

22 December 2011

**Administrative Decisions made by Public Bodies in Scotland where there is no Right of Appeal against the Decision or where the Right of Appeal is Inaccessible or Inappropriate.**

The Administrative Justice and Tribunals Council (AJTC) has a statutory responsibility to keep the administrative justice system under review with the aim of making it *'fair, accessible and efficient'* and this responsibility extends to its Scottish Committee (SCAJTC). In drawing up a work plan for 2011, the SCAJTC considered a number of issues which were raised in its recent report *Tribunal Reform in Scotland: A Vision for the Future* and which members felt merited further consideration. One such issue was administrative decisions made by public bodies in Scotland that affect the rights of individuals against and which there is currently no right of appeal for. Members considered the topic to be of paramount importance to the future of administrative justice in Scotland and are now undertaking a project which will lead to the provision of guidance to Scottish Government regarding the issue.

As part of the project the SCAJTC has prepared a consultation paper which we would like to use to canvass your views regarding the modes of redress which the Committee regards could be introduced to allow those who cannot currently challenge an administrative decision to do so. The topics for consideration are set out in the form of a questionnaire attached as Annex A with this letter and instructions on how to respond at Annex B.

Can I say in advance that we very much appreciate your help with this matter, and that we look forward to hearing from you. Ideally we would like to receive responses by not later than 31 January 2012.

Richard M Henderson  
Chair

**Administrative Decisions made by Public Bodies in Scotland where there is no Right of Appeal against the Decision or where the Right of Appeal is Inaccessible or Inappropriate.**

**A Consultation Exercise**

**Background**

A recent investigation by the Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC) has identified a number of policy areas where there is no right of appeal against an administrative decision of a public body or where the right of appeal is inaccessible or inappropriate. This investigation has been written up as a discussion paper, a copy of which is attached.

The discussion paper identifies four policy areas (community care, higher education, housing and legal aid) where there are no independent, external appeal procedures, apart from judicial review, which can be used by individuals who are dissatisfied with the outcome of a decision made by a public official. Thus it is extremely difficult for someone to challenge a community care decision, a decision about a student's tuition fee status or the assessment of financial support, a large number of housing decisions, or a decision about entitlement to Legal Advice and Assistance or to Civil and Criminal Legal Aid. It also identifies a fifth policy area (planning), where procedures for challenging local planning decisions do exist but do not appear to be functioning satisfactorily. Although Local Review Committees, which are committees of the (local) Planning Authority, are quite easy to access, they are not really independent and do not appear to give more than perfunctory attention to the appellant's case. Thus, they fail the test of appropriateness. These findings are summarised in the table below.

Policy area	Do external procedures for challenging administrative decisions exist?	Are these procedures accessible	Are these procedures appropriate
Community care	no	–	–
Higher education	no	–	–
Housing	no	–	–
Legal aid	no	–	–
Planning	yes	yes	no

Rather than itself considering whether procedures for challenging adverse decisions should be introduced in those policy areas where none currently exist or where the existing procedures are inaccessible or inappropriate, SCAJTC is conducting a consultation exercise with key stakeholders in each of these areas. Stakeholders will be asked:

- a. whether they regard the existing position as satisfactory;
- b. if not, whether they think something should be done to remedy the situation;
- c. whether, on the other hand, they think that public interest considerations indicate that nothing should be done;
- d. if they think something should be done, which of the alternatives set out in Para 50 above they would favour.

## **The SCAJTC'S Position**

The SCAJTC believes that, unless there are compelling reasons to the contrary, citizens should have the right to appeal against administrative decisions, and that the onus should be on government to rebut that right where it considers that it is not in the public interest to assert it.

## **Principles**

In deciding on the form that this right should take, the SCAJTC believes that there are a number of important principles that should be borne in mind and used to judge the appropriateness of any procedures for enabling someone to challenge an administrative decision that may be introduced. The SCAJTC believes that any new procedures should:

- be quick and easy for members of the public to access;
- enable those who used them to put their case;
- be proportionate to what is at issue;
- be independent from the initial decision maker;
- be able to consider errors of fact and the incorrect or inappropriate exercise of discretion as well as errors of law;
- provide 'feedback' to initial decision makers in order to improve standards of administrative decision-making.

## **Policy Options**

There would appear to be four ways in which someone who cannot currently challenge an administrative decision could be enabled to do so. This could be achieved by:

- a. establishing a right of appeal to a court, presumably, in such cases, to the sheriff court either to an existing court such as the small claims court or the heritable property court, or to a newly-constituted court;
- b. establishing a right of appeal to a tribunal, either to an existing tribunal or to a newly-constituted tribunal within the Scottish Tribunals Service;
- c. establishing a right to an independent review of the decision, like the independent reviews of discretionary Social Fund decisions that are undertaken by the Independent Review Service (IRS).
- d. expanding the jurisdiction of the SPSO to enable it to investigate the correctness of all decisions.

Your participation in this consultation exercise is requested and will be very helpful in shaping the response of the Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC) and the advice that it will give to the Scottish Government {and the Scottish Parliament}. The respondent information form and questionnaire are included at the end of this document and can be completed electronically or by hand before returning by the most appropriate method.

## CONSULTATION QUESTIONS

(Please delete 'yes' or 'no' as required)

1. Do you agree that that, unless there are compelling reasons to the contrary, citizens should have the right to appeal against administrative decisions, and that the onus should be on government to rebut that right where it considers that it is not in the public interest to assert it.	yes	no
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2. Which of the following policy areas do you have experience of? <i>Please delete 'yes' or 'no'.</i>		
Community care	yes – go to question 3	no
Higher education	yes – go to question 4	no
Housing	yes – go to question 5	no
Legal aid	yes – go to question 6	no
Planning	yes – go to question 7	no

3. COMMUNITY CARE (for details see <i>Discussion Paper</i> , Chapter 4).		
3.1. Do you regard the existing position, in which there is no right of appeal against an adverse community care assessment or decision, as satisfactory?	yes	no
3.2. (Please only respond if you answered 'no' to 3.1). Do you think something should be done to remedy the situation?	yes	no
3.3. (Please only respond if you answered 'yes' to 3.1). Do you think that public interest considerations indicate that nothing should be done about the situation?	yes	no
3.4. Would you favour any of the following?		
• establishing a right of appeal against an adverse community care assessment or decision to a court	yes	no
• establishing a right of appeal against an adverse against an adverse community care assessment or decision to a tribunal	yes	no
• establishing a right to an independent review of an adverse against an adverse community care assessment or decision,	yes	no
• expanding the jurisdiction of the SPSO to enable it to investigate the correctness of an adverse against an adverse community care assessment or decision	yes	no

<ul style="list-style-type: none"> <li>• some other way of challenging adverse against an adverse community care assessment or decisions. <i>(Please specify)</i></li> </ul>	yes	no
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4. HIGHER EDUCATION (for details see <i>Discussion Paper</i> , Chapter 4)..		
4.1. Do you regard the existing position, in which there is no right of appeal against the determination of tuition-fee status or financial support for students, as satisfactory? .	yes	no
4.2. (Only respond if you answered 'no' to 4.1). Do you think something should be done to remedy the situation? .	yes	no
4.3. (Only respond if you answered 'yes' to 4.1). Do you think that public interest considerations indicate that nothing should be done about the situation? .	yes	no
4.4. Would you favour any of the following?.		
<ul style="list-style-type: none"> <li>• establishing a right of appeal against an adverse determination of tuition-fee status or financial support for student to a court</li> </ul>	yes	no
<ul style="list-style-type: none"> <li>• establishing a right of appeal against an adverse determination of tuition-fee status or financial support for student to a tribunal</li> </ul>	yes	no
<ul style="list-style-type: none"> <li>• establishing a right to an independent review of an adverse determination of tuition-fee status or financial support for studentn,</li> </ul>	yes	no
<ul style="list-style-type: none"> <li>• expanding the jurisdiction of the SPSO to enable it to investigate the correctness of an adverse determination of tuition-fee status or financial support for student</li> </ul>	yes	no
<ul style="list-style-type: none"> <li>• some other way of challenging adverse determination of tuition-fee status or financial support for student. <i>(Please specify.)</i></li> </ul>	yes	no

5. HOUSING (for details see <i>Discussion Paper</i> , Chapter 4).		
5.1. Do you regard the existing position, in which there is no right of appeal against a number of housing decisions, as satisfactory? .	yes	no
5.2. (Please only respond if you answered 'no' to 5.1). Do you think something should be done to remedy the situation?	yes	no
5.3. (Please only respond if you answered 'yes' to 5.1). Do you think that public interest considerations indicate that nothing should be done about the situation? .	yes	no
5.4. Would you favour any of the following? .		
• establishing a right of appeal against an adverse housing decision to a court	yes	no
• establishing a right of appeal against an adverse housing decision to a tribunal	yes	no
• establishing a right to an independent review of an adverse housing decision,	yes	no
• expanding the jurisdiction of the SPSO to enable it to investigate the correctness of an adverse housing decision	yes	no
• some other way of challenging adverse housing decisions. ( <i>Please specify.</i> )	yes	no

6. LEGAL AID (for details see <i>Discussion Paper</i> , Chapter 4).		
6.1. Do you regard the existing position, in which there is no right of appeal against decisions of the Scottish Legal Aid Board, as satisfactory? .	yes	no
6.2. (Please only respond if you answered 'no' to 6.1). Do you think something should be done to remedy the situation?	yes	no
6.3. (Please only respond if you answered 'yes' to 6.1). Do you think that public interest considerations indicate that nothing should be done about the situation? .	yes	no

6.4. Would you favour any of the following?		
• establishing a right of appeal against an adverse legal aid decision to a court	yes	no
• establishing a right of appeal against an adverse legal aid decision to a new tribunal	yes	no
• establishing a right to an independent review of an adverse legal aid decision,	yes	no
• expanding the jurisdiction of the SPSO to enable it to investigate the correctness of an adverse legal aid decision	yes	no
• some other way of challenging adverse decisions. ( <i>Please specify.</i> )	yes	no

7. PLANNING (for details see <i>Discussion Paper</i> , Chapter 4).		
7.1. Do you regard the existing position, in which appeals against local planning decisions are decided by Local Review Boards, as satisfactory?	yes	no
7.2. (Please only respond if you answered 'no' to 7.1). Do you think something should be done to remedy the situation?	yes	no
7.3. (Please only respond if you answered 'yes' to 7.1). Do you think that, in the interests of local democratic accountability, nothing should be done about the situation?	yes	no
7.4. Would you favour any of the following?		
• establishing a right of appeal against an adverse planning decision to a court	yes	no
• establishing a right of appeal against an adverse planning decision to an independent tribunal	yes	no
• establishing a right to an independent review of an adverse planning decision,	yes	no
• expanding the jurisdiction of the SPSO to enable it to investigate the correctness of an adverse planning decision	yes	no

<ul style="list-style-type: none"><li>• some other way of challenging adverse planning decisions. (<i>Please specify</i>).</li></ul>	yes	no
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Thank you very much for taking the time to give us your views. Please indicate in the box below if you would like to receive a copy of our final report, which will be based on the results of this Consultation Exercise.

I would like to receive a copy of SCAJTC's final report.	yes	no
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# ADMINISTRATIVE DECISIONS MADE BY PUBLIC BODIES IN SCOTLAND

## Responding to this consultation paper

We are inviting written responses to this consultation paper by 31 January 2012. **Please send your response with the completed Respondent Information Form** (see "Handling your Response" below) to:

[debbie.davidson@ajtc.gsi.gov.uk](mailto:debbie.davidson@ajtc.gsi.gov.uk)

or

Debbie Davidson  
Secretary  
SCAJTC  
George House  
126 George Street  
Edinburgh  
EH2 4HH

If you have any queries contact Debbie Davidson on 0131 271 4302.

We would be grateful if you could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

The consultation paper can be viewed online on the Scottish Committee page of the Administrative Justice and Tribunals Council (AJTC) website at [www.justice.gov.uk/ajtc/scottish/scottish.htm](http://www.justice.gov.uk/ajtc/scottish/scottish.htm)

## Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public on the Scottish Committee page of the AJTC website. Please complete and return the **Respondent Information Form** attached to this letter as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the AJTC and its Scottish Committee are subject to the provisions of the Freedom of Information Act 2000 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public on the Scottish Committee page of the AJTC website by 20 October 2010. You can make arrangements to view paper copies of the responses by contacting the Secretary to the Scottish Committee on 0131 271 4302. Responses can be copied and sent to you, but a charge may be made for this service.

## What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us develop advice to Scottish Government regarding the administrative decisions made by public bodies in Scotland that affect the rights of individuals against which there

is currently no right of appeal. We aim to submit this advice to the Scottish Government by 31 March 2012.

### **Comments and complaints**

If you have any comments about how this consultation exercise has been conducted, please send them to the Secretary to the Scottish Committee:

Debbie Davidson  
Secretary  
SCAJTC  
George House  
126 George Street  
Edinburgh  
EH2 4HH

E-mail: [debbie.davidson@ajtc.gsi.gov.uk](mailto:debbie.davidson@ajtc.gsi.gov.uk)

### **Richard M Henderson**

Chairman  
Scottish Committee of the Administrative Justice and Tribunals Council

# RESPONDENT INFORMATION FORM

**Please Note: This form MUST be returned with your response to ensure that we handle your response appropriately**

## 1. Name/Organisation

Organisation name

Title: Mr  Mrs  Ms  Miss  Dr.  Lord  Please tick as appropriate

Surname

Forename

## 2. Postal Address

Postcode

Phone

Email

## 3. Permissions

I am responding as ...

Individual

Please tick as appropriate

Group/Organisation

Do you agree to your response being made available to the public on the Scottish Committee page of the AJTC website?

Please tick as appropriate Yes  No

Where confidentiality is not requested,

we will make your responses available to the public on the following basis

Please tick **ONE** of the following boxes

Yes, make my response, name and address all available

Yes, make my response available, but not my name and address

Yes, make my response and name available, but not my address

The name and address of your organisation **will be** made available to the public on the Scottish Committee page of the AJTC website.

Are you content for your **response** to be made available?

Please tick as appropriate Yes

No

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DATE RECEIVED

2012