

Public Bodies Bill Team
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Consultation: 'Public Bodies Bill: reforming the public bodies of the Ministry of Justice'

This is the response of the AJTC to the consultation paper 'Public Bodies Bill: reforming the public bodies of the Ministry of Justice' in which the MoJ is consulting on the government's proposal that the AJTC, among other bodies, be abolished. Before addressing the substantive issues in the consultation paper we would like to reiterate our disappointment, expressed at the time of the announcement in October 2010, that the AJTC was not consulted or invited to contribute to the review process before the government's decision was reached.

Our view is that the proposal to abolish the AJTC is misguided and should not be pursued for a number of reasons which I summarise below. These are enlarged upon in this letter and in the enclosed response to the specific questions posed in the consultation paper.

Summary

The AJTC's position can be summarised broadly as follows:

- as the AJTC's forthcoming report will demonstrate, administrative justice is fundamentally important to citizens. It faces major challenges and yet (as most recently suggested by the MoJ Structural Reform Plan to 2015) is not recognised as an aspect of justice which is given real priority;
- the Government appears to accept the proposition that the functions currently assigned to the AJTC are valuable and should continue to be discharged;
- the proposed abolition appears to be founded on the flawed proposition that those functions - especially the provision of the *independent* advice which is so important in an arena where citizens are challenging government - can be discharged effectively within a Government department (which is not anyway responsible for many aspects) and which is unlikely to be adequately resourced;
- the consultation paper considerably overstates the financial savings to be achieved by abolition;

- even if the functions could be discharged by Government itself, as the Government implies, the timing of the proposed abolition is itself misguided;
- importantly, the proposed abolition of AJTC does not take adequate account of the UK dimension of administrative justice and significantly complicates the resolution of current devolution questions arising in particular from the reorganisation of HMCS and the Tribunals Service.

The independence of AJTC has enabled it to interact with government at both national and local levels, the judiciary at all levels, academics and other stakeholders and to successfully influence systemic change and improvement for the benefit of both users and providers.

In short, it would be perverse to abolish a well-established, well-respected and well-connected body which - at relatively minuscule cost to the public purse – brings significant experience and expertise to the overview of administrative justice in the UK and which is in a unique position to put forward suggested improvements across the entire system of decision-making, complaints and appeals as it impacts on the daily lives of ordinary citizens.

Functions and Expertise

The primary role of the AJTC is to "keep under review and report on" the administrative justice system. The AJTC is the successor organisation to the Council on Tribunals (CoT), which operated from 1959 to 2007. CoT was formed following the Franks Report on Administrative Tribunals and Enquiries, which established the need for greater coherence, procedural uniformity and independent supervision of government tribunals. The AJTC was created by the Tribunals, Courts and Enforcement (TCE) Act 2007. This was a response to the Leggatt Review of Tribunals in 2001 and the subsequent 2004 White Paper *Transforming Public Services: Complaints, Redress and Tribunals*. The White Paper described the continuing growth and complexity of routes to complaint or appeal, most notably tribunals and ombudsmen. It highlighted the lack of strategic oversight of administrative justice which had resulted in a lack of coherence as it had developed. The 2007 Act gave a broad definition of administrative justice encompassing original decision-making processes within government departments and the full range of complaint and redress routes available from internal reconsideration of decisions through to ombudsmen and judicial review.

During the passage of the Public Bodies Bill through the House of Lords, our former Chairman Lord Newton of Braintree said:

"We are discussing not an ephemeral body that was set up on a transient whim but a council that has been a consistent part of the scene - and generally valued as part of the scene - for some 50 years."

We recognise that the future of the AJTC is a matter for Ministers and then for Parliament. Nevertheless we are deeply frustrated by the apparently arbitrary and superficial nature of the decision to abolish, notwithstanding our history and the recent thorough review of our functions.

The consultation document acknowledges the influential role that the AJTC, and the Council on Tribunals before it, have played in the administrative justice system in the past. However we reject the government's argument that the AJTC no longer represents an efficient or economic use of resources, especially as the calculations in the consultation paper considerably overstate anticipated savings.

The AJTC has real expertise and enjoys excellent relationships with all the key players across the administrative justice system. Our membership comprises senior individuals

drawn from a broad spectrum of administrative justice, who provide credibility to our role. We believe it to be essential that the *functions* of the AJTC - although not necessarily the organisation as presently constituted in every detail - should be retained within an independent and authoritative organisation.

We challenge the Government's proposition that AJTC functions can be discharged by MoJ civil servants, who would lack the required independence or breadth of understanding to fulfil our functions. The MoJ team assigned to this task is responsible for a number of other important policy areas. It is significant that this role does not feature in MoJ's published strategic plans. It is clear that an advisory Council of sixteen experienced and well-connected administrative justice experts, supported by a small team of experienced policy officers, cannot be replaced by less than two civil servants. Moreover, there is no evidence at all that government has considered how oversight of the wider administrative justice system will be maintained beyond MoJ's immediate responsibilities.

There is considerable scope - with the right approach - to increase efficiency in the system without damaging quality. Our recent work, on 'Right First Time' decision-making, on general principles for administrative justice and on proportionate dispute resolution, is all intended to promote and support a strategic approach to the serious challenges the system is facing. Our track record, the expertise and commitment of our members and our secretariat, and perhaps most importantly of all, our independence, would seem to be of crucial importance to a Government that is, of necessity, conflicted in seeking significant reform of a system of justice in which it is a party to most disputes.

Timing

The timing of the abolition proposal is surprising. The volume of appeals to tribunals has risen dramatically in the last few years. Administrative Justice actively engages more citizens than any other part of the justice system. The government is urgently seeking new approaches to dispute resolution - with new opportunities and new risks - to accommodate a substantial reduction in the justice budget. We believe the Council is uniquely well placed to help meet this challenge.

At a time of increasing economic and social uncertainty, access to justice (and public perceptions of the justice system) matter more than ever. Administrative justice essentially exists to allow citizens – often the most dispossessed - to have proper consideration of alleged mistakes and their other grievances against the machinery of government. Without an accessible and effective administrative justice system, which binds people to well-established democratic values of lawfulness and fairness, there must be increased risks of social alienation. At the very time that "Fixing the broken society" has become a top priority, many will find it very strange that the Government should wish to abolish the body which is the champion and defender of the administrative justice system.

AJTC particularly safeguards the interests of users - actual and potential. We have noted that the Government's 'Open Public Services' White Paper, published in July, announces the intention to "examine the role of elected and unelected office-holders in championing individuals' rights, ensuring availability of services and providing overview and scrutiny."

At the launch of the White Paper, the Prime Minister emphasised the importance to be attached to promoting the user voice in relation to public services. We believe that it would be contradictory and short-sighted to abolish the AJTC, the organisation that exists for this very purpose, before the proposed examination takes place. The White Paper refers to the Government's wish to encourage existing champions, such as Which?, to speak out on consumers' behalf in relation to public services. Although there is undoubtedly considerable scope for Which? to increase its involvement with public services, I can say with authority

as its Deputy Chairman, that it has neither the expertise nor the networks across the justice system to perform the AJTC role.

Conclusion

Abolition of the AJTC would see the disappearance of a well-established, well-respected and well-connected body which has the unique overview across the entire system of decision-making, complaints and appeals as it impacts on the daily lives of ordinary citizens. There remains much to be done to improve the accessibility, fairness and efficiency of these arrangements and there are doubtless ways in which the AJTC's work could be better tuned to the present government's priorities. The Council would of course be delighted to engage in a dialogue to this end. But the waste of abolition is manifestly not the right way to achieve this wider goal.

Richard Thomas CBE
Chairman

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RESPONSE OF THE AJTC

What are your views on the proposed abolition of the AJTC?

The consultation paper states that “it is no longer an efficient or economic use of resources to have an independent advisory body to carry out functions in relation to administrative justice, tribunals and statutory inquiries.” It argues that a “a dedicated team of civil servants within the department’s Justice Policy Group are responsible for providing independent advice on strategic administrative justice policy” and that “most central government tribunals have now been brought into the Tribunals Service (now part of HMCTS)” and “effective governance arrangements are now in place.”

Of course the MoJ should have an administrative justice policy capability and we have noted the very recent appointments made to develop such a capability. However, we do not consider that there will ever be the necessary independence or capacity within the MoJ to replicate the functions of the AJTC. A policy function within government would not be able to provide “independent” advice to Ministers as the consultation paper claims. The Civil Service provides impartial advice but its role is to serve the government of the day and as such, “independent” advice from civil servants in a ministerial department is a constitutional impossibility. That is a major reason why Arm’s Length Bodies have come into existence historically, and also why it is not tenable to re-provide their functions within a government department in every case.

As well the freedom to tackle issues where there is inevitably a direct conflict between government and the aggrieved citizen, the independence of the AJTC (and, earlier, the CoT) has enabled it to build distinctive continuity, expertise, experience, networks, insights, reputation and influence in ways which would be neither appropriate nor practicable for a government department. It is also noteworthy that in the areas of civil and family justice, the government has recognised the continuing need for independent arms-length advisory bodies; we have seen no convincing argument why a similar need does not also continue to exist in the field of administrative justice where the need for an independent body is greater.

We will shortly publish a report setting out our analysis of the present state of the administrative justice system and outlining what we regard as the key elements of a strategic administrative justice policy. This report will challenge government to recognise the scale of unnecessary cost generated by its own actions. In particular, the report is critical of complex and badly drafted laws in some areas of administrative justice and about the extent to which poor decision-making in government departments is allowed to recur time and again without strategic action to improve it. It will also record our concerns about recent policy trends which create barriers to justice, including the reduction in legal aid, the introduction of fees and the unacceptable and growing delays in providing hearing dates for appeals. The report will emphasise:

- The need for good laws to underpin administrative justice;
- The need for public service decisions to be made right first time;
- The ongoing need for tribunal reform across the UK;
- The need for help, advice and representation in pursuing redress;
- Proportionate Dispute Resolution and wider strategic reform.

We would be pleased to share a late draft of the report with MoJ shortly. We recognise that government will not always find constructive challenge of this kind welcome, but citizens are entitled to a voice in a system that fundamentally affects their daily lives. This is not the kind of advice that civil servants are in a position to give, and neither, frankly, would most citizens consider it appropriate that they do so. Enlightened self-interest would also recognise the value of this sort of input from the governmental perspective.

The consultation paper refers to strategic administrative justice policy. The MoJ frankly does not have any such policy at the moment and its Structural Reform Plan, which determines the Departments priorities until 2015, is virtually silent on administrative justice. Despite the size of the administrative justice system and its impact on the lives of so many citizens, it retains a “Cinderella” status and attracts little political attention. Part of the difficulty is that administrative justice policy is not the responsibility of MoJ or any other single government department. In Scotland, Wales and Northern Ireland, there is an awkward mixture of devolved and reserved tribunals. The Cabinet Office retains responsibility for ombudsman policy. Significant tribunal jurisdictions concerning education and parking are operated at local government level. Planning appeals are the responsibility of the Department for Communities and Local Government. The original decision making processes which gave rise to nearly a million appeals to tribunals this year is the responsibility of several Departments, most notably DWP and the Home Office. The Department for Business, Industry and Skills is responsible for policy on workplace disputes.

The AJTC is currently the only body that has an overview of the system as a whole, able to provide independent oversight with the needs of the user in mind. It is the only body well placed to provide advice and propose improvements to government departments and others based on generally applicable principles and expertise across the system as a whole. The learning curve for a newly formed MoJ team, even for those functions currently within the MoJ portfolio, will be extremely steep. We have yet to receive any indication as to how oversight will be maintained beyond MoJ's immediate responsibilities.

We are particularly concerned that the consultation paper contains so little about the UK-wide aspects of the administrative justice system and about the reserved tribunals which sit in Scotland. It states that “the department will work with colleagues in the devolved governments to maintain a UK-wide view”. We do not believe that this is in any way an adequate arrangement to replace the role played by the AJTC's statutory Scottish and Welsh Committees. The MoJ has recently initiated three policy changes which have a significant impact in Scotland: the creation of HMCTS - an agency with an England and Wales remit but with ‘responsibility’ for tribunals in Scotland; the further devolution of tribunals to Scotland; and the unification of the courts and tribunals judiciary in England and Wales under the Lord Chief Justice, which will have implications for cross-border sitting. Policy responsibility for these initiatives appears to rest with HMCTS and not with the central MOJ policy team. We have yet to see evidence that the complex issues associated with these initiatives are properly understood. We note with growing concern that consultation papers which have been promised on these issues have been repeatedly delayed.

We also reject the assertion in the consultation paper that the MoJ or HMCTS is well placed to listen to and take account of the needs of users in making or implementing administrative justice policy. Administrative justice is concerned specifically with decisions made by the state in relation to individuals and families. The government is a party to the vast majority of the disputes coming before tribunals and has an interest in policy decisions, for example in relation to legal aid and fees, which impact on the access of individual citizens to the justice system. The difficulty this presents for the government was

alluded to by Baroness Scotland of Asthal during the passage of the Public Bodies Bill in the Lords. She said:

“The council believes that the Government bear responsibility for causing many of the appeals in the administrative justice system through poor decision-making, poor communication, delay and overly complex or incomprehensible rules. Not only will the legal aid cuts affect individual claimants, they will contribute to increasing work and delays in courts and tribunals that are already under pressure. How will such a challenge to the department that is also responsible for legal aid be made, made independently, and by whom? The value of an independent critical eye will remain present.”

We question both the estimate of the savings that will be achieved through abolition of the AJTC and the assertion that a “dedicated team” in the Ministry of Justice will take over the work of the AJTC. We believe the likely actual ‘saving’ to be made from AJTC abolition, assuming closure on 31 March 2012, will be in the order of £2 million for the financial years 2012-13 to 2014-5, and not the £4.3 million estimated by MoJ. The MoJ figure is based on an assumed saving of £1.4m for each of these three years, rounded up for inflation. The AJTC’s actual annual expenditure since 2007, including the costs of its Scottish and Welsh Committees, and projected expenditure for 2011/12 are as follows:

2007/8	2008/9	2009/10	2010/11	2011/12 (projected)
1,114,931	1,107,782	1,193,350	1,009,704	907,000

We believe that £1m, and not the £1.4 m figure quoted in the consultation paper, is closer to the actual annual gross sum that that will be saved in the next 3 financial years should the AJTC be abolished, and this saving will be reduced by the costs of closure, which MoJ estimates to be £0.6m over this period, and also by the cost of the new dedicated MoJ staff team.

The Government has not attempted to cost its “dedicated team” in MoJ. The team is responsible for ‘business as usual’ recently transferred from the Tribunals Service, providing support to the Tribunal Procedure Committee and creation of the new Property Lands and Housing Chamber of the First Tier Tribunal. The resource available to replace the work of the AJTC appears to amount to little more than one or two newly-appointed officials who have administrative justice policy as part of their wider portfolio. There is no guarantee that even this resource will be retained for any length of time as the restructuring of the MoJ’s Justice Policy Group is still ongoing, with the risk that the staff concerned will be reallocated to work regarded as a higher priority at any time, as has already happened this year. It seems to us highly likely that this small resource will quickly be lost because administrative justice does not feature in MoJ’s published strategic plans. We respect and value the work of MoJ officials, with whom our secretariat works closely, but we do not accept that an advisory council of sixteen experienced and well-connected administrative justice experts, supported by a small team of dedicated policy officers, can easily be replaced by the full-time equivalent of less than two civil servants. We share the view of Lord Borrie, who said in the House of Lords:

“The council and, for five decades, its predecessor, the Council on Tribunals, invariably consisted of judges, practitioners, academics and others from various backgrounds ... full-time civil servants cannot replicate the breadth of knowledge and empirical experience that is so useful”

Question 2: Do you believe that there are any functions of the AJTC that will not be adequately covered following the proposed abolition and suggested future handling of functions as set out above? Please state what these are and your reasons.

The primary function of the AJTC is independent review of the administrative justice system. We have argued above that the MoJ's proposals are not only inadequate in replacing this function but that it is a logical impossibility for them to do so given the constitutional role of civil servants.

We fully expect that the devolved governments will take steps to fill the vacuum left by the abolition of our Scottish and Welsh committees. The AJTC's power to visit tribunals, and to witness their deliberations, is of real importance to an understanding of the system from a user's perspective, and an issue has already begun to arise as how the devolved governments might confer that power in respect of reserved tribunals. As we have already indicated in answer to Q1, we think MoJ's present proposals as to how it will maintain a proper understanding of UK-wide issues in administrative justice in the absence of the AJTC are unrealistic both in principle and in practice by reference to the resource that appears likely to be made available to the administrative justice policy function.

We have already expressed our disappointment that we were not consulted before the proposed abolition was announced. The impact analysis which accompanies the consultation paper considers only 2 options: retention of the AJTC in its present form or abolition. The government has given no indication that it is willing to consider other approaches to the handling of the AJTC's functions. An amendment to the Public Bodies Bill in the House of Lords created a legislative opportunity for the functions of the Civil Justice Council and the AJTC to be merged. The Government had indicated (on page 6 of the consultation paper) that it does not intend to bring forward any order in relation to the Civil Justice Council.

Against this background we see little point in proposing other options in this consultation response but we stand ready to work constructively with MoJ in the event that it wishes to actively consider alternatives following the consultation exercise.

Question 3: Do the proposals have any significant direct impact on you?

We agree that the direct impact of the abolition of the AJTC upon its members and the staff in its secretariat is broadly as set out on the impact assessment which was published alongside the consultation paper. We also note that the expertise in administrative justice developed by our members and staff over many years will disappear, with little prospect that it can be recovered, once government proposals are fully implemented.