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Scottish Government
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CONSULTATION SEEKING VIEWS ON PROPOSALS FOR THE CREATION OF A SCOTTISH CIVIL JUSTICE COUNCIL TO REPLACE THE EXISTING CIVIL RULES COUNCILS.

This is the response of the Scottish Committee (the Committee) of the Administrative Justice and Tribunals Council (the AJTC) to the Scottish Government consultation paper on the Creation of a Scottish Civil Justice Council, as published by the Scottish Ministers on 29 September 2011.

The detail responses of the Committee to the questions in the Consultation Paper are set out in the Annex to this letter. The Committee would wish however to make several comments in supplement of the detail points made in the Annex.

The need for a continuing and independent review function in the field of administrative justice - The AJTC was established in 2007. It has a statutory responsibility to keep the administrative justice system under review with the aim of making the system 'fair, accessible and efficient'¹, and this responsibility extends to its Scottish Committee.

"Administrative justice" refers not only to principles of justice, but also to the policy sectors or fields (e.g. health, immigration, social security) in which they are applied, and the organisational 'system' as a whole. Importantly, administrative justice is not limited to disputes between citizen and state but includes principles and ideas about fair treatment and transparency which are relevant in many areas of life where there are imbalances of power.²

Administrative justice is a huge, often neglected and little understood area of the overall justice system in the UK. The Tribunals, Courts and Enforcement (TCE) Act 2007 makes clear that original decisions made by public service bodies are the basis of the administrative justice system. The dimensions of the system have never properly been

¹ Tribunals, Courts and Enforcement Act 2007

² See *The Developing Administrative Justice Landscape* – AJTC – 2009.

scoped; we can however say that there is at the very least an equivalence between the number of tribunal cases lodged in Scottish tribunals annually and the number of civil court proceedings instituted annually before the Scottish courts³. What is beyond doubt however is that the range of issues which fall within the scope of the administrative justice system means that the system is likely to be the part of the overall justice system with which most citizens will have contact.

The AJTC, which is the statutory successor to the Council on Tribunals, has begun to make inroads into the array of tasks which arise, if, as it must, the system is to be kept under review. Thus, amongst other things, the Council has endeavoured to identify the landscape of the administrative justice system⁴, set out principles⁵, and put forward recommendations for better administration⁶.

The Council has also recently published a report – *Securing Fairness and Redress: Administrative Justice at Risk?* – in which it identifies the main challenges facing the administrative justice system and outlines the strategic agenda which, it believes, needs to be followed and acted on to reduce the risks and continue along the path to improvement.

The trigger for that report was the decision of the UK Government to seek the abolition of the AJTC in the Public Bodies Bill, currently before the UK Parliament. Both the AJTC and the Committee regret the proposal for abolition, expressing the view that the proposal to abolish the AJTC is misguided and should not be pursued. In its response to the consultation on the proposal for abolition, the AJTC listed the following as its principal reasons against abolition, namely

1. administrative justice is fundamentally important to citizens, yet, while it faces major challenges, it is not recognised by the UK Government as an aspect of justice to be given real priority;
2. the UK Government appears to accept the proposition that the functions currently assigned to the AJTC are valuable and should continue to be discharged;
3. however, 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 itself responsible for many aspects of administrative justice) and which is unlikely to be adequately resourced;
4. the abolition consultation paper considerably overstates the financial savings to be achieved by abolition;
5. even if the functions could be discharged by Government itself, as the Government implies, the timing of the proposed abolition is itself misguided;
6. 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.

Against all of this background – a largely ignored part of the justice system which is of immense importance to the citizen, coupled to a decision by the UK government to abolish

³ In 2008/09 there were some 143000 cases received in tribunals operating in Scotland (excluding asylum and immigration for which statistics are not in general available on a disaggregated basis for Scotland). In the same period there were some 3000 references received by the Scottish Public Services Ombudsman. By way of contrast there were, again in the same period, some 132000 cases initiated in the Scottish Civil Courts.

⁴ Fn 2 above.

⁵ *Principles for Administrative Justice* – Nov 2010.

⁶ *Right First Time* – June 2011.

the only structure capable of taking an integrated view of that part and of making coherent recommendations for its improvement – the Committee welcomes the proposal, in general terms, the proposal for establishing a Scottish Civil Justice Council, which at the least will provide a recognition of the importance of administrative justice within the overall context of the justice system in Scotland.

The Committee does however have several comments to make on how this opportunity may best be approached.

First – The Committee believes that the Council's policy review function should be the primary function. The Committee recognises the importance of ensuring reform of the civil justice system in Scotland, and within that the importance of ensuring that rules of court are properly harmonised. It recognises that a primary concern of government is to secure the implementation of the Gill reforms, and that, within that overall aim, ensuring a coherent approach across the piece is crucial. It further recognises that a Civil Justice Council would be able to bring the necessary overview for what may, at one level, essentially be a rule making issue.

However the Committee is concerned that the proposals appear to make the development of rules of court into the primary purpose of the Council, while the policy role of making recommendations for the improvement of the civil justice system would appear to be a subsidiary one. The Committee is concerned that a rule focussed approach would steer the Council to concentrate on what is described in the consultation as '*a largely technical role in considering specific changes to rules of court.*'⁷ The Committee welcomes the proposal that '*the new body should be designed to make the functioning of the civil justice system more naturally adaptive, taking into account regular feedback and fostering a culture of continuous improvement.*'⁸ For this to happen, that role must be given primacy; the secondary role of securing rule changes will follow automatically in any event.

Second – Scope of the policy review function. The Committee welcomes the references in para 31 to the possibility that '*the Council should consider how to make the civil justice system more accessible, fair and efficient, and to also consider broader issues of dispute resolution and avoidance, for example how best to develop mediation; and where appropriate, to make other recommendations for change*'. However those functions should be freestanding and not linked simply to the issue of rule making. The Committee believes that the Council should be the 'think tank' for the development of the civil justice system in Scotland

Third – Statement of functions for the Council. The Committee accordingly would not be content with the narrative of functions as currently set out at para 31 of the consultation. The Committee considers that the statement of functions of the AJTC as set out in the Tribunals Courts and Enforcement act 2007 provides a model for the policy review function for a Civil Justice Council. **The Committee would recommend** therefore that the structure of the proposal should in effect be reversed such the primary roles of the Council would be to

- (a) keep the civil justice system under review,
- (b) consider ways to make the system accessible, fair and efficient

⁷ para 19.

⁸ para 23.

- (c) advise Scottish Ministers on the development of the system,
- (d) refer proposals for changes in the system to Scottish Ministers, and
- (e) make proposals for research into the system.

The functions in relation to the making of rules at 31 would be secondary although no less important.

Fourth – The policy review function must include administrative justice. The Committee fully endorses the proposal that the Council have functions in relation to administrative justice and tribunals. It is concerned, however, that the proposal for inclusion of such functions would appear to arise simply in the context of the proposed abolition of AJTC. The Committee would prefer that proposals for inclusion of administrative justice within the area of responsibility of the Council should proceed on the basis of the proposition that inclusion of administrative justice is essential if the full breadth of the civil justice system is to be comprehended within the Council's remit. If administrative justice, which of course goes far beyond issues affecting tribunals, is not fully embedded within the civil justice system then the risk is that the opportunity for coherent development is lost or diminished. Administrative justice, including tribunals, at present occupies largely different structures and space to civil justice. We are concerned that administrative justice and tribunals might continue to be the Cinderellas of a broader civil justice system unless specific measures are adopted to protect and develop such critical areas. Thus **the Committee would recommend**

1. that the definition of civil justice should include a clear statement that it includes administrative justice and tribunals, and
2. the composition and structure of the Council must reflect the importance of the administrative justice function.

Fifth – The structure of the Council must reflect the importance of the administrative justice function. The Committee has noted the proposals so far as structure and membership of the Council are concerned, and has certain concerns. The Committee recognises that the breadth of the Council's responsibility will be significant. It agrees that it is bound to operate through sub committees and ad hoc groups, and that non members will be involved in those⁹. It also recognises that there are good reasons against over prescription of structure and that there are arguments for leaving it to the Council to work out what may be the best approach. However on this occasion it believes that some statutory prescription is necessary.

The Committee is concerned that an approach which left it to the Council to set its own structure would present certain risks, and that tribunals and administrative justice might easily remain the Cinderellas within the justice system. The consequence of that would be to squander the opportunity for development of integrated approaches to justice across the whole civil and administrative justice landscape which a Scottish Civil Justice Council might otherwise offer. We would prefer therefore that there should be some statutory prescription of the requirement for there to be an administrative justice committee from the outset. We understand that consideration may currently be being given in England and Wales to specific establishment of administrative justice and civil justice committees for the Civil Justice Council.

⁹ para 44.

Sixth – The composition of the Council must reflect the importance of the administrative justice function. The Committee welcomes the proposal that membership of the Council includes persons with experience of tribunals, consumer affairs and lay advice sector. It also welcomes the inclusion of persons able to represent the interests of particular kinds of litigants; it would hope that such litigants would not be limited to employees and business sector as suggested in the proposal, but might include those affected by decisions in relation to administrative decisions of government at all levels. The Committee has noted that the proposed composition of the Council closely follows the composition of the Civil Justice Council as set out in s6 of the Civil Procedure Act 1997. Of course the CJC does not at present have responsibility for matters of administrative justice, although we understand that that may be under review at present, and therefore the composition set out in s may be taken as relevant to civil justice as opposed to administrative justice. In those circumstances we would suggest that some specific recognition of the administrative justice dimension would be appropriate in the composition of the proposed Scottish Council.

The Committee would further hope that within the overall limit of 15 members as recommended¹⁰ the number of legal professionals including judges would not provide a majority.

Seventh – The need for a continuing UK perspective - The final point which we would wish to make concerns the effect of abolition of the AJTC on the UK perspective on administrative justice. It is not the function of this response to argue for the continuation of the AJTC. However it is necessary to be clear as to the consequences of abolition of the Council in particular in relation to the effects that that will have on the ability to have a UK perspective on administrative justice issues. In its response to the consultation on abolition, the AJTC pointed out that the proposed abolition does not take adequate account of the UK dimension of administrative justice.

Is a UK perspective important? A significant proportion of tribunal proceedings in Scotland concern adjudication over reserved matters; that is to say that the systems and codes which are adjudicated on are, and will continue to be the responsibility of the UK Government. Similarly the decision making processes giving rise to disputes in Scotland within the administrative justice area are in many cases the decisions of bodies which are part of or responsible to the UK Government. With the abolition of the AJTC there will no longer be an independent body able to monitor their activities, and therefore control is effectively diluted.

The Scottish Parliament and Government may well be restricted as to the extent to which they can address the problem. But the Committee feels it is important that this consequence of abolition of the AJTC is at the least understood so that consideration may be given to other means by which this important function can be discharged

Conclusion

In general terms the Committee welcomes the proposal for the establishment of a Scottish Civil Justice Council. Such a Council will contribute to the creation of a more integrated civil justice system in Scotland which can only be to the benefit of those who find themselves as users of the dispute resolution services of the state. The Committee considers that the

¹⁰ para 38.

proposals represent an important opportunity for modernisation of the civil justice system and would hope that the Council would be created in such a way as to encourage radical thinking and development. The Committee would be very happy to contribute further to the debate on the development of policy on this and related matters.

Yours sincerely,

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Chair SCAJTC

ANNEX B – CONSULTATION QUESTIONNAIRE

Q1. Do you agree or disagree that there should be a Scottish Civil Justice Council?

Agree

The Scottish Committee of the AJTC is charged with statutory functions including those related to monitoring and keeping under review both tribunals in Scotland and the administrative justice system in Scotland.

The Committee agrees with the views expressed by Scottish Government that the scale of the Scottish jurisdiction and the need for a co-ordinated package of major reforms argue for a single body, responsible both for the strategic overview of civil justice and for taking forward necessary technical changes.

The Committee also agrees that such a body should be designed to make the functioning of the civil justice system more naturally adaptive, taking into account regular feedback and fostering a culture of continuous improvement

Q2. Do you agree or disagree with the proposed functions of the Council, including that it should have a policy remit? If you disagree, please give reasons for your answer.

Agreed, although with some qualification on the issue of which is the principal function.

The Scottish Committee agrees with the analysis in the consultation paper arguing for a single body responsible for both strategic overview as well as taking forward other necessary technical changes.

The Committee also welcomes the proposal that the new body should be designed to make the functioning of the civil justice system more naturally adaptive. The Committee believes that a strategic overview covering the entire civil justice landscape including the administrative justice sector is more likely to be able to deliver that adaptive approach and thereby will contribute to access to justice in general. The Committee believes that the principal function of the Council should be in relation to that function, and that functions in relation to rule making and securing technical changes should be secondary.

Q3. Should the Council be able to make recommendations in relation to administrative justice and tribunals? Please give reasons for your answer.

Yes

While the Committee would argue that administrative justice, including tribunals, at present occupies largely different structures and space to civil justice; it nevertheless agrees that there are and should be close links between civil justice and administrative justice. The AJTC, of which the Committee is a part, currently has functions in relation to administrative justice and tribunals as noted in the paper at paragraph 24.

Administrative justice is of critical importance to citizens, but it is in general terms regularly underestimated in terms both of scale and in terms of its potentially life changing importance.

In terms of scale it may be instructive to note that in 2008/09 there were some 143000 cases received in tribunals operating in Scotland (excluding asylum and immigration for which statistics are not in general available on a disaggregated basis for Scotland). In the same period there were some 3000 references received by the Scottish Public Services Ombudsman. By way of contrast there were, again in the same period, some 132000 cases initiated in the Scottish Civil Courts.

In terms of importance to citizens it is appropriate to point out that cases before tribunals may regularly deal with matters of life, liberty, health and financial security.

There are no clear criteria dictating why certain issues are justifiable before tribunals while others are matters for the ordinary courts. The civil justice system when looked at as including administrative justice has not developed according to a logical or even necessarily sensible pattern. The landscape of administrative justice is not straightforward. It comprises not only tribunals but also for example ombudsmen and complaints systems. An integrated view requires to be taken in building the system. Separating administrative justice out from civil justice would mean that the overall civil justice system would not be developed coherently in future. Therefore a Civil Justice Council must have functions in relation to administrative justice. The Committee, being clear that the Council must have functions in relation to administrative justice and tribunals, is equally clear that the structure and membership of the Council must be such that it can discharge such functions effectively.

The Committee believes that the Council should comprise a civil justice committee and an administrative justice committee, for which specific provision should be made in primary legislation.

Q4. Do you consider that the Council should have the ability to make rules of court? If so, what process should be adopted for making them? Please give as much detail as possible

Yes, but as a secondary function. The Committee would envisage a Rules Committee being established with appropriate sub committees to deal with tribunal rules and court rules.

Q5. Do you agree or disagree that the overall responsibility for the Council should lie with the Lord President rather than Scottish Ministers?

Agree. It is inappropriate that a body designed to provide independent advice on matters related to the judiciary and the operation of the justice system should be responsible to the Executive. So far as administrative justice is concerned it is also relevant to reflect that administrative justice is *par excellence* concerned with matters which involve disputes between the citizen and the State, and in those circumstances it is clearly inappropriate that Ministers of the State should effectively have control over the body charged with monitoring the performance of the State.

The Council should have functions enabling it to provide advice to Scottish Ministers, but it should be responsible to the Lord President and obliged to account to the Scottish Parliament.

Q6. Do you agree or disagree that the Council should be able to make recommendations to the Scottish Ministers as well as the Lord President?

Agree

The Committee agrees with the proposal at paragraph 32 of the consultation paper. If the Council is to discharge a function of providing advice on matters of policy then it will be essential that it should have the power to provide that advice to Ministers. Ministers have responsibility for determining the appropriate policy for achieving necessary change and have responsibility in general terms for the promotion of primary legislation and the expenditure of public funds.

Q7. Do you consider that the role and functions of the Council should be conferred upon any other body or bodies instead? If so, which? Please give reasons for your answer.

No

The Committee's principal interest in this matter arises in relation to the question of whether in the absence of the AJTC there will be any body with statutory

responsibility for continuing, independent review of tribunals and administrative justice in Scotland.

In the event that the AJTC were not to be abolished then the Committee would still consider it appropriate, for the reasons set out in answer to Q3 above, that the proposed Council has functions in relation to administrative justice and tribunals in Scotland. It would in such an eventuality be a matter for discussion how the Council and the AJTC might liaise; however given that responsibility for substantial sections of the administrative justice landscape will continue to be reserved to the UK Government and Parliament it would make sense for any arrangement affecting the new Council to be structured in such a way as to enable the closest possible cross border links within the UK.

The Committee does not consider that the Scottish Law Commission would be an appropriate body on which to confer functions in relation to the monitoring and keeping under review of the administrative justice system and tribunals in Scotland. A body charged with such functions requires to draw its membership to enable the interests of users of the system, as opposed to practitioners within the system, to be at the forefront of consideration.

Q8. Do you consider that the proposed membership is appropriate? If not, what alternative would you suggest?

Yes, but with some modifications. The Committee has no significant difficulty with the membership as proposed, so far as that goes. We believe that the membership proposed in fact reflects a Civil Justice Council as opposed to a Council with responsibility for administrative justice as a major function within civil justice.

While we welcome the requirement that members must include those with experience of tribunals, consumer affairs and the lay advice sector, we have noted that the proposed composition of the Council closely follows the composition of the Civil Justice Council as set out in s 6 of the Civil Procedure Act 1997. That composition will have been designed to discharge the functions of the Council. Of course the CJC does not at present have responsibility for matters of administrative justice, although we understand that that may be under review at present.

It is also fair to say then that the membership proposed for the Council is apt to address matters of civil justice, excluding administrative justice. Therefore it is also fair to say that the membership proposed will have to be revisited if the Council is to have responsibilities in relation to administrative justice matters.

We would suggest that some specific recognition of the administrative justice dimension would be appropriate in the composition of the proposed Council. Assuming that our proposal for a structure including civil justice and administrative justice committees - answer 3 above - were adopted then we believe that membership of the Council should reflect the administrative justice discipline in something approaching parity with the civil justice discipline.

The Committee welcomes the proposal for co-optation at para 38.

Q9. Should any other person / category of person be included in the membership? Please give reasons.

Yes See answer to Q8.

Q10. Do you agree or disagree that the Lord President and Scottish Ministers should be able to appoint other members to the Council as they see fit? If not, why not?

Agree See answer to Q8.

Q11. Do you consider that members should receive expenses only, or should members be paid?

The Committee has no preference.

We recognise that the current Rules Councils are unpaid appointments. However the Committee believes that the nature of the remit of the Council may point towards a more intrusive commitment on members than might have applied so far as the Rules Councils are concerned, and that a paid appointment system might therefore be appropriate.

Equally we also recognise that in current economic circumstances there may be public policy arguments for such appointments to be expenses only.

However the Committee also feels that payment of expenses only might restrict the constituency from which members might be drawn, especially in the administrative justice sector, and that, given probable limitations on the scale of secretariat, and the consequent requirement for greater input from members, the argument for a paid appointment might be preferred.

Q12. Do you agree or disagree that there should be a general requirement for the Council to consult and work with other groups and bodies with an interest in the civil justice system?

Agree. It is difficult to see how the Council could possibly work if it were unable, or unwilling, to consult or work with other groups with an interest in the civil justice system.

Q13. Do you agree or disagree that the requirements for the provision of an annual report are appropriate?

Agree

The Committee believes that accountability lies at the heart of good administration, and that it is essential that the Council be publicly accountable for its activities. It is appropriate therefore that the Council report annually to the Lord President and that a copy of its Annual Report is laid before the Scottish Parliament.

Q14. Do you consider that any additional or alternative reporting arrangements would be appropriate? Please give reasons for your answer.

Yes

The Committee believes that the Council should in addition be required to present a copy of its Annual Report to the Scottish Ministers.

Q15. Do you agree or disagree that the Scottish Ministers and the Lord President should be able to direct the Council to consider and advise upon any matter falling within its general remit?

Agree

The Committee believes that if the work of the Council is to extend to areas of policy then that will inform its composition and its work programme. While it will be essential that the Council have the independence to determine its own programme it would be counter intuitive to suggest that it alone had a monopoly of wisdom in that determination. Both Ministers and the Lord President have functions for the discharge of which the Council's advice could be highly relevant.

Q16. Do you have any other comments on the proposals outlined in this paper?

Yes

The Committee believes that the establishment of a Council as proposed which brings together responsibilities in relation to both administrative justice and civil justice as currently defined would represent a significant opportunity for development of a holistic approach to civil justice in Scotland.

The Committee recognises that there will be considerable challenges to be faced by a Council established, as it will be, during a period of severe financial constraints.

However the Committee believes that maintaining a distance between civil justice as currently defined and administrative justice, as would be the case if the Council did not take on responsibility for administrative justice, would perpetuate a chaotic approach to the development of the Scottish legal system resulting in difficulties for citizens in achieving access to justice as should be their right.