). Employment Judges for ETS are appointed by the Lord President. Lay members are appointed by the Lord Chancellor. Judicial leadership of the ETS is provided by the President of Employment Tribunals under the overall leadership of the Senior President of Tribunals. The EAT Judge sitting in Scotland is nominated by the Lord President and the EAT lay members are appointed by the Lord Chancellor.

## **Other UK/GB Tribunals**

3.23. The government's intention is that most non-devolved tribunals will eventually be incorporated into the new structure. However, a number of bodies currently under the supervision of the AJTC are likely to be left out in the long term because they are not conventional judicial tribunals, for example bodies such as the Civil Aviation Authority which combine dispute resolution with other functions.

## Scottish Tribunals

3.24. The tribunals which exercise jurisdiction only in Scotland may be described as devolved tribunals as legislative and executive competence both for the relevant areas of substantive law and policy and for the corresponding institutions of dispute resolution lies with the Scottish Parliament and Scottish Government.

### **Structure and Organisation**

3.25. Each of the devolved tribunals is a wholly separate entity with its own constituent legislation, membership and administrative support arrangements. There is no statutory framework for collaboration between devolved tribunals, however, the Scottish Tribunals Forum provides an informal means of discussing matters of common interest.

3.26. Some tribunals have a formal regional structure related to local government boundaries, for example, local Valuation Appeal Committees, Education Appeal Committees and Children's Hearings.<sup>22</sup> In other tribunals, although there is not a formal regional structure, they sit in a variety of venues across Scotland. The Additional Support Needs Tribunal for Scotland (ASNTS) can sit in any of the 32 local authorities in Scotland.

3.27. There are no formal arrangements for transfer of chairs/conveners and members between jurisdictions as recruitment is carried out separately for each tribunal. However, as was the case with the reserved tribunals before the 2007 Act reorganisation, in practice a significant number of chairs/conveners sit on more than one tribunal (including combining service on devolved and reserved tribunals) and some tribunal chairs/conveners are also part-time sheriffs.

### **Appeals**

3.28. There is no consistent route of appeal from devolved tribunals. In some cases appeal is to the sheriff court (e.g. appeals from decisions of Children's Hearings and from the Private Rented Housing Panel (PRHP) in repairs cases) or to the Sheriff Principal (e.g. appeals from the Mental Health Tribunal for Scotland (MHTS)). In others, appeal is to the Court of Session (e.g. the ASNTS and the NHS Tribunal Scotland). In some cases, e.g. the Police Appeals Tribunals, no appeal is provided and the only way of challenging the decision is by way of judicial review. Where the initial appeal is to the sheriff or Sheriff Principal the relevant statute may provide for a further appeal to the Court of Session or reliance may be placed on the general right of appeal in civil matters.

### **Policy and Ministerial Responsibility**

3.29. Prior to devolution, responsibility for tribunals was distributed across the various functional departments of The Scottish Office. Overall responsibility for policy on tribunals is now vested in the Cabinet Secretary for Justice and the Justice Directorate of the Scottish Government. That Directorate also has specific responsibility for several tribunals including the Lands Tribunal for Scotland and the MHTS. However, in relation to other tribunals, responsibility both for policy and

<sup>22</sup> There will be significant changes to the Children's Hearings system if the proposals in the Children's Hearings (Scotland) Bill are enacted in their current form.

for certain executive functions is vested in the relevant directorate, for example, the Directorate for Children, Young People and Social Care in the case of Children's Hearings and the Support for Learning Division of the Learning Directorate in the case of the ASNTS.

### ***Appointment of Judges and Members***

- 3.30. Arrangements for appointment vary across the tribunals. In most cases, the statutory power of appointment is vested in the Scottish Ministers. In some cases ministerial appointment of legally qualified members may be made only from a list or panel selected by the Lord President, for example, the Lands Tribunal for Scotland and the Police Appeals Tribunals. In other cases, for example, the MHTS and the ASNTS, Scottish Ministers have a free choice, subject to need for the appointee to have any statutory qualifications. A third model is appointment directly by the Lord President, as in the case of the chair and deputy chair of the NHS Tribunal Scotland. Different models again are employed for Parking Adjudicators who are appointed by the Scottish Traffic Commissioner with the consent of the Lord Advocate, while Valuation Appeal Panel members are appointed by Sheriffs Principal.
- 3.31. In general recruitment exercises for appointments for which the Scottish Ministers are responsible are carried out using public appointments processes rather than judicial selection processes.
- 3.32. If consideration is extended to all bodies subject to the supervision of the AJTC and not just those which are clearly judicial tribunals, further models emerge including appointment by local authorities (e.g. to education appeal committees).

### ***Independence***

- 3.33. Guarantees of independence of devolved tribunals are less formal and far-reaching than those for the First-tier and Upper Tribunals. The guarantee of judicial independence in section 1 of the Judiciary and Courts (Scotland) Act 2008 does not extend to tribunals. As indicated above, for the majority of tribunals, responsibility for policy lies with the relevant functional directorate of the Scottish Government and ministerial powers such as powers of appointment are exercised by the ministers responsible for those functions. The degree of security of tenure varies and tribunal chairs and members in Scotland do not have the additional protection conferred on First-tier, Upper Tribunal and Employment Tribunals judiciary by the 2007 Act.

### ***Judicial Leadership***

- 3.34. There is not a uniform approach to leadership but a number of tribunals have a designated judicial head, often given the title of President (e.g. the ASNTS, the Lands Tribunal Scotland, the MHTS and the PRHP). Some of the less frequently convened tribunals appear to have no leadership structure or permanent administrative apparatus and hearing panels are convened on an ad hoc basis as the need arises. Police Appeal Tribunals, for example, are convened by the relevant police authority.

### ***Administrative Support***

- 3.35. Provision of administrative support for devolved tribunals is organised separately for each tribunal. The majority of tribunals have permanent administrative staff although in many cases the staff complement is small. There appears to be little collaboration between different tribunal administrations.
- 3.36. Support for certain tribunals is provided by the relevant local authority (for example, Education Appeal Committees and, indirectly, local Valuation Appeal Panels) or other public bodies whose decisions are being appealed (for example, police authorities and joint police boards in the case of Police Appeals Tribunals).

### ***Training***

- 3.37. The provision of training is generally the responsibility of the tribunal itself and practice varies considerably. There is no centralised oversight of training.
- 3.38. It is clear from this review of the tribunals' landscape in Scotland that the devolved tribunals are disparate and function almost entirely independently of one another. Unlike the reserved tribunals in Scotland that form part of the First-tier and Upper Tribunals, they currently have access to none of the potential benefits offered by an overarching governance framework and coherent administrative structure.



Chapter 4:  
Philip Recommendations  
– Progress Towards  
Implementation



- 4.1. In December 2008 the Scottish Government asked the SCAJTC for advice in relation to three of the options in the Philip Report. The Committee provided that advice in May 2009, concluding that at best, with anything short of Option 5, there would be two tribunals systems within Scotland, the first overseeing UK and GB tribunals and the second, Scottish tribunals. Accordingly, the weight of the Committee's advice favoured the establishment of a new Scottish Tribunals Service to support both UK and GB tribunals within Scotland and all Scottish tribunals – Option 5.
- 4.2. The Committee felt that Option 5 would preserve the integrity of the Scottish legal system, provide the new service with sufficient weight and authority to improve end-to-end experience for the tribunal user in Scotland and incorporate the benefits and experience of the UK Tribunals Service. However, the Committee was clear that in the event that Option 5 was decided on, questions of judicial independence and appointments, as well as clear responsibility for rules and procedures would require to be addressed. The complexity of this work meant that the creation of a Scottish Tribunals Service (STS) for the administration of devolved tribunals was a necessary first step in the process. Importantly, the Committee did not suggest what form or shape the STS might take. The Committee decided subsequently, however, that it should consider that issue.
- 4.3. Following the receipt of this advice from the SCAJTC, Scottish Government Justice Ministers elected to progress with the phased implementation of a STS, initially bringing together the administrations of tribunals for which Scottish Ministers provide administrative support. The long term aim is that the STS will provide administrative support for all tribunals in Scotland, whether they deal with devolved or reserved areas of law.
- 4.4. The three phases of the implementation programme are currently proposed as follows:
- *Phase 1* – tribunals that have their administrative support directly provided by the Scottish Government, and for which it is regarded to be relatively straightforward for their administrative bodies to combine to form a Scottish Tribunals Service. i.e. MHTS; ASNTS; PRHP; Pensions Appeal Tribunal Scotland; and the Scottish Charity Appeals Panel (until abolition).
  - *Phase 2* – tribunals that have either their administrative support directly provided by the Scottish Government but for which it is regarded to be more difficult for their administrations to join the service; or tribunals that are Scottish tribunals but that currently have their administrative support provided by the UK Tribunals Service, and so will require discussions with the UK Government.
  - *Phase 3* – tribunals for which it will be more complicated for their administrations to join a Scottish Tribunals Service, either because of the potential need for changes to the structure of the tribunal itself, or because they would require inter-governmental discussions, either between local government (local authorities and health boards), or the UK Government.
- 4.5. The precise order in which a tribunals' administrative support joins the Scottish Tribunals Service is expected to be dependent on a range of factors including the ease with which their operations can join the service and discussions with UK Ministers and local government where appropriate. Those discussions have not yet commenced and as such, the Scottish Government's Phase 2 and 3 proposals are currently aspirational.

- 4.6. At present the Scottish Government anticipates that phase one of the implementation programme will be completed in 2010, work on phase two will begin in 2011, and work on phase three will commence in 2012 or possibly later, depending on progress with the first two phases. The recently announced merger of the UK Tribunals Service with HM Courts Service, however, is likely to impact considerably on the timetable for unification.
- 4.7. Work on the creation of a unified Scottish tribunals' administration is being led by the MHTS by virtue of the fact that it has the largest administration of the devolved tribunals. The status of the MHTS administration is currently that of a Scottish Government Delivery Unit. Discussions are underway with the Phase 1 tribunals to agree the practical steps required to create a unified administration.
- 4.8. No work has yet commenced on any possible changes to judicial structure or tribunal governance arrangements.



# Chapter 5: Scottish Civil Courts Review



5.1. A review of the civil courts in Scotland, headed by the Lord Justice Clerk, the Rt. Hon. Lord Gill, was launched in April 2007 with a view to

“...making recommendations for changes to improve access to civil justice, promote early resolution of disputes, make the best use of resources and ensure that cases are dealt with in ways which are proportionate to the value, importance and complexity of the issues raised.”<sup>23</sup>

5.2. The Report was published in September 2009. The Gill Review summarised the problems perceived to affect the existing system of civil justice. The key themes that emerged from the consultation process were:

- The pressure of criminal business and the impact which this has on the quality of civil justice in terms of delay and judicial continuity;
- The need for a greater degree of judicial specialisation;
- The hierarchy of the courts and appropriate use of judicial resources;
- Over reliance on temporary resources;
- The need for effective case management and reformed procedures;
- Investment in information technology;
- Party litigants and a new forum or method of dealing with lower value cases;
- Problems relating to the cost and funding of litigation.

## The Review's Proposals

5.3. The Review proposed a number of structural and functional reforms to address the problems identified. The underlying principles from which the proposals flowed were that a civil justice system should be fair in its procedures and working practices; apt to secure justice in the outcome of disputes; accessible to all and sensitive to the needs of those who use it; should encourage early resolution of disputes and deal with cases as quickly and with as much economy as is consistent with justice; should make effective and efficient use of its resources, allocating them to cases proportionately to the importance and value of the issues at stake; and should have regard to the effective and efficient application of the resources of others.

5.4. The main proposals were:

### **Structural reforms**

- Reallocation of business between the Court of Session and sheriff court with all cases of a value of up to £150,000 going to the sheriff court.
- Creation of a new judicial office of district judge. District judges would sit in the sheriff court and have jurisdiction to hear summary criminal business, housing actions, civil claims of £5,000 or less and referrals and appeals from Children's Hearings, and would have concurrent jurisdiction with the sheriff in family actions.
- Creation of a specialist personal injury court with an all-Scotland jurisdiction in Edinburgh Sheriff Court.

<sup>23</sup> See <http://www.scotcourts.gov.uk/civilcourtsreview/>

- Creation of a Sheriff Appeal Court which, on the civil side, would deal with appeals from decisions of the sheriff and the district judge. All civil appeals would go to the Sheriff Appeal Court in the first instance, unless the court grants leave to appeal in a case raising a complex or novel point of law direct to the Inner House of the Court of Session.
- A higher degree of specialisation by sheriffs including designation of specialists in one or more of the following areas: crime, general civil, personal injury, family and commercial law.
- The use of temporary judges and part-time sheriffs should be reduced.

#### ***Functional reforms***

- There should be enhanced case management powers to enable courts to control the conduct and pace of litigation.
- There should be improved use of information technology.
- In order to enhance access to justice, there should be a new simplified procedure to replace summary cause and small claims procedure for all cases with a value of £5,000 or less, actions for recovery of possession of residential tenancies and mortgage repossession.
- ADR should be encouraged in appropriate cases and settlement facilitated.
- Reforms to judicial review, multi-party actions and party litigants.
- The establishment of a Civil Justice Council for Scotland with responsibility for drafting the rules of court and the broader function of keeping under review the provision of civil justice by the courts in Scotland, including matters such as the structure of the courts, their jurisdiction, procedures and working methods, and the cost of litigation.

5.5. The Review was confined to civil justice in the sense of justice delivered by the ordinary courts. It did not consider the relationship between civil justice and administrative justice and, in particular the role of tribunals in delivering justice or the relationship between courts and tribunals. However, as stated in the second Philip report, there are significant overlaps between civil and administrative justice which suggest that the two should not be considered in isolation from each other. Courts and tribunals have the same essential function. Both are bodies which resolve disputes by making binding decisions according to law and do so by a process of adjudication. Both are expected to be independent both of the executive and the legislature and of the parties appearing before them.

5.6. The most important differences relate to specialisation and process. The civil courts in Scotland are generalist. Both the Court of Session and the sheriff court have a very wide and diverse jurisdiction. By contrast, tribunals tend to have jurisdiction over specific subject areas such as social security, immigration control and employment law. This allows for development of specialised expertise in the relevant area of law. More significantly it allows those with professional expertise or experience in the relevant field of knowledge (e.g. medicine, education, or the property market) to sit as part of the tribunal. As for process, tribunals are intended to provide a less formal and adversarial model of adjudication than the ordinary courts.

5.7. There has been significant convergence between courts and tribunals in recent decades. The most significant change on the court side has been the creation of simplified procedures for handling low value cases: summary cause and small claims. On the tribunal side the general trend has been

one of judicialisation and specific changes include the progressive elimination of non-lawyer chairs and the changes to appointment procedures, titles and judicial leadership made by the 2007 Act. However, these changes have not eliminated the differences. It remains true that, in general, tribunals are more specialised than courts and that their approach to adjudication is less formal and adversarial than that of the courts.

- 5.8. The Gill Review makes proposals that touch on both of these issues. The proposal to create a new simplified procedure to replace summary cause and small claims procedure is not a new departure. It would constitute the third attempt in Scotland to create within the ordinary courts a simple procedure capable of being operated by litigants themselves without legal representation. The proposal for greater specialisation in the sheriff court can also be seen as bringing courts closer to the tribunal model. However, it is important to note that this involves only specialisation in law, and it is not suggested that courts incorporate non-legal expertise into decision-making panels. The primary method of bringing special expertise to bear would continue to be expert evidence.

## Implications of the Gill Recommendations for Tribunals

- 5.9. The question of whether courts and tribunals should be merged into a single structure is considered in Chapter 8. Assuming that they continue to be separate structures, the implications of the Gill recommendations for tribunals might be as follows.

### ***Sheriff Appeal Court***

- 5.10. As discussed later in Chapter 7 there are no consistent arrangements for appeals from first-instance tribunals in Scotland. The general view of respondents to our initial questionnaire was that there is unlikely to be sufficient appellate business to justify the creation of an equivalent to the Upper Tribunal in Scotland. That implies appeals from tribunal decisions going to the courts. If the Gill recommendations are implemented it would be possible for appeal to the Sheriff Appeal Court to be the default position with a further appeal on a point of law with leave to the Inner House of the Court of Session. There may be particular cases where it is felt appropriate to have a right of appeal direct to the Inner House from a first-instance tribunal. It would be desirable, however, if provision was made to enable the composition of the bench of the Sheriff Appeal Court to be adjusted where necessary to ensure that appropriate subject, as well as legal, experts are able to consider appeals.

### ***New simplified procedure***

- 5.11. The new procedure is intended to be capable of being operated by litigants themselves without legal representation. Tribunals already operate procedures which have been designed with the same intention. Whether the more interventionist style of litigation which the Gill Review expects to see operating under the proposed new simplified procedure would be sufficiently successful in allowing access to justice without legal representation remains to be seen.
- 5.12. Courts may be able to learn from the experience of tribunals in trying to make the informal/enabling model of litigation work effectively. If experience suggests that it is not working effectively, that may suggest a case for transferring some categories of disputes to tribunals.

### ***Allocation of Jurisdiction***

- 5.13. The allocation of jurisdiction between courts and tribunals does not have to remain exactly as it is now. It may be appropriate to reconfigure some areas, for example, by the creation of a housing tribunal to assume jurisdiction over a range of matters currently dealt with by the sheriff court and the PRHP including disputes over rent, repairs, other tenants' rights and recovery of possession in both private and social rented sectors.<sup>24</sup> However, each case should be considered on its merits and we do not offer specific proposals for reallocation of jurisdiction here.
- 5.14. Clearly, several of Lord Gill's proposals would have implications for tribunals in the event that they are implemented. The overarching aim of the proposals is to improve efficiency in the civil courts, which should increase capacity. If this happens then consideration will inevitably need to be given to how that capacity can best be utilised and this might raise the prospect of the functions of some tribunals being transferred to the proposed reformed civil courts. If this happens – and tribunals are to retain their distinctive approach – then judges and lawyers would require to be able to switch between the two modes of adjudication according to the category of business before them. If this is not possible those tribunals will become more like courts and there is likely to be a greater need for legal representation for service users than under current arrangements. Transferring tribunal functions to the reformed civil courts will also increase their caseloads and may counteract some of the advantages of the proposed reforms.

24 For a detailed proposal, see O'Carroll, D. and Scott S. (2004) – *A Housing Tribunal for Scotland?*, (CIH, Edinburgh).



# Chapter 6: Arguments for Reform



6.1. The Leggatt Report described the defects of tribunals as they were at that time as follows:

“... too often their methods are old-fashioned and they are daunting to users. Their training and IT are under-resourced. Because they are many and disparate, there is a considerable waste of resources in managing them, and they achieve no economies of scale. Most importantly, they are not independent of the departments that sponsor them.”

(para. 1)

6.2. These along with other criticisms of the tribunal system were also made by a number of academic commentators. Writing in 2001, Adler and Bradley,<sup>25</sup> for example, suggested that the problems with the existing arrangements included (i) that there were mechanisms for appealing against some administrative decisions but not against others, (ii) that sometimes new tribunals were created and existing tribunals altered for short-term administrative or political reasons, (iii) limitations on tribunal resources, and (iv) the relative weakness of the Council on Tribunals compared to government departments and Parliament and a consequent lack of impact.

6.3. The problems identified by Leggatt, academic and other commentators can be divided into three broad categories:

- insufficient independence
- lack of coherence
- lack of user-friendliness.

6.4. A more comprehensive statement of the perceived deficiencies would include the following:

- responsibility for development of tribunal policy was diffused among a large number of departments;
- tribunals were not independent of sponsoring departments;
- some tribunals were under-resourced;
- the existence of large numbers of separate tribunals led to waste of resources and prevented economies of scale being achieved;
- the existence of entirely separate tribunals impeded learning from the experience of others and the sharing of good practice;
- training of chairs and members was under-resourced and inadequate;
- lack of a consistent approach on a range of issues including:
  - the provision of rights of appeal against administrative decisions
  - the provision of rights of appeal from a first-tier to a second-tier tribunal
  - the provision of rights of appeal from tribunals to courts
  - the content of procedure rules for tribunals;
- case management was ineffective and cases often took too long;
- tribunals were not sufficiently user-friendly;
- users were unable effectively to represent themselves; and,
- the limited effectiveness of the Council on Tribunals.

25 Adler, M. and Bradley, A. (2001) – ‘The Case for Systematic Reform and the Establishment of a Unified Administrative Tribunal’. In Partington, M. (ed.), *The Leggatt Review of Tribunals: Academic Seminar Papers* (Bristol: University of Bristol, 2001), pp. 1-30.

- 6.5. In considering what should be the future arrangements for tribunals in Scotland it is necessary to take a view on the extent to which these deficiencies applied to tribunals in Scotland at the time of the Leggatt report and the extent to which they still apply even after the reforms implemented by the Tribunals, Courts and Enforcement Act 2007.

#### ***Responsibility for development of tribunal policy diffused among departments***

- 6.6. This criticism applied equally to both devolved and reserved tribunals in Scotland at the time of the Leggatt Report. As regards the reserved tribunals within the unified tribunal structure, this defect has been remedied by transferring responsibility for the development of tribunal policy to the MoJ. As regards the devolved tribunals, overall responsibility has been transferred to the Justice Directorate of the Scottish Government. Accordingly, although there is not a single focus for policy development covering all tribunals in Scotland, there are now only two such foci, one in the UK Government and one in the Scottish Government.

#### ***Tribunals not independent of sponsoring departments***

- 6.7. This criticism also applied equally in Scotland at the time the Leggatt report was written. Since then, the independence of the reserved tribunals within the unified tribunal structure has been strengthened by measures which treat tribunals in a similar way to the courts such as the extension of the statutory guarantee of judicial independence. There has been a transfer of funding and ministerial responsibilities in relation to tribunals generally to the MoJ, judicial appointments procedures have been adopted and judicial leadership provided through the creation of the post of Senior President of Tribunals.
- 6.8. As regards devolved tribunals, some steps in the direction of clearer structural independence have been taken. Responsibility for funding and ministerial oversight for some tribunals was either already with, or has recently been transferred to the Justice Directorate of the Scottish Government. These are the Lands Tribunal for Scotland, the MHTS and the Scottish Charity Appeals Panel. It is understood that discussions about the transfer of other tribunals are underway. However, some tribunals continue to be funded by the relevant functional department and although appointments to the three tribunals mentioned above are administered through the Justice Directorate, appointment to all tribunals are dealt with using public appointments procedures rather than through the procedures for judicial appointments managed by the Judicial Appointments Board for Scotland (JABS). Nor do tribunal chairs and members have the same protections from dismissal as do tribunal judges and members within the unified tribunal structure.

#### ***Some tribunals are under-resourced; waste of resources/economies of scale; lack of learning from experience of others/sharing good practice***

- 6.9. The major difficulty in considering these issues is the evidence base. Leggatt's terms of reference were restricted to looking at tribunals whose jurisdiction related to England, or England and Wales, and to tribunals with jurisdiction in Great Britain or the UK to the extent that they operated in England and Wales. The evidence and views Leggatt received did not, therefore, relate to devolved tribunals or the functioning of reserved tribunals in Scotland. Whilst Leggatt felt able to reach the conclusions that all of the above problems were operative in the reserved tribunals, we cannot make such judgments with confidence in relation to devolved tribunals. However, given the fragmented nature of the tribunal 'system' in Scotland, it is plausible to suggest that some

tribunals could be under-resourced, that there could be inefficiencies in the use of resources, loss of opportunity to achieve economies of scale and that it is less likely that examples of good practice in particular areas are generalised. On this basis, it would be appropriate to investigate what benefits might flow from a less fragmented system.

### ***Training of chairs and members was under-resourced and inadequate***

6.10. Research recently carried out on behalf of the Scottish Government<sup>26</sup> concluded that:

“The existing fractured, autonomous and remote system is inappropriate, with some tribunals producing a high level of training input while others are unable to do so due to type, size and financial constraints.”

(page 42)

6.11. The report suggested that existing provision could fairly be described as haphazard particularly given the contrast between the sophisticated models applying to Social Security and Child Support Appeals or in the smallest of reserved tribunals and the ad hoc forms of support offered in some devolved tribunals. Whilst this did not necessarily indicate poor quality of support, comments from Presidents, Chairs and other tribunal members identified scope for development or improvement. Some respondents to the research thought that the result might be variable performance within different tribunals’ hearings which might in turn affect the experience of service users and undermine the integrity of process and decision. The report recommended that there should be some rationalisation of provision of training and discussed different options for achieving that. The findings of the research have been questioned in the tribunal community and it is not clear what action, if any, will follow from it.

### ***Inconsistent approach to provision of rights of appeal against administrative decisions***

6.12. There is certainly room to argue that this criticism applies in Scotland. Most decisions by public bodies that affect the legal rights or important interests of particular individuals are subject to rights of appeal to an independent tribunal or to a court. However, there are exceptions of which the most notable is perhaps the absence of rights of appeal under the homelessness legislation.

### ***Inconsistent approach to provision of rights of appeal from a first-tier to a second-tier tribunal***

6.13. The unification of jurisdiction of reserved tribunals has meant that in most subject areas (criminal injuries compensation appeals are an exception), there is now a right of appeal from the First-tier to the Upper Tribunal on a point of law. There are currently no second-tier tribunals operating in devolved jurisdictions.<sup>27</sup> In general, decisions of devolved tribunals are subject to a right of appeal on a point of law to the civil courts. Whether the absence of a second-tier tribunal for these jurisdictions should be seen as a weakness of the current arrangements is open to question.

<sup>26</sup> Ross, M.; Reid, L. and Bleichner, S. (2010) – Tribunal Training in Scotland. Scottish Government. At: <http://www.scotland.gov.uk/Publications/2010/03/23162713/16>

<sup>27</sup> However, the Administrative Appeals Tribunal hears appeals from PATS and the Employment Appeal Tribunal hears appeals from the Employment Tribunal Scotland.

### ***Inconsistent approach to the provision of rights of appeal from tribunals to courts***

6.14. Before the unification of tribunals there were certain tribunals, both devolved and reserved, from whose decisions there were no rights of appeal to the courts. For those jurisdictions absorbed into the First-tier tribunal, there is now an ultimate right of appeal on a point of law to the superior courts (Court of Appeal, Inner House of the Court of Session, or Northern Ireland Court of Appeal as appropriate) because the 2007 Act created such a right of appeal from decisions of the Upper Tribunal. As regards devolved tribunals, there is in most cases, a right of appeal to the courts, although the approach is not uniform with appeals sometimes going to the Sheriff Principal, sometimes to the Outer House of the Court of Session, sometimes to the Inner House and sometimes to the Lands Valuation Appeal Court.

### ***Inconsistent approach to the content of procedure rules for tribunals***

6.15. It is generally agreed that it would not be appropriate to have a single uniform set of procedure rules for all tribunal jurisdictions given their contextual differences. However, Leggatt perceived the degree of variation to be excessive. He suggested that

“[The] aim should be to achieve the greatest possible coherence across the system whilst recognising the needs of different Divisions ... at least for different time limits.”

(para. 8.9)

6.16. Following unification, there has been considerable rationalisation of rules and there is now a single set of rules for each chamber of the First-tier Tribunal providing commonality wherever possible. No such rationalisation has been attempted as regards devolved tribunals.

### ***Lack of effective case management***

6.17. In considering this issue, we encounter again the problem of the evidence base. The evidence on which Leggatt relied, related to reserved tribunals. We do not have sufficiently detailed information about delay and other aspects of case management in devolved tribunals from which we might draw firm conclusions.<sup>28</sup>

### ***Tribunals are not sufficiently user-friendly***

6.18. Leggatt's conclusions are broadly consistent with research evidence which suggests that many users find a tribunal hearing a daunting experience, are unclear about the nature of hearings and have difficulty in presenting their case without the assistance of a representative. As the evidence gathered by Leggatt related to reserved tribunals we should be cautious in drawing conclusions about devolved tribunals, but we must consider the possibility that these concerns might equally apply to some devolved tribunals.

28 Annual reports of devolved tribunals paint a mixed picture. For example, the ASNTS appears not to have any delay in handling cases (Fourth Annual Report of the President of the Additional Support Needs Tribunals for Scotland 2008/2009); the Scottish Children's Reporter Administration published statistics show that performance on agreed time intervals for making decisions about referrals sits at 77% nationally, while performance on agreed time intervals for holding hearings sits at 75% (Scottish Children's Reporter Administration, Online Statistics 2008-09); the PRHP had a waiting time of 11 weeks from receipt to hearing in rent cases in 2008-09 (Administrative Justice and Tribunals Council website, statistics).

### ***Users are unable effectively to represent themselves***

6.19. Several research reports have suggested that users are often unable to represent themselves effectively at tribunals.<sup>29</sup> However, the most recent research suggests that in recent years tribunals may have become better at performing an enabling role<sup>30</sup> thus reducing the need for representation, although this research also highlights the importance of pre-hearing advice. It is unclear whether the problem of users being unable to represent themselves effectively is equally pronounced in devolved and reserved tribunals.

### ***The limited effectiveness of the Council on Tribunals***

6.20. The Council on Tribunals has been replaced by the Administrative Justice and Tribunals Council which has a significantly broader remit. It will be for others to determine whether the AJTC will have greater impact than the Council, although it is clear that the AJTC is setting an agenda designed to address the issues referred to in 6.2 above.

### **Conclusion**

6.21. It is not possible for the SCAJTC to undertake a detailed investigation of the functioning of devolved tribunals to examine the extent to which they are affected by each of these problems. It is fair to say, however, that none of the devolved tribunals is entirely immune to these problems. Steps have been taken in some areas to address issues of independence; the only forum in which experience and good practice can be shared is the Tribunal Judges' Forum, which is limited to tribunal judiciary; it remains the case in Scotland that there is no consistent approach to rights or routes of appeal against the decisions of tribunals; and no work has been undertaken to rationalise tribunals' rules.

29 See, for example, Genn, H. and Genn, Y. (1989) – *The Effectiveness of Representation at Tribunals* (Lord Chancellor's Department).

30 Adler, M. (2009) – 'Tribunals Ain't What They Used To Be' ADJUST Newsletter March 2009. At: <http://www.ajtc.gov.uk/publications/publications.htm>

# Chapter 7: Principles



7.1. A variety of actual or potential problems with tribunals has been identified. The SCAJTC, in submitting its advice on the Philip options to the Scottish Government in 2009, based its view in favour of Options 4 and 5 on an acceptance of the Leggatt analysis and as such, reform is necessary. However, the responses to our initial questionnaire show no great support for extensive change. Thus, we have taken the view that:

- the purpose of reform must be to improve the delivery of administrative justice in Scotland;
- change should be made only where necessary and not for its own sake;
- it should be incremental; and,
- it should be negotiated, to ensure that, wherever possible, the positive aspects of the current 'system' are retained.

### ***Aims of Administrative Justice***

7.2. The aims of a system of administrative justice, as set out in the second report of the AJSG,<sup>31</sup> should be:

- ensuring public bodies get it right first time when making decisions;
- ensuring that where decisions are incorrect or treatment of citizens is otherwise defective there are effective redress mechanisms;
- ensuring that public bodies learn from their mistakes increasing the likelihood of getting it right first time.

7.3. Tribunals consider not only citizen-state disputes but also party and party disputes. The general aims of a tribunal system could, therefore, be defined as:

- providing effective redress for defective decisions by public bodies and effective resolution of private disputes;
- contributing so far as possible to the systematic improvement of administrative decision-making.

7.4. The AJTC has been considering the broader and more strategic issues which should characterise a modern administrative justice system, including tribunals comprised within it. It published a consultation document in March 2010 setting out its approach to principles of administrative justice and specifying ten draft principles.<sup>32</sup> The AJTC proposes that a good administrative justice system should:

1. make users central – and always keep their needs in mind;
2. lead to just and timely outcomes – correct decisions within timescales which meet the needs of users;
3. ensure its decisions comply with the law;
4. demonstrate independence and openness – in internal review, complaint-handling and appeals;
5. treat people fairly and respectfully – having regard to individual circumstances;
6. work proportionately and efficiently – in offering routes to redress, in procedural requirements and in delivering value for money;

31 Consumer Focus Scotland (2009) – *Op. Cit.* para. 5.1.

32 Administrative Justice and Tribunals Council (2010) – Principles For Administrative Justice – The AJTC'S Approach. Consultation Draft. At: [http://www.ajtc.gov.uk/docs/PrinciplesForAdministrativeJustice\\_accessible.pdf](http://www.ajtc.gov.uk/docs/PrinciplesForAdministrativeJustice_accessible.pdf)

7. be coherent and consistent – in treating similar circumstances in a similar way;
8. keep people informed and empowered – providing information, advice, help from others and in appropriate cases, representation;
9. adopt high standards of behaviour – in governance and in dealings with users; and,
10. value continuous learning – organisationally and in policy-making.

7.5. While these draft principles concern administrative justice as a whole, each is entirely applicable to the functioning of tribunals as they build on and extend the key Franks characteristics of openness, fairness and impartiality. At present, however, many of the tribunals operating in Scotland are not able to fully meet some of these principles due to the way in which they have been established and the framework within which they operate. In seeking to create a coherent Scottish Tribunals System some core principles need to be established.

### ***Distinctiveness of the Scottish Legal System***

7.6. It might be argued that any proposed structure for tribunals in Scotland should recognise and protect the distinctiveness of the Scottish legal system. Lord Justice Carnwath in his Senior President's Annual Report acknowledges that the system created by the UK Tribunals Service is novel. It is, however, dominated by English legal thinking. A coherent tribunal structure for Scotland should be based firmly on Scottish legal thinking while at the same time ensuring that UK or GB laws can be applied uniformly in all jurisdictions within the UK in which they are designed to be effective. Proper and uniform application of UK law is ultimately a matter for the courts. It must also be open to tribunals dealing with similar subject areas in the different jurisdictions to develop protocols and working practices which ensure that issues can be dealt with uniformly.

**7.7. Discussion Question: Would you agree with the proposition that in creating a coherent tribunals system for Scotland the distinctiveness of the Scottish legal system should be preserved?**

### ***Independence***

7.8. It is a constitutional value in Scotland that judicial decision making processes should be independent and it is necessary for tribunals to uphold this value. In addition, Article 6 of the ECHR requires tribunals to be independent and impartial. Independence from sponsoring departments, and from those bodies and organisations against whose decisions tribunals hear appeals, therefore, must be ensured. A number of changes to current arrangements would impact significantly on the independence of tribunals in Scotland. These are:

- a transfer of overall responsibility for the development of policy for devolved tribunals to Scottish Justice Ministers and a single part of the Scottish Government's Justice Directorate.<sup>33</sup> Overall responsibility for the development of tribunal policy for those jurisdictions which adjudicate in Scotland on reserved matters would remain with the Lord Chancellor. However, the Lord Chancellor and the Cabinet Secretary for Justice would be required to consider certain matters jointly. It might be appropriate to transfer certain Ministerial functions currently exercised by the Lord Chancellor and/or other UK Ministers to

<sup>33</sup> By 'policy' we mean policy relating to the establishment, reform or abolition of tribunals and the jurisdiction and powers of tribunals. We do not include within our definition policy relating to the substance of any particular function, which would remain with the relevant department.

the Cabinet Secretary for Justice, for example, powers in relation to the making of tribunal procedure rules;<sup>34</sup>

- removal of responsibility for the appointment of members of tribunals operating in Scotland from the Scottish Government and implementation of appointment processes for all members of tribunals that are approved and overseen by JABS. This would ensure that all members of tribunals are, and are seen to be judicial office holders, rather than holders of public office. It would also bring the approach for devolved tribunals into line with that taken to reserved tribunals until such time as the reserved tribunals join any Scottish tribunals system;
- extending the guarantee of judicial independence contained in section 1 of the Judiciary and Courts (Scotland) Act 2008 to tribunals judiciary; and,
- giving chairs and members of tribunals operating in Scotland similar protection from dismissal to that contained in the Tribunals, Courts and Enforcement Act 2007.

7.9. If it is accepted that independence must be a core principle of any tribunals structure a number of issues arise in respect of devolved tribunals.

#### ***Scottish Government administered tribunals***

7.10. It has already been recognised and agreed that those tribunals that are currently administered and/or sponsored by Scottish Government Directorates require those links to be severed. This process is underway with the creation of a unified tribunals' administration.

#### ***Local Authority Tribunals***

7.11. Those tribunals that are convened by Local Authorities to hear appeals against decisions made by the Local Authority cannot be said to be properly independent. A report published in 2000 by the Scottish Committee of the Council on Tribunals concluded that the constitution and workings of Education Appeal Committees should be reviewed. In November 2006 the Scottish Executive issued a consultation paper<sup>35</sup> in which it agreed with the Scottish Committee's recommendations that Education Appeal Committees should be independent and should be seen to be so. While operating processes may have improved, issues of independence continue to arise in relation to these particular systems.

7.12. Valuation Appeal Panels have the benefit of their members being appointed by Sheriffs Principal following public advertisement. However, the Secretaries to the Panels, although appointed by Sheriffs Principal, are paid by the relevant local authority, which also reimburse members expenses. Some Panels also continue to hold hearings in council offices. Issues of independence arise, therefore, in relation to the Valuation Appeal Panels and their relationship with the local authorities against whose decisions they hear appeals.

7.13. If the local authority linked tribunals are to be fully incorporated into any Scottish Tribunals System the issue of independence would require to be addressed. While it might be entirely appropriate

34 Section 36 (1) of the 2007 Act empowers the Lord Chancellor to transfer, by order, any power to make procedural rules for a scheduled tribunal to himself.

35 Scottish Executive (2006) – Education Appeal Committees: Proposals for Reform: A Consultation. At: <http://www.scotland.gov.uk/Publications/2006/11/06152443/2>

for local authorities to offer a mechanism by which their decisions on these matters can be reviewed, both Scottish constitutional values and ECHR requirements demand that a properly independent appeal mechanism should be put in place. This does not mean that the benefits of local membership need necessarily be lost or that radical change is required to the structure of Valuation Appeal Panels. It might be sufficient to make amendments to methods of recruitment, contracts of appointment and the location of hearing venues.

**7.14. Discussion Question: What changes should be made to the way in which Local Authority tribunals operate to make them properly independent and enable them to be fully incorporated into a coherent Scottish tribunals system?**

***Hybrid Bodies***

7.15. The tribunal functions of bodies that have hybrid administrative decision making and dispute resolution roles (e.g. the Traffic Commissioner) can also be said to be not entirely independent. Any of at least three presumptions could be made for these bodies:

- i. they should not be incorporated into any coherent Scottish tribunals system since much of their function does not relate to the hearing and adjudication of appeals. However, if they are not incorporated into the system then the adjudicatory aspects of their work would be undertaken in isolation of any of the benefits that being part of a coherent system could offer.
- ii. They should be included in any coherent Scottish tribunals system, although there might be certain circumstances that would justify such bodies not being included. This approach could create governance problems since only part of the bodies functions would fall within the remit of the tribunals' governance structure.
- iii. Having hybrid functions means that such bodies do not comply with the core principles of tribunals and the appeal functions of the existing hybrid bodies should be removed from their jurisdictions. This would require their appeal functions to be taken on by another, new or existing, tribunal.

**7.16 Discussion Question: How should hybrid bodies be dealt with?**

**7.17 Discussion Question: If the appeal functions of the hybrid bodies were to be incorporated into a coherent Scottish tribunals system (presumption ii or iii above), what issues would need to be addressed to facilitate this?**

***The Distinctive Nature of Tribunals***

7.18 Tribunals provide an alternative means of dispute resolution to the courts. The work that they do makes an immense contribution to civil justice in Scotland and they decide large volumes of cases which might otherwise have to be dealt with by the civil courts. Tribunals are intended, as described in more detail at paragraph 3.7, to be user-focused and provide a different model of adjudication to the ordinary courts which is less formal and less adversarial than the traditional approach of the ordinary courts. Taking a case to a tribunal rather than the courts should have at least two distinct advantages: firstly, tribunals can combine legal and other expertise in the decision-making panel; and second, simpler procedures, an informal atmosphere and the playing

of an interventionist role by the panel<sup>36</sup> should ensure that *so far as reasonably possible* service users are enabled to prepare and present their own cases without representation or, at any rate, without representation by lawyers. This direct participation is an important aspect of tribunals. Their distinctiveness, and the advantages this bestows, compared to the ordinary civil courts should be acknowledged and safeguarded.

**7.19 Discussion Question: Do you agree that the distinctive way in which tribunals operate should be safeguarded?**

***Remuneration***

7.20 As well as being recruited independently and in accordance with consistent procedures all members of tribunals should be appropriately remunerated. This would ensure they are fairly rewarded for the work they undertake, perhaps widening the range of people who apply to be tribunal members. It would mean, however, that some existing tribunals would lose their voluntary nature.

**7.21 Discussion Question: What would be the advantages and disadvantages of ensuring that all tribunal members are appropriately remunerated?**

***Party to Party Tribunals***

7.22 The way in which the ETS functions raises questions of whether it is appropriate for party to party tribunals to be incorporated into any coherent system of tribunals in Scotland. In many respects the ETS functions more like a traditional civil court than a tribunal and it could be argued that it should be redesignated as a court and absorbed into the Scottish courts system. However, there is no immediately obvious factor that would absolutely preclude ETS or other party to party tribunals from being fully incorporated into any Scottish tribunals system. Ultimately, it will be for Scottish Ministers, in discussion with colleagues in the Department for Business Innovation and Skills and the MoJ to determine whether ETS should remain a tribunal or formally become a court.

**7.23 Discussion Question: Do you think party to party tribunals should be incorporated into any Scottish tribunals system or should become part of the structure of the Scottish courts?**

***Right of Appeal***

7.24 In most areas of public administration in which decisions are taken affecting the rights of individuals, a right of appeal to a tribunal or court is provided. However, there are exceptions, for example, decisions taken by local authorities under the homelessness legislation. A person aggrieved by a decision in respect of which there is no right of appeal might be able to seek judicial review, but there is an important distinction between appeal and judicial review. The latter allows a decision to be challenged only on grounds of legality whereas a right of appeal to a tribunal typically allows decisions to be challenged on their merits. Judicial review is available only in the Court of Session and is not, therefore, a locally-based remedy. It also involves considerable expense. It could be argued that all decisions made by public bodies that affect the rights of individuals should be subject to an appeal to a court or tribunal (which might be either an existing or a new tribunal or court). There would have to be special considerations to justify the absence of such a right of appeal.

**7.25 Discussion Question: Do you agree that all decisions made by public bodies affecting the rights of individuals should be subject to a right of appeal?**

**7.26 Discussion Question: In what areas do you think a right of appeal needs to be established?**

### ***Appeal Routes***

7.27 In general, the devolved tribunals are first-instance appellate bodies in the sense that they hear appeals from administrative rather than judicial bodies. In general, there should be a right of appeal on a point of law against the decisions of first-instance tribunals. At present routes of appeal are variable, as shown in the chart at Annex 5. Devolved tribunals can appeal variously to the sheriff court, the Sheriff Principal or the Court of Session, while the reserved tribunals operating in Scotland can appeal to the Upper Tribunal. Lord Gill suggests that the root of the civil justice problem in Scotland is that there is no proper hierarchy of civil courts at first instance or at appellate level, which results in the system deploying its resources wastefully, inflicting needless expense on litigants and failing to deliver justice promptly. The solution, Lord Gill suggests, is a classification by which litigation should be conducted only in the court that is appropriate for it by reason of its nature, value or importance. As such, there would be merit in the creation of a consistent route of appeal from tribunals.

7.28 If the Gill recommendations are not implemented the route of appeal could be to a Scottish Upper Tribunal if there were sufficient business to merit the creation of such a body. If not, the route could be to the Sheriff Principal in the first instance and onwards, with leave, to the Inner House of the Court of Session. This would have implications for the current Upper Tribunal in Scotland. However, it would be desirable for adjustments to be made to court rules to enable the composition of the appeal court to be amended so that subject experts could also be involved in considering appeals.

7.29 If the Gill recommendations are implemented the route of appeal could be to the new Sheriff Appeal Court and onwards, with leave, to the Inner House of the Court of Session. The jurisdiction of the Upper Tribunal in Scotland could be transferred to the Sheriff Appeal Court. If the Employment Tribunal Scotland remains a tribunal, appeals against its decisions could go in the first instance to a specialist employment division of the Sheriff Appeal Court. This would mean that the EAT would no longer have jurisdiction in Scotland.

**7.30 Discussion Question: Do you agree that routes of appeal against the decisions of tribunals in Scotland should be rationalised?**

**7.31 Discussion Question: What should a rationalised route of appeal look like?**

## Conclusion

7.32 If the principles outlined above are accepted this should facilitate the creation of a tribunals system in Scotland that aspires to:

- provide effective remedies for defective decisions by public bodies and effective resolution of private disputes;
- by providing independent adjudication
- which is user-friendly
- in the context of a coherent system which respects the distinctiveness of the Scottish legal system.

7.33 Although an important first step towards an independent Scottish tribunals system is already underway in the creation of a unified administrative support service, further steps need to be taken to ensure both independence and perceptions of independence. The creation of a unified administration will also begin to address issues of coherence but it cannot alone result in the creation of a coherent Scottish tribunals system. If the need for harmonisation or at least greater consistency of approach is accepted, then there are a variety of institutional structures through which this might be delivered. Even if a detailed investigation of devolved tribunals revealed much the same set of problems that affected reserved tribunals, it would not follow that an identical approach to reform needs to be taken, namely the creation of a unified and broadly symmetrical structure headed by a Senior President. The three categories of problems identified by Leggatt (independence, lack of coherence and lack of user-friendliness) are not interdependent so each might be addressed separately and by different measures. Standardised administrative procedures might also improve user friendliness but user experiences are influenced primarily by the conduct of the actual hearing and the tribunal judiciary are central to this. Their training, both generic and specialist, and their application of the rules are pivotal. Arguably, these can best be supported through a move to a coherent tribunal structure with robust governance arrangements. The next chapter identifies a number of models of tribunal system which could, to varying degree, address the accepted problems of lack of independence, coherence and user-friendliness.

# Chapter 8: Tribunals System – Models For Discussion



- 8.1. The development of the Tribunals Service with its close ties to the MoJ and the framework of First-tier and Upper Tribunals led by a judge of the Court of Appeal together give rise to an increased risk that reserved tribunals operating in Scotland might be perceived as structures within a system of English law. The announcement by the MoJ on 24 March that the Tribunals Service will be merged with HM Courts Service in England and Wales also has profound implications. As yet very little detail is available on the nature of the merger and there is no clarity on whether or not the reserved tribunals operating in Scotland will be included. If they are, this may be seen as a problematic extension of English legal structures into Scotland. If they are not included, they will be in need of a new structure within which to be located and this will make an acceleration of progress in implementing Philip Option 5 both inevitable and necessary.
- 8.2. In submitting its advice on the Philip Options to the Scottish Government in May 2009 (see Chapter 4), the SCAJTC accepted the Leggatt analysis of tribunals and agreed that the fragmented structure was at best inefficient and that direct structural links between tribunals and sponsor departments were potentially an ECHR issue. Accordingly, changes have to be made if the system is to be improved. As also noted in Chapter 4, Scottish Ministers are committed to the creation of a unified administrative support service, initially for devolved tribunals but ultimately for *all* tribunals in Scotland. Thus, significant structural reform is already approaching. In considering system models we have taken as our starting position the fact that a unified ‘Scottish Tribunals Administration’ will be created.

## Scottish Tribunals System Models

- 8.3. The creation of a unified ‘Scottish Tribunals Administration’ opens up a number of options for the creation of a Scottish tribunals system. These include:
- A. Creation of a unified administrative support service for all devolved and reserved tribunals while all else remains the same;
  - B. Bringing together of all devolved and reserved tribunals operating in Scotland into a unified administration and structure led by a judicial head that parallels the reserved tribunals as they are currently constituted;
  - C. Bringing together of all devolved tribunals into a unified administration, creation of a collegiate structure led by a Tribunals Board or Committee for devolved tribunals and retention of reserved tribunals within the UK Tribunals Service judicial structure (Philip Option 4);
  - D. Bringing together of all tribunals in Scotland into a unified administration and the creation of a collegiate structure led by a Tribunals Board or Committee for both devolved and reserved tribunals (Philip Option 5).

In addition, the possibility of a merger of HM Courts Service and the Tribunals Service, as referred to in the MoJ statement of 24 March, impels us to address possible consequences for Scotland, and to suggest a further option in the form of:

- E. Merger of all devolved and reserved tribunals operating in Scotland with the Scottish courts.

## Model A: Unified Administrative Support Service Only

- 8.4. It could be argued that the Scottish Government's plans to create a unified Scottish Tribunals Administration (STA) which eventually encompasses all devolved and reserved tribunals operating in Scotland will be sufficient to address the problems of lack of independence, coherence and user-friendliness. In effect, this is the form that the UK Tribunals Service took prior to implementation of the 2007 Act which created the judicial structure. If no other changes are introduced this approach would create a model within which:
- Administrative support would be provided by a unified STA which, under current proposals will be a Delivery Unit operating under the aegis of the Justice Directorate of the Scottish Government and overseen by a Head of Administration;
  - The devolved tribunals would retain their separate identities;
  - The reserved tribunals operating in Scotland would remain within their First-tier and Upper Tribunal structures and continue to be overseen by the Senior President but would eventually have their administration provided by the STA;
  - Appointment processes for devolved tribunals could be standardised and managed by the STA;
  - Terms and conditions of administrative staff would be standardised while those of tribunal heads and members would remain as they are;
  - Rationalisation and sharing of accommodation may be possible and would be administered by the STA;
  - Training of devolved tribunal chairs and members would be centrally organised by the STA.
- 8.5. This would undoubtedly be a step in the right direction and the model has some advantages. In particular, it enables the administration of tribunals to be improved; it allows all of the devolved tribunals to retain their separate identities; it does not lever them into potentially uncomfortable groupings and does not place any governance requirements on them. In effect, it would allow the tribunals to continue to function as at present while rationalising and streamlining administrative processes. More efficient processes may have a positive impact on user experiences.
- 8.6. However, the model also has a number of disadvantages. It is questionable whether it goes far enough towards creating independence – while the STA remains a Delivery Unit all administrative staff will, in effect, be employed by and be answerable to the Scottish Government. The model will not facilitate the creation of a coherent tribunal system as no governance structure will be created to link any of the tribunals together or to provide an oversight on matters such as practice and procedure or to collectively represent the tribunals' interests to Scottish Ministers. The MoJ's merger announcement also has implications which could make this model more difficult to adopt. If the Scottish operations of the reserved tribunals are not to be included in the merger with HM Courts Service they will leave a structured system with a single judicial head and become part of a system with a unified administration but no overarching governance framework which will create a number of anomalies with their counterparts dealing with reserved matters in England and Wales.
- 8.7. **Discussion Question: Do you think a model in which the administration of all tribunals in Scotland is unified while all else remains the same could lead to a Scottish tribunal system that is properly independent, coherent and user friendly?**

## Model B: Adoption of Reserved Tribunals Structure in Scotland

8.8. The creation of the unified structure for reserved tribunals supported by the UK Tribunals Service was intended to address many of the problems identified by Leggatt and has certainly resulted in a system that brings together under the remit of an overall judicial head many tribunals operating on a GB, England and Wales or England-only basis. Mirroring the current structure of reserved tribunals and the UK Tribunals Service in Scotland to create a single administration and judicial structure for all devolved and reserved tribunals operating in Scotland is a model that must be considered. Adoption of this model would require:

- the appointment of a judicial head who would have overall responsibility for all tribunals in Scotland, and would be responsible for directing the work of the STA;
- the grouping together of tribunals in related fields into a chamber structure with judicial heads overseeing each grouping;
- the creation of an appellate body akin to the Upper Tribunal so that a consistent approach applies across all tribunals; and,
- transfer of the reserved tribunals operating in Scotland out of the UK Tribunals Service administrative and judicial structures and into the Scottish tribunals system.

8.9. Such a model would be consistent with Philip Option 5 in that it would create a single, unified and coherent structure for all tribunals operating in Scotland. It would also create a structure with which the reserved tribunals in Scotland are already familiar, perhaps easing the transition to Scottish jurisdiction in the event that they are not included in the merger of the Tribunals Service with HM Courts Service. All tribunals operating in Scotland would be under the jurisdiction of a single judicial head, appointment processes would be handled by the tribunals' administration body, making them uniform and independent and a consistent approach to appeals would be created. In order to ensure independence and remove any direct links to sponsoring departments, however, it would be necessary for the STA to cease to be a Scottish Government Delivery Unit. It could instead become an Executive Agency, as is the case in England and Wales; or, like SCS, it could become a statutory body.

8.10. Over and above a unified tribunals' administration the Tribunals Service model adds a coherent judicial framework within which tribunals can operate. Legislation would be required to create a judicial overall head of tribunals in Scotland. However, it is questionable whether such a highly structured and hierarchical approach is necessary or appropriate in the Scottish context. It would add an additional layer of judicial oversight to a number of tribunals – many of the respondents to our initial questionnaire did not see a need for this. The creation of chambers could lead to some tribunals losing their identity and many of the tribunals operating in Scotland cannot be comfortably brigaded into chambers, potentially leading to a need to create a large number of small chambers. Again, this proposal received only very limited support in response to the initial questionnaire. With regard to appeals, the volume of appellate business in Scotland is unlikely to be sufficient to justify the creation of a full-time Upper Tribunal, although if appeal routes were rationalised so that all appeals against decisions of tribunals went initially to the Upper Tribunal volumes would increase.<sup>37</sup> At paragraph 7.29 we have identified the possibility of the

<sup>37</sup> For example, in 2008-09 the Administrative Appeals Chamber in Scotland disposed of 760 appeals; in 2009-10 the figure was 748. In 2008-09 the Employment Appeal Tribunal received 1,794 appeals across England, Wales and Scotland. Figures for 2009-10 are not yet available. Approximately 15% of cases received by the Employment Tribunals each year are Scottish cases. If the same proportion of cases received by the Employment Appeal Tribunal is Scottish there will be in the region of 270 employment appeals in Scotland per annum.

jurisdiction of the Upper Tribunal in Scotland transferring to the Sheriff Appeal Court should the Gill recommendations be implemented. This would be a departure from the UK Tribunals Service model but could be more appropriate in Scotland given the volume of appellate business.

- 8.11. It must be noted that this reserved tribunals model would be a replication of the position in England and Wales *as it currently stands*. In light of the recent merger announcement it may well provide the platform for a future merger of tribunals in Scotland with the SCS.
- 8.12. Discussion Question: Do you think a structure mirroring the current structure for reserved tribunals but encompassing all devolved and reserved tribunals under the remit of a senior judicial head is appropriate in Scotland?**

### Model C: Unified Administration, Collegiate Structure for Devolved Tribunals, Retention of Reserved Tribunals in the UK Tribunals Service (Philip Option 4)

- 8.13. If the structure of the reserved tribunals is not regarded as being necessary or appropriate in Scotland then alternative models for the creation of a coherent system have to be considered. One alternative that has the potential to address concerns around lack of coherence, insufficient independence and insufficient user friendliness is a collegiate approach to the devolved tribunals based, not on a hierarchical structure headed by a judicial figure, but upon a partnership of the devolved tribunals. Under this model, there would be two sets of tribunal structures in Scotland, one for reserved tribunals comprising the current First-tier and Upper Tribunals and supported by the UK Tribunals Service (and, in future, the unified court and tribunal service proposed by MoJ), and a separate collegiate structure for devolved tribunals. This, in essence, is Philip Option 4.
- 8.14. However, the recent MoJ merger announcement means that Philip Option 4 is no longer likely to be a realistic proposition, even in the short to medium term. Although not impossible, it is difficult to see how the reserved tribunals operating in Scotland could be comfortably merged with HM Courts Service, with which they currently have no affiliation. It is possible, therefore, that these tribunals will be separated from the Tribunals Service rather than being included in the merger with HM Courts Service, which will result in them requiring a new governance framework within which to operate. If this is the case, Philip Option 5 – a Scottish Tribunals Service to support both GB tribunals within Scotland and the Scottish Tribunals – becomes more likely and the opportunity to progress to this model incrementally via Option 4 is removed.
- 8.15. Consequently, the dual system model is not discussed any further here. However, should the reserved tribunals in Scotland be included in the merger with HM Courts Service, the features of the Scottish collegiate model, outlined in Model D below, could be applied with modification to only the devolved tribunals.
- 8.16. Discussion Question: Do you think the MoJ's intention to merge the Tribunals Service with HM Courts Service is likely to make Model C (creation of a unified structure only for devolved tribunals) redundant?**

## Model D: Unified Administration and a Collegiate Structure for all Devolved and Reserved Tribunals (Philip Option 5)

8.17. In this model *all* tribunals with jurisdiction in Scotland would come within the remit of a unified administration and governance structure, creating a tribunals system of the sort envisaged as Option 5 in the Philip report. The Scottish operations of the reserved tribunals would transfer out of the UK Tribunals Service and the First-tier and Upper Tribunal judiciary in Scotland would become part of the Scottish tribunals' collegiate structure. Both the Senior President and the Tribunals Service would cease to have any functions with respect to tribunals in Scotland. However, it is neither possible nor desirable for those reserved tribunals that are part of the First-tier and Upper Tribunals to sever all links with the UK Tribunals Service. There must continue to be links with those who carry policy responsibility for reserved matters; a mechanism for mutual sharing of experience and practice developments remains essential; and continued sharing of resources such as libraries and accommodation is highly desirable.

8.18. These necessary links to the First-tier and Upper Tribunals should be maintained through agreements and protocols between the UK and Scottish Governments, the Tribunals Service and the STA and between the Senior President and the proposed Scottish Board of Tribunals.

8.19. Under this unified collegiate model the Scottish tribunals system would have the following characteristics:

### **Structure**

Administrative support would be provided by the STA which, under current proposals, will be a Scottish Government Delivery Unit. It is questionable whether this is appropriate and whether it allows sufficient independence. In our view it would be more appropriate for the STA to be a separate statutory body headed by a chief executive who would work closely with the President/Convener of each tribunal under the arrangements set out below.

8.20. In order to ensure that administrative support is provided in a manner appropriate to each jurisdiction, the STA whether as an Executive Agency or a statutory body akin to SCS, would operate under the supervision of a board comprising amongst others, a number of the Presidents/Conveners of the devolved tribunals. On any such 'Tribunals Board' some places should be reserved for tribunal user groups.

8.21. The Tribunals Board would have two functions. The first would be to oversee the delivery of administrative support for the tribunals; the second would be to ensure the effective delivery of tribunal justice, in essence delivering the functions of the Senior President through a collegiate body.

8.22. The functions of the Tribunals Board might then include:

- representing the views of tribunal judiciary to the Scottish Parliament, Scottish Ministers and Scottish Government Justice Directorate; and the UK Government in respect of reserved matters;

- supervision and direction of the STA;
- ensuring the maintenance of appropriate arrangements for the training, guidance and welfare of tribunal judiciary;
- ensuring the review of existing procedure rules for devolved tribunals and enabling the writing of rules for any new tribunals;
- liaising with the Scottish Government on the making of orders prescribing the qualifications required for appointment of members of tribunals;
- overseeing recruitment and appointment processes for tribunal judiciary under the overall supervision of JABS;
- monitoring the incidence and nature of appeals against the decisions of tribunals;
- developing and negotiating effective Framework Agreements to ensure mutual co-operation with the UK Tribunals Service First-tier and Upper Tribunals; and, crucially,
- delivering tribunal reform in Scotland, in close collaboration with the Scottish Government and MoJ, in order to create a coherent, independent and user-friendly Scottish tribunal system.

8.23. The Tribunals Board would be a statutory body, its functions and duties would be laid down in statute and it would report to the Scottish Parliament. It could comprise between 10 and 12 members appointed through public appointment processes, initially executed by the Scottish Government. The Tribunals Board would, of course, require a head. If parity with the ‘regular’ judiciary was felt to be desirable, this may be a judicial head but, given the Board’s responsibilities as set out above, it does not necessarily follow that it has to be, and there might be good reason to require that the chair be someone who has no separate connection with tribunals in Scotland. In order to promote the interests of users and retain user friendliness it might be appropriate for the head of the Tribunals Board to be a lay person.

**8.24. Discussion Question: If a collegiate structure were to be created should the head of the governance body be a judicial head of a tribunal or a lay person? What would be the advantages and disadvantages of both?**

8.25. Given that the Board has to be a manageable size and has to include a reasonable number of lay members, it would not be possible for all Presidents/Conveners to be included. To ensure that the interests of the full spectrum of tribunals are represented it might, therefore, be necessary to establish a Standing Conference or Council of Tribunal Presidents/Conveners. This need not be a statutory body and all tribunals could be represented on it. Members of the Tribunals Board could be drawn from the Standing Council. The main function of the Standing Council would be to provide the connection between the tribunals and the decision making body, ensuring that the Board was aware of the views of the members of all devolved tribunals on all matters relating to tribunals.

**8.26. Discussion Question: Do you think the creation of a Standing Conference or Council of Tribunal Presidents/Conveners is necessary or appropriate?**

### ***Judicial Leadership***

8.27. Each tribunal in Scotland, whether dealing with devolved or reserved matters, should have a recognised judicial head that might be titled President or Convener. This would require fresh appointments in the case of the formerly reserved tribunals. Those devolved tribunals with integrated national structures, such as the MHTS, already have recognised judicial heads. Others (i.e. the local authority and police tribunals) have distributed structures with no national judicial head and it would be difficult for them, as currently structured, to be represented on the proposed Tribunals Board. However, we have suggested in Chapter 7 that these tribunals should be reformed, for example, by removing them from local authority control and remodelling them as properly independent judicial tribunals. If this happens then it should be straightforward to integrate them into the proposed new structure. The Presidents and Conveners of the various tribunals would carry out their functions under the overall supervision of the Tribunals Board.

### ***Allocation of Jurisdiction***

8.28. Within this proposed collegiate structure each of the tribunals would retain their separate identity but any possibilities for amalgamation of existing jurisdictions dealing with cognate subject matter should be explored.

### ***Terms and Conditions***

8.29. The terms and conditions of appointment of tribunal judiciary should be reviewed by a body independent of the Scottish Government in order to (a) ensure their independence from government, and (b) ensure that rates of remuneration are appropriate to the responsibilities of the position and that differences in remuneration do not adversely affect recruitment to particular tribunals. The review of matters relevant to (a) could be separated from questions of remuneration and, therefore, resolved more swiftly. Settlement of terms and conditions on a basis analogous to the ordinary courts might be appropriate.

### ***Performance Review***

8.30. The Tribunals Board would be responsible for ensuring that effective and consistent arrangements are in place for performance review for all tribunals operating in Scotland. It might be considered appropriate to develop Key Performance Indicators for administrative performance in collaboration with the STA. All tribunals would be required to account for their performance by reporting to the Board on at least an annual basis.

### ***Administrative Support***

8.31. The STA, which would be subject to direction by the Tribunals Board, would provide comprehensive administrative support for all tribunals in Scotland. This would include arranging accommodation for hearings, arranging sittings, allocating chairs/conveners and members to hearings, communicating with appellants/parties, and clerking tribunals. Existing tribunals' administrative staff would transfer to the STA. In the short term such staff would perform their pre-existing duties i.e. continue to provide support for their pre-transfer jurisdiction. In time, and after appropriate training, they would be expected to take on duties in relation to a wider range of jurisdictions.

### ***Accommodation***

8.32. The STA would be responsible for ensuring the provision and management of appropriate accommodation. It might be expected that, pending a comprehensive review of accommodation needs, the STA would take over any accommodation currently occupied by the Tribunals Service in Scotland. Where appropriate (for example, where Scottish cases come before reserved tribunals that do not have a physical presence in Scotland) venues would be shared with the Tribunals Service and the STA would be responsible for negotiating and agreeing this.

### ***Training of Chairs/Conveners and Members***

8.33. The training that tribunal chairs/conveners and members require is a mixture of generic training in the core skills of adjudication and context-specific training. The latter is primarily in the substantive law of the subject area, but other context-specific features of particular tribunals might generate specific training needs. Responsibility for making appropriate arrangements for training members of tribunals in Scotland would be vested by statute in the Tribunals Board and provision of training would be organised primarily by the STA under their direction. It would be important to achieve the correct balance between centralised and decentralised provision and the Board might well in practice delegate training provision to the tribunal leaders for each subject area. There might be scope for organising certain training e.g. on core skills, jointly with the Judicial Studies Committee, particularly for chairs and conveners. On the other hand, it might be more effective for training in generic core skills to be combined with subject specific training. Such judgments would be made by the Tribunals Board in discussion with Tribunal Presidents/Conveners. In some instances, for example, where the substantive law is reserved, it might remain the case that some training can be most effectively provided on a GB-wide basis. In these circumstances the Tribunals Board, the STA, and the UK Tribunals Service would require to liaise to ensure the most effective and efficient provision of training across the UK.

### ***Tribunal Procedure Rules***

8.34. A review of existing procedure rules for devolved tribunals would be undertaken with a view to harmonising them to the extent appropriate and making any necessary improvements. The Tribunals Board would be responsible for ensuring that such a review takes place and would also be charged with ensuring that procedure rules for any new tribunals in Scotland are produced. Although considerable effort has already gone into rationalising rules for the reserved tribunals there could be value in revisiting these when the rules for devolved tribunals are reviewed in order to ensure that they fit within Scottish judicial codes and traditions. All new procedure rules should be scrutinised by the SCAJTC before being finalised.

### ***Access to Justice***

8.35. The Scottish Government should review current arrangements for civil legal aid/advice and assistance insofar as they relate to representation at tribunals, to ensure that public funds for legal advice and/or representation are available to the extent appropriate. The possibility arises under this Model that different approaches to ensuring access to justice in relation to areas of law which are reserved, for example social security and immigration control, might be taken in Scotland as compared to the rest of the UK. This should not be seen as a problem. One of the potential benefits of devolving power from the centre is that it creates greater opportunities for tailored solutions and for different parts of the governmental system to learn from one another. Moreover,

there have long been significant differences between Scotland and the rest of the UK in relation to access to justice in reserved matters because of the existence of a separate legal system reinforced by the fact that the courts and legal aid are devolved matters.

8.36. Nevertheless, it must remain an important objective of the Scottish tribunal system that users are able, so far as reasonably possible, effectively to represent themselves (whilst accepting that this is a more realistic aim in some jurisdictions than it is in others). The Tribunals Board would have responsibility for keeping under review tribunal rules, training, processes and standards of service delivery in order to ensure they are achieving this aim and they would have a duty to exercise their powers accordingly.

8.37. Training of tribunal chairs/members would be designed to encourage and support the enabling approach.

### ***Appeals Against Tribunal Decisions***

8.38. Within this Model routes of appeal would be rationalised. The reserved tribunals operating in Scotland would cease to have an onward right of appeal to the Upper Tribunal. They would instead, along with the devolved tribunals, have a right of appeal in the first instance to the Sheriff Principal (or if the Gill recommendations are implemented, to the Sheriff Appeal Court) and onwards, with permission, to the Court of Session. The jurisdiction of the Upper Tribunal in Scotland could transfer to the Sheriff Appeal Court.

### **8.39. Discussion Question: Do you think a collegiate structure of the nature set out could work?**

#### ***Reserved Tribunals to be Included in the Scottish Collegiate Model***

8.40. In addition to all devolved Scottish tribunals, those reserved First-tier and Upper Tribunals currently supported by the Tribunals Service (Scotland) and other reserved tribunals that have a physical presence in Scotland would be brought into the unified Scottish collegiate structure. This encompasses the following reserved jurisdictions:

#### ***Tribunals supported by Tribunals Service (Scotland)***

Criminal injuries compensation

Immigration and asylum

Social security and child support (First-tier Tribunal)

Social security and child support (Upper Tribunal)

#### ***Other Reserved Tribunals with a physical presence in Scotland***

First Tier Taxation Chamber

Upper Tribunal Tax and Chancery Chamber

Upper Tribunal Administrative Appeals Chamber

8.41. The Employment Tribunal Scotland is also currently supported administratively by Tribunals Service (Scotland). Whether this tribunal becomes part of this proposed collegiate structure would depend on whether or not it becomes part of the structure of the Scottish courts.

- 8.42. This leaves the question of how to handle any Scottish cases coming before those reserved tribunals that do not have a physical presence in Scotland, either because the volume of cases originating in Scotland is too small or simply because the tribunal has a single point of administration that is not in Scotland. This includes a range of tribunals that are part of the Tribunals Service First-tier and Upper Tribunals chamber structure (e.g. those tribunals in the First-tier General Regulatory Chamber) and others that are not supported by the UK Tribunals Service (e.g. the Fire-fighters Pensions Appeal Tribunal; the Plant Varieties and Seeds Tribunal).
- 8.43. There are several options for handling any Scottish cases that are brought to these tribunals:
- They could continue to be administered and heard by the existing reserved tribunals, the primary advantage of this being that the tribunal judiciary will be experienced in dealing with the subject matter. However, this would create a situation in which the vast majority of Scottish tribunal business is dealt with in Scotland within a collegiate system and a Scottish legal context, while a small number of Scottish cases are handled elsewhere in the UK within a different judicial structure and legal context.
  - They could be passed to the STA for administration and be heard in Scotland by the existing reserved tribunal judiciary. However, unless there are a significant number of cases, it could be difficult for administrative staff to provide effective support.
  - They could be passed to the STA for administration and be heard by a Scottish tribunal specifically convened, perhaps on a cross-ticketing basis, for hearing miscellaneous cases. One obvious disadvantage of this approach would be that the infrequency of cases would make it difficult for the tribunal judges to develop any expertise.
  - A Scottish tribunal could be created for any jurisdiction in which the tribunal currently sits only in England but for which a significant number of cases originate in Scotland.
- 8.44. Although the logic of Model D is that all tribunal cases arising in Scotland should be heard in Scotland by Scottish tribunals, there may be pragmatic reasons for leaving such cases to be handled by the existing reserved tribunals and administered by the Tribunals Service.
- 8.45. Discussion Question: How do you think Scottish cases, currently heard by reserved tribunals that do not have a physical presence in Scotland, should be handled in the context of an independent, coherent and user friendly Scottish tribunals system?**

### Model E: Merger of all Tribunals in Scotland with the Scottish Courts

- 8.46. The most fundamental question raised by recent reviews of both civil and administrative justice and by the reforms to tribunals made by the 2007 Act is whether we should continue to maintain separate hierarchies of courts and tribunals in Scotland. Tribunals perform essentially the same function as courts. They are bodies which resolve disputes by making binding decisions according to law, and do so by a process of adjudication. Like the courts, tribunals are expected to be independent both of the executive and the legislature and of the parties appearing before them. The needs of the two systems for efficient administration, accommodation, skilled adjudicators and coherent governance are similar and it could be argued that this similarity provides a justification for abandoning the distinction between tribunals and courts and absorbing tribunals into a restructured court system.

- 8.47. However, as outlined at paragraphs 3.6 and 3.7, while they perform essentially the same function, there are significant differences between tribunals and the ordinary courts. The main differences are:
- Cost – litigating in the courts has a significant financial cost attached while access to a tribunal is usually free to service users;
  - Specialism – tribunals incorporate specialised expertise (both in the law and in the relevant subject area);
  - Accessibility – appeals are generally heard by tribunals within reasonable timescales while litigation through the courts can often take several years;
  - Approach – tribunals provide a less formal and adversarial model of adjudication than the courts; and,
  - Award of expenses – tribunals generally do not have a right to award costs.
- 8.48. The MoJ's announcement that the UK Tribunals Service will be merged with HM Courts Service (see paragraphs 2.20-2.23), a move driven primarily by a need to make efficiency gains, means that this model needs to be considered in the Scottish context. The model could take one of two forms:
- Model E1 – merger only of the administration of the tribunals in Scotland with the administration of the Scottish courts; or,
  - Model E2 – merger of both the administration and the structure of tribunals with the Scottish courts.

The first of these models is what has been proposed by the MoJ for reserved tribunals and the courts in England and Wales. The merger announcement makes explicit reference to preservation of the different structures etc. of courts and tribunals. This development has been facilitated by the creation of a unified tribunal system for reserved tribunals with an overall judicial head and supported by a single Tribunals Service.

- 8.49. In considering either of these models, however, it has to be recognised that SCS has very recently undergone significant reform and structural change arising from the Courts and Judiciary (Scotland) Act 2008. The capacity of the organisation to deal with further fundamental reform in the near future would have to be considered very carefully.

#### ***Model E1 – Merger only of tribunals' and courts' administrations***

- 8.50. Such a merger would, as with Models A and B, rationalise service delivery by creating a unified administration for tribunals, while maintaining the structural separation of courts and tribunals. Administrative services would be provided by SCS staff rather than by staff of a separate tribunals' administration. Independence would be ensured as the SCS is an independent body established under the Courts and Judiciary (Scotland) Act 2008, although any merged structure would require amendment of that statutory basis. SCS would become responsible for the provision of training and professional development, which would lead to a welcome standardisation of process and introduce a large degree of consistency. Rationalisation might save costs if staff and accommodation are currently under utilised and it may offer a better career structure for tribunal administrative staff. Recruitment and appointment processes would require to be carried out by an expanded JABS in order not to interfere with the independence of current judicial appointment processes.

- 8.51. Tribunals and courts are currently administered differently with each having systems tailored to their differing needs. The way in which tribunals are administered contributes to their user-friendliness and it would be important to ensure that this can be safeguarded. Unification with the courts brings with it a risk that tribunal administrative processes will be overwhelmed by and subsumed into the larger scale and more dominant court processes. Thus, retention of the distinctive approaches of tribunals might be more difficult to achieve than if separate administration of courts and tribunals is maintained.
- 8.52. A potentially significant difficulty of merging the administrative support structures for courts and tribunals is that in Scotland, unlike the position in England and Wales, there is no existing unified governance structure for tribunals. Each tribunal has its own separate leadership arrangements. If the SCS as currently constituted were to take over the administration of tribunals, the current judicial leadership of tribunals would be excluded. That would create a risk of the merged administration being insufficiently responsive to the needs of tribunals and their users, and the application of the courts' administrative practices as the default model, resulting in tribunals losing some of their distinctiveness and becoming more like courts.
- 8.53. Accordingly, provision would have to be made for involving tribunal heads in the new organisation. At present SCS is answerable only to the corporate body chaired by the Lord President. If the merged support service were required to act under the direction of both the SCS and the existing tribunal heads it would have too many different 'masters'. If, alternatively, all the tribunal heads were to be added to the SCS body corporate that body would become too large and unwieldy. Thus, if there is no change to tribunals themselves, unifying courts and tribunal administrative support while safeguarding the structure of tribunals would be difficult. Unifying the devolved and reserved tribunals operating in Scotland into a single structure, whether a chamber structure such as that in place for the reserved tribunals (Model B), or a collegiate structure (Model D), would make unification of the courts and tribunals administration more feasible. Accordingly, if this option (i.e. unifying administrative support for courts and tribunals while maintaining their structural separation) is to be feasible, some involvement in the form of collective leadership for tribunals would have to be created from whose number members could be appointed to participate in oversight of court and tribunal administration.
- 8.54. Discussion Question: Do you think a model in which the administration of tribunals and courts in Scotland is merged, but their separate structures retained, will enable tribunals to retain their distinctive features?**
- 8.55. Discussion Question: How do you think independence, coherence and user friendliness of tribunals could be assured in any such merger?**

#### ***Model E2 – Merger of Administrations and Structures of Tribunals and Courts***

- 8.56. Full unification of courts and tribunals could take more than one form. In theory, the different models of adjudication employed by tribunals and courts, one generalist and formal and the other specialist and informal could be offered within the structure of the ordinary courts. It is well beyond the scope of this paper to suggest any specific approach. However certain categories of cases could be dealt with under relatively formal and adversarial processes and others under

relatively informal and enabling processes. The system could also operate on the basis of a higher degree of specialisation than the current court system. In practice, however, full unification could well mean transferring the existing jurisdiction of specialised tribunals to the ordinary courts with categories of case being allocated to the Court of Session, or to sheriffs, or to district judges within the sheriff court as deemed appropriate. It might be that a Tribunals Division could be created to provide a structure within which tribunals could function. These would be fundamental changes to the nature of civil justice in Scotland that would require enormous upheaval to existing structures and would put at risk the distinctive features of, and the advantages offered by, tribunals which would simply become ordinary civil courts.

8.57. In particular, it is not clear that the two models of adjudication can be successfully combined. For courts to do what tribunals now do successfully would require judges and lawyers to be able to switch between the two modes of adjudication according to the category of business before them. The fact that this would not in reality be a fresh start makes this less likely. Judges, lawyers and courts administrative staff can be seen as forming a 'civil litigation community' grounded in a formal adversarial litigation culture. Fusion of tribunals and courts would involve fusion of cultures which would at the least be challenging. One consequence of fusion might, therefore, be a greater need for legal representation than under current arrangements.

8.58. Full unification on the model of the ordinary courts is likely to be disproportionately costly and more costly in absolute terms, the latter being particularly important in the current climate of public expenditure constraint. It would require resolution of a large number of specific issues where there are currently differences of approach between courts and tribunals, such as the extent to which fee paid or part-time salaried as opposed to full-time, salaried and permanent judges are used, rights of audience of non-lawyers, the general position of non-lawyer representatives, and the appropriate approach to unrepresented litigants. Insofar as greater judicial specialisation is seen as desirable, it is not clear that this can be better managed under a system in which the courts have an even wider and more diverse jurisdiction than they do at present. Also, there would be no role for an upper tribunal in a fully unified structure. Appeals would simply go to the next higher authority.

**8.59. Discussion Question: Do you think that full integration of tribunals in Scotland with the administration and structures of the Scottish courts is desirable and workable?**

8.60. At present responsibility for tribunals does not fall within the remit of the Lord President or the SCS and any merger of tribunals in Scotland with the Scottish courts would require amendment to the 2008 Courts and Judiciary (Scotland) Act to extend their remit to cover tribunals. The extent of the Lord President's remit would depend on whether the merger was limited to unifying administration or whether it extended to structures as well. Legislative amendment would offer an opportunity to create a statutory head of tribunals.

8.61. Our consideration of the implications of merging tribunals with the Scottish courts and of creating a unified courts and tribunals service are based on the civil justice system as it currently stands. However, several of the recommendations of the Gill Review potentially have implications for any merger of tribunals with the courts. Lord Gill's proposals for judicial specialisation raise the

prospect that where subject matters correspond there could be merit in transferring the functions of some tribunals to the courts, although this would risk loss of the distinctive, less adversarial and more user friendly nature of tribunals. The proposals for a third tier judiciary indicate that some of the areas they will cover could be similar to those covered by tribunals, raising the prospect that tribunal judiciary could form part of the third tier or that district judges could hear what is currently tribunal business. Lord Gill's proposals are intended to improve efficiency in the civil courts and this could free up physical capacity for hearing tribunal cases if the systems have been merged.

8.62. The feasibility of any model in which tribunals and courts in Scotland are merged, whether limited to administration or full merger of administration and structure, would need to be revisited once it is clear to what extent the Gill recommendations are to be implemented.

### **Conclusion**

8.63. We have attempted in this chapter to set out a range of models that could provide a coherent governance framework for tribunals in Scotland and thus, address the problems identified by Leggatt. We believe that each of the models is achievable, although obviously some are more challenging than others. Whether any of them is desirable is a matter for discussion. We do not claim that these models are exhaustive. Each has a range of permutations that might be equally feasible and, of course, the wider landscape continues to change, raising the possibility that other models could emerge. Neither do we make any claim to have been exhaustive in our consideration of the issues that would arise in implementing any of the proposed models. Instead, we have attempted to flag the main issues in the hope that discussion will be stimulated amongst those who are experts in the field of tribunals and wider administrative justice.

**8.64. Discussion Question: Which of the models outlined at A-E above would best advance the interests of users of tribunals in Scotland?**

**8.65. Discussion Question: In your view is there any other model that would be more appropriate than those suggested at A-E above?**



# Annex 1: Group Membership



### **Working Group**

Richard Henderson, Chair of Scottish Committee  
Professor Alice Brown  
Professor Andrew Coyle  
Colin Milne  
John Elliot  
Professor Tom Mullen, Glasgow University  
Michael Scanlan  
Michael Menlowe  
Debbie Davidson, Secretary to Scottish Committee  
Gordon Quinn, Assistant Secretary to Scottish Committee

### **Scottish Committee of the Administrative Justice and Tribunals Council**

Richard Henderson, Chair  
Michael Scanlan  
Michael Menlowe  
Annabell Fowles  
Professor Andrew Coyle


### ***Ex-officio members***

Ann Abraham, Parliamentary Commissioner for Administration  
Jim Martin, Scottish Public Services Ombudsman

### ***Secretariat***

Debbie Davidson, Secretary to Scottish Committee  
Gordon Quinn, Assistant Secretary to Scottish Committee

# Annex 2: Background to the Reform of Tribunals at GB level



### ***The Franks Report and the period to 2001***

The Franks Committee was established as a result of growing concern over the range and diversity of tribunals and uncertainty over the procedures they followed, resulting in a lack of cohesion and supervision. Lord Justice Carnwath in his first report as Senior President, giving a comprehensive overview of the circumstances which led to the Tribunals, Courts and Enforcement Act 2007, starts with Franks.<sup>38</sup> He says

“It was not until 1957 that the Franks’ report on administrative tribunals and inquiries set the modern trend, which, in the words of Professor Wade, was to recognise that “... statutory tribunals are an integral part of the machinery of justice in the state, and not merely administrative devices for disposing of claims and arguments conveniently”.

While the circumstances which gave rise to the Franks Report, including the Cichel Down affair, have now disappeared into history, the outcome of the Report was a turning point, completely changing perceptions of tribunals. Franks placed tribunals firmly in the judicial sphere and identified the principles of openness, fairness and impartiality as being central to the operation of tribunals.<sup>39</sup> Franks gave brief examples of their application:

“Take openness. If these procedures were wholly secret, the basis of confidence and acceptability would be lacking. Next take fairness. If the objector were not allowed to state his case, there would be nothing to stop oppression. Thirdly, there is impartiality. How can a citizen be satisfied unless he feels that those who decide his case come to their decisions with open minds?”

### ***The Leggatt Report, the Tribunals Service and the 2007 Act***

The Franks reforms and those of the Tribunal and Inquiries Acts of 1958 and 1971, although far reaching, were not sufficient to create a coherent tribunals system. As Lord Justice Carnwath comments,<sup>40</sup>

“the problems of piecemeal development and lack of coherence remained uncorrected, and some 40 years later, the Leggatt Report observed:

“The present collection of tribunals has grown up in an almost entirely haphazard way. Individual tribunals were set up, and usually administered by departments, as they developed new statutory schemes and procedures. The result is a collection of tribunals, mostly administered by departments, with wide variations of practice and approach, and almost no coherence. The current arrangements seem to us to have been developed to meet the needs and convenience of the departments and other bodies which run tribunals, rather than the needs of the user.”

The Review of Tribunals by Sir Andrew Leggatt was established in May 2000 to look at the delivery of

38 Tribunals Service (2010a) *Op. Cit.* p.14.

39 Taken from Council on Tribunals website at <http://www.council-on-tribunals.gov.uk/about/origins.htm>

40 Tribunals Service (2010a), *Op. Cit.* p.14.

justice through tribunals to ensure that there are fair, timely, proportionate and effective arrangements, which comply with the requirements of ECHR, for handling disputes within an effective framework and a coherent structure for the delivery of administrative justice. The Review Group was also tasked with ensuring that adequate arrangements were identified for improving people's knowledge and understanding of their rights and responsibilities in relation to disputes brought to tribunals; that the arrangements for the funding and management of tribunals by Government departments are efficient, effective and economical; and that performance standards for tribunals are coherent, consistent, and public; and effective measures for monitoring and enforcing those standards are established.<sup>41</sup>

### **The Leggatt Report**

“painted a bleak picture. It described a patchwork of tribunals administered by different government departments, each of which had been created by individual pieces of primary legislation, but without any overarching framework. To deal with this problem, the Leggatt report recommended that tribunals should be brought together into a single system, administered by a new Tribunals Service in what was then the Lord Chancellor's Department. Like many similar reports, the recommendations of the Leggatt inquiry might have gone unheeded, but for human rights concerns. The departments which administered tribunals were generally the rule making authority for their tribunals and paid the salaries and fees of the tribunal members. Since those departments were usually parties to the proceedings before the tribunal, it was evident that tribunals did not have the independence which was required by Article 6 of the European Convention on Human Rights.”<sup>42</sup>

The remit for the Leggatt Review did not extend to Scottish Tribunals. Devolution in 1999 meant that responsibility for tribunals in devolved areas of law fell to the Scottish Executive, now the Scottish Government. The Leggatt Report did have a bearing on Scotland to the extent that it addressed the position of tribunals within GB or UK jurisdictions. Leggatt also made comment in relation to Scottish tribunals and the need to develop the system in Scotland; for example he drew attention to anomalies in responsibility for tribunals in Scotland,<sup>43</sup> he was concerned about appointment arrangements<sup>44</sup> and he noted the absence of any body responsible for tribunal training in Scotland.<sup>45</sup> In his final comment in that section he notes,

“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, taking account of the outcome of this review and consulting with the other administrations in the UK.”

(para 11.21)

41 Leggatt terms of reference – <http://www.tribunals-review.org.uk/>

42 Bano A. (2007) – The Tribunals 'Umbrella'. ADJUST Newsletter, Dec 2007. At: [http://www.ajtc.gov.uk/adjust/articles/feature\\_ab\\_umbrella.htm](http://www.ajtc.gov.uk/adjust/articles/feature_ab_umbrella.htm)

43 Leggatt, A. (2001) *Op. Cit.* Para 11.11.

44 *Ibid.* 11.14

45 *Ibid.* 11.16

### ***Council on Tribunals – Framework of Standards for Tribunals 2002***

Although overtaken to some extent by the reforms of 2007 and thereafter, it is worth noting some of the work which was undertaken after 2001. In particular, the work of the Council on Tribunals in setting out, in November 2002,<sup>46</sup> a Framework of Standards for Tribunals.<sup>47</sup> That statement was followed in 2003 by the Council's Guide to Drafting Tribunal Rules,<sup>48</sup> which is frequently referred to by individual rule making bodies. The statement of Standards was published in consequence of the Council belief that the principal hallmark of any tribunal is that it must be independent, and be perceived as such. The tribunal should be able to reach decisions according to law without pressure either from the body or person whose decision is being appealed, from any party to a dispute or from anyone else. Judicial decisions should be uninfluenced by resource or other external considerations.

### ***The 2004 White Paper – Transforming Public Services: Complaints, Redress and Tribunals***

The UK government published a White Paper in 2004<sup>49</sup> setting out the proposals for implementation of tribunal reform, as its response to the Leggatt report and in which it agreed to the Leggatt recommendations. The White Paper outlined a holistic, bottom-up approach to administrative justice. Importantly, the White Paper set out that neither it nor the Leggatt Report was concerned with tribunals in Scotland dealing with devolved subjects<sup>50</sup>, but it noted that the new Tribunals Service would include some tribunals administered by central government throughout Great Britain so the Tribunals Service would have a presence in Scotland. It also acknowledged that there are a number of tribunals operating in subject areas reserved to the UK government but whose administration had been devolved to the then Scottish Executive. It further noted that the UK government would review with the Scottish Executive the arrangements for tribunals affected by the proposals, for which responsibility had been specifically devolved to the Scottish Executive.

### ***Establishment of the Tribunals Service 2006***

Chapter 5 of the Leggatt Report made detailed proposals for the establishment of a Tribunals Service. Importantly it considered the options of establishing such a service in advance of legislation reforming the tribunals' structures, and on the other hand awaiting a legislative framework. The recommendation was clear; it would, says the report, be impracticable to reform and unify 70 separate tribunals simultaneously. Some might be relatively straightforward. Others (and it gave the example of the School Admission Panels) were said to be a major task in themselves.

“Creation of a new Tribunals Service should not be delayed until all the details have been worked out for all the tribunals; to do so would be a recipe for inaction.”<sup>51</sup>

46 and updated in February 2006

47 Council on Tribunals (2002) – Framework of Standards for Tribunals. At: <http://www.council-on-tribunals.gov.uk/standards/framework.htm>

48 Council on Tribunals (2003) – Guide to Drafting Tribunal Rules. At: [http://www.council-on-tribunals.gov.uk/docs/guid\\_guidedraft.pdf](http://www.council-on-tribunals.gov.uk/docs/guid_guidedraft.pdf)

49 Department for Constitutional Affairs (2004) *Op. Cit.*

50 *Ibid.* para 6.10

51 Leggatt, A, (2001) *Op. Cit.* Para 5.14.

On 11 March 2003 the then Lord Chancellor, Lord Irvine of Lairg, announced proposals for a unified tribunals service which would have at its core the top ten non-devolved central government tribunals.<sup>52</sup> Those were the ten largest tribunal organisations administered by central government, and were responsible for more than 90% of cases. The Department for Constitutional Affairs (DCA) already had administrative responsibility for five of these, together with a number of smaller tribunals. These tribunals were to form the core of the new system (the Tribunals Service) and would be joined by the Appeals Service, the Employment Tribunals Service, the Special Educational Needs and Disability Tribunal, the Criminal Injuries Compensation Appeals Panel and the Mental Health Review Tribunal for England, which would transfer from their current sponsoring departments.<sup>53</sup>

The Tribunals Service was eventually created on 3 April 2006, in advance of the Tribunals, Courts and Enforcement Act 2007 as an executive agency of the Ministry of Justice, which by then had taken over responsibility from DCA. The Tribunals Service, which remains an Executive Agency has since then provided administrative support for the tribunals' judiciary who hear cases and decide appeals.

In its Framework Document<sup>54</sup> the Tribunals Service notes that

“Responsibility for administering devolved tribunals remains with the relevant administration in Wales, Scotland or Northern Ireland. Any proposed changes to legislation or policy that governs tribunals will be a matter of close communication with the devolved administrations.”

The Tribunals Service of course continues to have responsibility for the current administration of the majority of tribunals in Scotland which fall within a GB jurisdiction.

The relationship between the Tribunals Service and former sponsor departments is addressed in the Framework Document:

“The structures and processes by which relationships between the Tribunals Service and the former sponsor departments of the five transferred tribunals are conducted are set out in Partnership Agreements. These set out the process of interaction in respect of policy formation and change, first instance decision-making and effective review by tribunals. Partnership Agreements ensure that a close and structured relationship is maintained between the Tribunals Service, DCA and the Government Departments with policy responsibility for decision-making and legislating in respect of decisions which carry a right of appeal in the Tribunals Service.”

(page 8)

Chapter 5 of the Framework Document sets out the basis of the relationship between the Chief Executive of the Tribunals Service and the Senior President.

52 Taken from Department for Constitutional Affairs (2004) *Op. Cit.* para. 6.4.

53 Taken from Department for Constitutional Affairs (2004) *Op. Cit.* para. 6.6

54 Tribunals Service (2006) *Op. Cit.*

The Tribunals Judicial Executive Board is the Senior President's discussion and decision making forum although final decisions on matters relating to his statutory and delegated responsibilities rest with him. The Board takes collegiate responsibility for the leadership, organisation and management of those tribunals judiciary who come under the remit of the Senior President as set out in the 2007 Act. The objectives of the Board are to:

- a. provide leadership, direction and support to the tribunals judiciary;
- b. manage the tribunals judiciary's overall relationship with the Tribunals Service, MoJ and other jurisdictions and bodies;
- c. provide comment and advice to the Tribunals Service and MoJ from the judicial perspective on any initiatives or projects relating to tribunals or their service delivery (Joint meeting);
- d. discuss with the Tribunals Service and MoJ the spending review priorities, targets and plans as they affect the tribunals judiciary and the financing and resources for the Tribunals Service (Joint meeting);
- e. liaise with the Judges' Council;
- f. ensure appropriate cross border relationships are maintained and promoted;
- g. develop policy and practice on judicial appointments in tribunals, relationships with the Judicial Appointments Commission and Lord Chancellor and hold discussions on specific appointments where necessary (Appointments and Assignment Group);
- h. ensure the provision and delivery of judicial training in tribunals within the TJO budget and to oversee the link with the Judicial Studies Board (the Training Group);
- i. oversee the provision, over time, of a consistent system of appraisal in tribunals and develop general policy for the welfare and guidance of the tribunals judiciary (the Appraisal and Welfare Group);
- j. direct the judicial communications strategy (both internal and external) for tribunals; develop policy and practice for precedent and reporting system in the new generic tribunals (the Communications Group);
- k. oversee the provision of publications, online services and other reference materials for judicial use and agree allocation of the publications budget (Publications Group).<sup>55</sup>

### ***The Tribunals, Courts and Enforcement Act 2007***

The Tribunals, Courts and Enforcement Act 2007<sup>56</sup> implemented the provisions of the 2004 White Paper. The key elements of the regime established by and around the 2007 Act are:

- a guarantee of independence
- a unified judiciary with common recruitment and training characteristics
- a unified structure of tribunals at both first instance and appellate levels, identified by subject specific chambers with substantially common rules of procedure
- centralised administration and support for Tribunals in the form of the Tribunals Service

***A guarantee of independence*** – See paragraph 2.14.

***A unified judiciary – the Senior President*** – One of the most important changes to the overall tribunals system is set out in section 2 of the 2007 Act in which the post of Senior President is specifically

<sup>55</sup> Tribunals Service (2010a) *Op. Cit.* P.61.

<sup>56</sup> 2007 Act *Op. Cit.* – s15.

created.<sup>57</sup> While the role and functions of the post are not precisely defined in the Act the creation of the post signifies the development of the unified structure. In a speech delivered in Edinburgh on 11 February 2009 Lord Justice Carnwath, the Senior President, said;

“As I was relieved to discover, the White Paper did not contain a job specification for Senior President. But it set out some general aspirations. It was envisaged that he or she would be “strong and vigorous”, and provide a “single clear voice able to speak for the tribunals judiciary collectively”. In the immediate future the role would be “strategic, co-ordinating and directing judicial input” into the development of the new service. In the longer term, the new leadership would have responsibility for developing more radical approaches to dispute resolution.”<sup>58</sup>

In his first report as Senior President, Lord Justice Carnwath comments that

“The office of Senior President in the TCEA is a novel constitutional entity as an autonomous judicial office with UK wide responsibilities.”<sup>59</sup>

The Consultation paper Transforming Tribunals<sup>60</sup> which addressed the implementation of the 2007 Act drew together the Senior President’s functions as including:

- responsibility for representing the views of tribunal judiciary to Parliament and Ministers;
- responsibility, within the resources provided by the Lord Chancellor, for the maintenance of appropriate arrangements for the training; guidance and welfare of judges and other members of the First-tier and Upper Tribunals as well as those of the Asylum and Immigration Tribunal, Employment Tribunal and Employment Appeal Tribunal (for which purpose he shares mutual duties of co-operation with the Lord Chief Justices of England and Wales, and of Northern Ireland, and the Lord President);
- concurrence (with the Lord Chancellor) in relation to the chambers structure for the First-tier Tribunal and the Upper Tribunal, the allocation of functions between chambers, and the making of orders prescribing the qualifications required for appointment of members of the First-tier Tribunal and the Upper Tribunal;
- assigning judges and members to chambers, for which purpose he is required to publish a policy agreed with the Lord Chancellor;
- reporting to the Lord Chancellor in relation to tribunal cases on matters which the Senior President wishes to bring to the attention of the Lord Chancellor and matters which the Lord Chancellor has asked the Senior President to cover;
- requesting court judges (with the agreement of the relevant chief justice) to act as a judge of the First-tier or Upper Tribunal;
- taking oaths of allegiance and judicial oaths (or nominating someone to do so) from tribunal judges and other members; and
- acting as (or nominating) a member of the Tribunal Procedure Committee (it is expected that the Senior President or his nominee will chair the Committee).

57 2007 Act *Op. Cit.* – s2.

58 <http://www.judiciary.gov.uk/docs/speeches/spt-trib-reform-scottish-dim.pdf>

59 Tribunals Service (2010a) *Op. Cit.*

60 Tribunals Service (2007) *Op. Cit.*

**A unified structure of tribunals – First Tier and Upper Tribunals** – The third element in the reform package in the 2007 Act is the new structure of tribunals in which two new tribunals, which would effectively and progressively absorb all the pre-existing tribunals, are created.

The Act does not define the composition of the First-tier or Upper Tribunal in terms of subject areas etc. but concentrates on judicial composition and inter-relationship between the tiers. In the event, the Upper Tribunal has evolved into four chambers:

- I. The Administrative Appeals Chamber (started work on 3 November 2008)
- II. The Tax and Chancery Chamber (started work on 1 April 2009, was known as the Finance and Tax Chamber up until 1 September 2009)
- III. The Lands Chamber (started work on 1 June 2009)
- IV. The Immigration and Asylum Chamber (started work on 15 February 2010)

The Employment Appeal Tribunal remains outside the formal Upper Tribunal structure

The First-tier Tribunal has also evolved into seven Chambers

- i. War Pensions and Armed Forces (established 3 Nov 2008)
- ii. Social Entitlement (established 3 Nov 2008)
- iii. Health, Education and Social Care (established 3 Nov 2008)
- iv. General Regulatory (established Sept 2009)
- v. Tax (established 1 April 2009)
- vi. Immigration and Asylum (established 15 Feb 2010)
- vii. Land, Property and Housing (timetable to be agreed)

The Employment Tribunal remains outside the formal First-tier Tribunal structure.

**The Tribunals Service as part of the reform process** – The centralised administration provided by the Tribunals Service is not a statutory construct but it undoubtedly forms a major element in the scheme of the reforms.<sup>61</sup>

The fact that the Tribunals Service is an Executive Agency of MoJ means that it was unnecessary for it to be dealt with under the 2007 Act. The Tribunals Service contributes to the Department's Transforming Justice Programme. In its 2010/11 Business Plan<sup>62</sup> the Tribunals Service describe this as

“a major MoJ-wide programme to radically change, over the next five years, the way we deliver justice. It will help us look at how we can provide the best service we can for our users and the public, with less money. A key aim is delivering synergies and efficiencies across the justice system to provide better access to justice for all at a lower cost to taxpayers. One aspect of this work is to develop more effective and closer working

61 The Tribunals Service is part of the Access to Justice Business Group in the MoJ, which was established to improve the management of resources to deliver improved services for all access to justice users. The group is responsible for the sponsorship of 29 legal and judicial public bodies including the Tribunals Service, Her Majesty's Courts Service, the Legal Services Commission and the Office of the Public Guardian. The Access to Justice Business Group leads on delivery of the second of the Ministry's four departmental strategic objectives, i.e. to 'Deliver fair and simple routes to civil and family justice'. See *TS Business Plan 2010/11* – 12 March 2010.

62 Tribunals Service (2010b) – Business Plan for 2010-11. At: [http://www.tribunals.gov.uk/tribunals/Documents/Publications/TS\\_Plan2010b.pdf](http://www.tribunals.gov.uk/tribunals/Documents/Publications/TS_Plan2010b.pdf)

between its operational agencies.”

### ***Transforming Tribunals – Consultation paper on implementation of the 2007 Act***

See paragraph 2.19. In setting out the arrangements for ticketing within jurisdictions the consultation paper noted that judges and members would be given a ‘ticket’ by the Chamber President indicating their suitability to sit in a particular jurisdiction. This will be subject to business need, and before being allowed to sit in additional jurisdictions within the Chamber, judges and members will require training and induction in areas with which they are unfamiliar (this may, for example, include training to enable them to deal effectively with cultural differences, where these are relevant to the decisions they have to take).<sup>63</sup> The paper also identified the possibility of assignment of tribunal judges to different chambers.<sup>64</sup>

### ***Implementation of the 2007 Act***

The regime of the 2007 Act has been introduced progressively over the period from its enactment and is still on-going. The detailed timetable for implementation as noted in the Senior President of Tribunals’ Annual Report is as follows:

#### **3 November 2008** – (“T Day”): Phase 1 Implementation:

- First-tier Tribunal – Three Chambers created (Social Entitlement; Health, Education and Social Care; and War Pensions and Armed Forces Compensation);
- Upper Tribunal – Administrative Appeals Chamber;
- Existing tribunal judicial offices transferred to the new chambers;
- Swearing in of transferred in judges and members begins.

#### **April 2009** – 1st April: Phase2 implementation:

- Abolition of General Commissioners for Income Tax;
- First tier – Tax Chamber created;
- Upper Tribunal – Finance and Tax Chamber created.

**May 2009** – Government published response to immigration and asylum consultation and confirmed intention to transfer immigration and asylum jurisdictions into First tier and Upper Tribunals.

**June 2009** – Upper Tribunal – Lands Chamber, took over functions of Lands Tribunal. Presidents for Lands Chamber and War Pensions and Armed Forces Compensation Chamber appointed.

**August 2009** – Deputy Chamber Presidents appointed to Health, Education and Social Care Chamber. Senior President announced a review of tribunals training.

#### **September 2009** – First tier General Regulatory Chamber phase 1

- Charity, Estate Agents, Consumer Credit and Transport transferred.

Upper Tribunal– Finance and Tax Chamber renamed Tax and Chancery Chamber.

**November 2009** – Mr Justice Nicholas Blake appointed as President of the Asylum and Immigration Chamber, Upper Tribunal (from February 2010).

63 Tribunals Service (2007) *Op. Cit.* Paras. 160/161.

64 Tribunals Service (2007) *Op. Cit.* Paras. 162/165.

**January 2010** – First tier General Regulatory Chamber phase 2

- Gambling, Claims Management, Information, Immigration Services, Adjudication Panel for England transferred in
- Family Health Services appeal Authority transferred into Health, Education and Social Care Chamber.

**February 2010** – Establishment of Immigration and Asylum Chambers in First tier Tribunal and Upper Tribunal.

**April 2010** – Financial Services and Markets Tribunal and the Pensions Regulatory tribunals to transfer into the Tax and Chancery Chamber in the Upper Tribunal.

The MoJ announcement of 24 March 2010 that it will merge HM Courts Service and the Tribunals Service into a new, single organisation indicates that

“The new structure will preserve the unique and distinctive features of both systems while taking advantage of the benefits to users, judges and staff from closer working.”

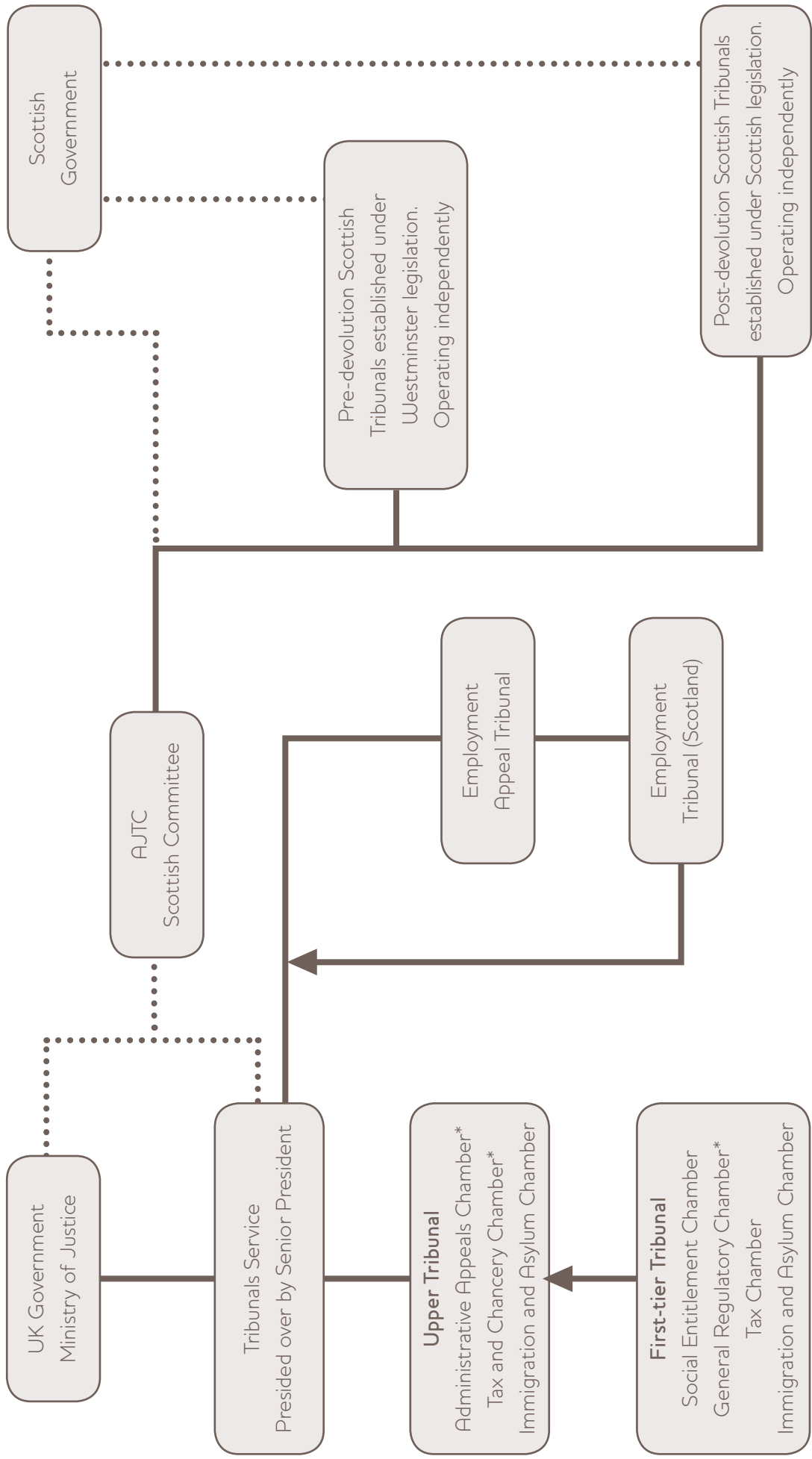
### ***Scottish Tribunals Post-1999***

See paragraphs 2.24 to 2.30. Possible ways forward for tribunals in Scotland, as set out in the Philip report<sup>65</sup> include:

- a clear statement of tribunals’ inquisitorial, rather than adversarial, role;
- that a two-tier tribunal system (as is in place for the Tribunals Service) may not be appropriate for Scotland, due to the smaller jurisdiction generating fewer cases and significantly fewer appeals;
- a guarantee in statute in relation to the independence of tribunals;
- consolidating policy development in relation to Scottish tribunals in the Scottish Government’s Justice Directorate to provide additional separation between devolved tribunals and their sponsoring government departments;
- making appointments to tribunals through the Judicial Appointments Board for Scotland (which carries out this task in relation to the judiciary) in order to emphasise the independence of tribunal members and to streamline aspects of the process such as terms and conditions of appointment;
- establishing a Scottish Tribunals Service to provide administrative support to devolved (and potentially reserved) tribunals operating in Scotland;
- a sharing of expertise and resources between a Scottish Tribunals Service and tribunals in other UK jurisdictions in relation to the training of tribunal members;
- rationalisation of the procedural rules for devolved tribunals (this has already happened to a large extent for those tribunals under the supervision of the Tribunals Service); and,
- consideration of how alternative dispute resolution processes, such as external review, can be integrated into the process of considering a tribunal case.

# Annex 3: Administrative Structure of Tribunals in Scotland





\* comprises some tribunals which have no jurisdiction in Scotland

# Annex 4: Tribunals with Jurisdiction in Scotland



## UK Tribunals with Jurisdiction in Scotland (Reserved Matters)

### First-tier General Regulatory Chamber

1. Consumer Credit Appeals Tribunal.
2. Estate Agents Appeal Panel.
3. Gambling Appeals Tribunal.
4. Immigration Services Tribunal.
5. Information Rights Tribunal (most hearings held in London but can sit anywhere in the UK).
6. Transport Tribunal (Scottish cases heard in Glasgow but not supported by Tribunals Service (Scotland)).

### First-tier Immigration and Asylum Chamber

7. Asylum and Immigration Tribunal.
8. Asylum Support Tribunal.

### First-tier Social Entitlement Chamber

9. Criminal Injuries Compensation Appeals (UK wide).
10. Social Security and Child Support appeals (Scotland only).

### First-tier Tax Chamber

11. Financial Services and Markets Tribunal.
12. Pensions Regulator Tribunal.
13. Tax (Scottish cases registered in Birmingham but allocated to Edinburgh Tax tribunal office).

### Upper Tribunal

14. Administrative Appeals Chamber.
15. Immigration and Asylum Chamber.
16. Tax and Chancery Chamber (Scottish cases can be dealt with by London or Scottish Upper Tribunal office).

### Employment Tribunals (separate pillar within Tribunals Service)

17. Employment Appeals Tribunal.
18. Employment Tribunal (Scotland).

### Other Tribunals not part of the Tribunal Service

19. Aircraft and Shipbuilding Industries Arbitration Tribunal (categorised by Council on Tribunals in 2006 as “Rarely convened/Moribund”).
20. Antarctic Act Tribunal (has never been convened).
21. Board of the Pension Protection Fund.
22. Civil Aviation Authority (has a Scottish office to which appeals against decisions in Scottish cases can be made).
23. Chemical Weapons Licensing Appeal (has never sat).
24. Competition Appeals Tribunal (independent judicial body).
25. Comptroller General of Patents, Designs and Trademarks (head of executive agency, offices in South Wales and London).

26. Copyright Tribunal (administered by Intellectual Property Office).
27. Fire-fighters Pensions Appeal Tribunal.
28. Foreign Compensation Commission (Foreign and Commonwealth Office NDPB).
29. Forestry Commission Private Woodlands.
30. Gender Recognition Panel (hearings not generally required. All applications considered on paper by Panel based in Leicester).
31. Information Commissioner (data).
32. Information Commissioner (freedom of information).
33. Insolvency Practitioners Tribunal.
34. Mines and Quarries Tribunal.
35. National Lottery Commission.
36. Office of the Health Professions Adjudicator (currently in the process of being established).
37. Plant Varieties and Seeds Tribunal (part of Defra, last sat in 1984).
38. Reserve Forces Appeal Tribunal (all hearings held in Manchester).
39. Reserve Forces Reinstatement Committees and Umpires.
40. Sea Fish Licence Tribunal (has never convened).

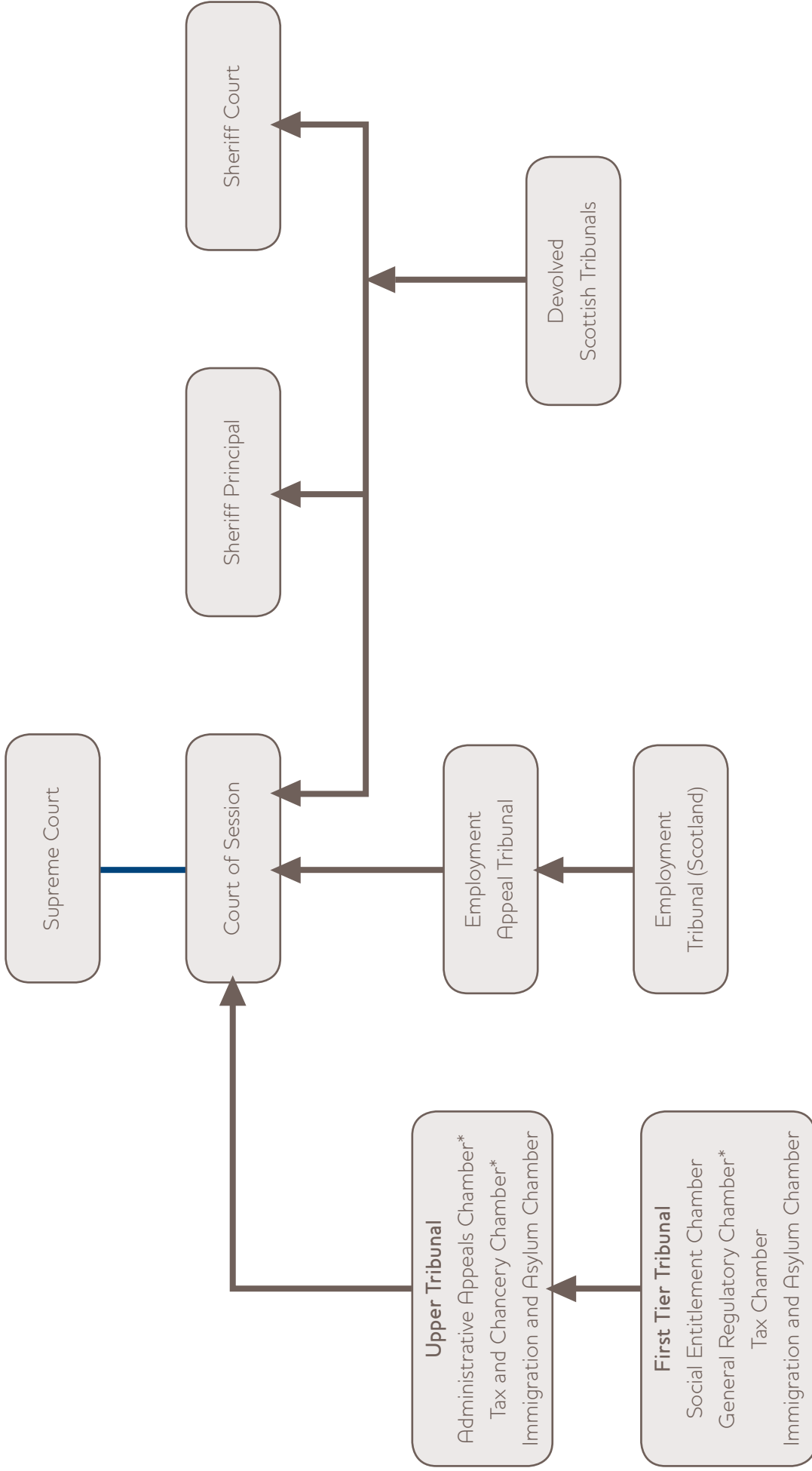
### Scottish Tribunals (Devolved Matters)

41. Additional Support Needs Tribunal Scotland.
42. Children's Hearings (n=32).
43. Crofters Commission.
44. Education Appeal Committees (n=29).
45. Horse Race Betting Levy Appeals Tribunal for Scotland.
46. Lands Tribunal for Scotland.
47. Mental Health Tribunal for Scotland.
48. NHS Discipline Committees.
49. NHS National Appeal Panel for Entry to Pharmaceutical Lists.
50. NHS Tribunal Scotland.
51. Panel of Agricultural Arbiters Scotland.
52. Pensions Appeal Tribunal Scotland.
53. Police Appeals Tribunal (n=8).
54. Police Pensions Appeal Tribunal (n=8).
55. Private Rented Housing Panel.
56. Scottish Charities Appeal Panel.
57. Scottish Parking Appeal Service.
58. Traffic Commissioner Scotland.
59. Valuation Appeal Committees (n=15).



# Annex 5: Appeal Routes of Tribunals in Scotland





\* comprises some tribunals which have no jurisdiction in Scotland





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