

Constitution, Law & Courts Directorate
Scottish Government
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28 May 2009

I refer to your letter of the 11th December 2008, and our interim response of the 14th January 2008, regarding his specific requests in respect of the options suggested in *Options for the Future Administration and Supervision of Tribunals in Scotland* produced by the Administrative Justice Advisory Group under the Chairmanship of Lord Philip.

With the benefit of opinion from the seminar that the Scottish Committee held in January into the content and implications of that Report, from subsequent soundings from stakeholders and others, and from our extensive experience, we are now able to provide our response as set out in the accompanying document.

Our principal recommendation is that Option 5 produces the optimal answer for the reform of Tribunals and we give our reasons for doing so. However, we also draw your attention to the many issues that would have to be addressed if its implementation were sought and suggest that an incremental approach be adopted against a strategy for reform.

The Scottish Committee hope that you find this response to be satisfactory in dealing with the concerns presented to us. If there are matters upon which you would like clarification we will be very happy to assist. We believe the promotion of tribunal reform in Scotland to be an important priority in delivering modern administrative justice and we look forward to being consulted on any proposals which may now be coming forward to that end.

Kind Regards

Alistair MacLeary
Chair

Observations by the Scottish Committee of the Administrative Justice and Tribunals Council in relation to the Report by Administrative Justice Steering Group entitled Options for the Future Administration and Supervision of Tribunals in Scotland

Purpose and Remit

1. This paper sets out the response of the Scottish Committee of the Administrative Justice and Tribunals Council to a request from Scottish Ministers dated 11 December 2008 for advice in relation to the Options as set out in Chapter 4 of the Report by the Administrative Justice Steering Group entitled “Options for the Future Administration and Supervision of Tribunals in Scotland” published on 8 December 2008 (the Report).
2. In particular Scottish Ministers wish to have the views of the Committee on
 - the merits of the options referred to
 - the advantages and disadvantages of each option
 - any obstacles we would foresee in taking each of the options forward
 - any other points or suggestions we would like to make in relation to the future structure of tribunals in Scotland

Structure of response

3. In this response we address:
 - a) The Background including in particular
 - i) the reference from Scottish Ministers
 - ii) the Leggatt Report
 - iii) relevant developments since Leggatt
 - b) The scope of tribunals in Scotland, including
 - i) the definition engaged by the Committee for the purposes of this response
 - ii) identification of GB wide tribunals in Scotland
 - iii) identification of Scottish tribunals existing before 1998
 - iv) identification of Devolved Scottish tribunals
 - c) Issues in connection with a Scottish Tribunals Service
 - d) Issues arising in connection with the appeals function
 - e) Assessment of the Options
 - f) General conclusion
 - g) Comments on the future role of the Scottish Committee

The Background

The reference from Scottish Ministers

4. The Report sets out the current arrangements for tribunals in Scotland, concerns about the current system, and posits 5 possible options for the future. Those options are
 - retain the status quo
 - put mechanisms in place to ensure better integration and co-operation between the UK Tribunals Service and wholly Scottish tribunals

- bring all Scottish Tribunals within the remit of the existing UK Tribunals Service
 - establish a new Scottish Tribunals Service to support all Scottish tribunals
 - establish a new Scottish Tribunals Service to support both GB tribunals within Scotland and all Scottish tribunals.
5. Scottish Ministers in their letter to us dated 11 December 2008 noted that they did not consider either Option 1 or Option 3 to be appropriate. We shall therefore restrict our comments to Options 2, 4 and 5.
6. In presenting our responses in this paper we highlight the background against which we base our views including our particular concerns about the current arrangements, assess the implications of each of the options in turn, and address the particular points referred to in para 2 above.

The Leggatt Report

7. Reforms at a UK level including the establishment of the UK Tribunals Service owe their parentage to the Leggatt Report¹. While that report principally impacts on England and Wales we agree that the approach whereby the Report assesses each of the options against the Leggatt principles is just as applicable to Scotland. The Report summarises these principles as:
- independent and impartial processes
 - an independent and skilled judiciary
 - a coherent system
8. We consider that Leggatt's recommendation that there should be "a more user friendly system" is equally important.
9. In 2002 the Council on Tribunals (as it then was) published its Framework of Standards² with the aim of providing advice to and promoting good practice within tribunals. The standards were that tribunals should:
- be independent and provide open, fair and impartial hearings
 - be accessible to users and focus on the needs of users
 - offer cost effective procedures and be properly resourced and organised.
10. Those standards overlap to an extent with the principles listed in para. 7. They differ in emphasis, however, in that they focus more on the user's perspective.
11. The Council published its Guide to Drafting Tribunal Rules in 2003³ in which they demonstrated how the above standards could be put into effect in the drawing up of procedural rules.

Developments since Leggatt.

12. The White Paper "Transforming Public Service: Complaints, Redress and Tribunals" (July 2004) looked at the whole end to end process for administrative justice being of the view that tribunal reform could not nor should not stand alone.
13. It focused on its "assumption that potential users will want and are entitled to the following:

¹ Tribunals for Users – One System, One Service ; March 2001

² Framework of Standards for Tribunals; 2002

³ Guide to Drafting Tribunal Rules; November 2003

- manifest independence of the new system from those whose decisions are being reviewed;
 - appropriate waiting times :that is that cases are dealt with at the right speed;
 - cases resolved without formal hearings if possible;
 - when hearings are necessary accessible hearing centres with modern facilities;
 - easily navigable, comprehensive and comprehensible information about the process;
 - hearings which are not daunting or legalistic;
 - independent and skilled judiciary;
 - authoritative, consistent and comprehensive decisions which command respect of those affected; and
 - a cost effective service that provides good value to the taxpayer⁴
14. It is clear that these entitlements echo the principles and standards already mentioned. In our response to the Report we take all of them and their application into account when focusing first and foremost on the needs of users.
15. The White Paper concluded that the best way forward was to establish a single system, the Tribunals Service, which would be able to bring about the desired radical change.
16. The Leggatt Report made it clear that the Council on Tribunals should have a key role in the proposed setting up of the Tribunals Service and indeed we have been heavily involved throughout the recent changes.
17. In the Council on Tribunals' 2005/2006 Annual Report we noted that we have "consistently and strongly supported" the move (to set up the Tribunals Service). "It is" we said then "a major step forward in reinforcing those qualities of openness, fairness and impartiality which Franks set as the benchmarks nearly 50 years ago." ⁵ In addition we welcomed the transfer of tribunals from their sponsoring departments to the then DCA as part of the formation of the Tribunals Service. We saw this as "a significant advance for the independence of tribunals" which "provides the opportunity for a number of benefits to be realised for tribunal users"⁶
18. The AJTC, including this Committee, has been well placed to observe the process of establishing the Tribunals Service. Our remit as "a critical friend" includes representation at Council level on the steering boards which were set up to oversee the transfer of particular tribunals to the Tribunals Service, the Tribunal Service Management Board and the Tribunal Presidents Group.
19. Through our visits programme to tribunal hearings, training events and user groups we have been able to observe on the one hand the effects of membership on those tribunals, including those in Scotland, which have joined the Service. On the other, we have observed the impact of the arrival of the Tribunals Service on those tribunals which have not joined.
20. The Tribunals, Courts and Enforcement Act (2007) (the 2007 Act) introduced radical reforms to create a truly unified tribunals system with the move from individual jurisdictions to a new two-tier system, the First –tier Tribunal and the

⁴ Transforming Public Services: Complaints, Redress and Tribunals. (2004) Para 5.1

⁵ Council on Tribunals Annual Report 2005/2006; Chairman's preface

⁶ Ibid para5

Upper Tribunal, which are divided into chambers of similar or related subject matter. While the Employment Tribunals, the Employment Appeal Tribunal and the Asylum and Immigration Tribunal are not incorporated into the chamber arrangement they are supported administratively by the Tribunals Service as separate pillars. The Act established the independence of the judiciary and the post of Senior President of Tribunals.

21. The Council welcomed and continue to welcome these moves. We have been involved in the implementation at several levels and in particular with the production of new rules of procedure for the individual chambers through our membership of the Tribunal Procedure Committee.
22. The 2007 Act also established the AJTC and its Scottish and Welsh Committees and endowed the new body with the much wider remit of administrative justice. That enhanced remit gives us the opportunity to place the tribunal world in a wider context.
23. We are thus in a unique position to provide a positive input to future deliberations about developments of tribunals in Scotland.

The Scope of Tribunals in Scotland

Definition

24. In examining the options set out in the Report it is important to have a clear picture of the scope of the proposals in terms of the number and size of tribunals which are affected.
25. For our present purpose, we have adopted a wide concept of tribunals to include any process by which an individual may challenge a decision in a specialised forum as opposed to a court. Tribunals are, in the main, creatures of statute and their powers are limited by primary and secondary legislation. They vary widely in their procedures from informal to legalistic.
26. We list those which could come under our definition of tribunal and which have jurisdiction in Scotland along with the size of their workload in Scotland. We then indicate which of them we consider to be Scottish tribunals. As a starting point we follow groupings⁷ used by the Report in identifying those tribunals it considered. We have expanded those groupings for the following reasons.
27. We do not consider the listings set out in the Report to be comprehensive. We have consequently added a number of tribunals which have not previously been mentioned and which we consider relevant on the basis that as many tribunals as possible which sit in Scotland irrespective of their provenance should be included when discussing the options. To do otherwise would be blindly to continue ad hoc differences which have arisen for purely historical reasons.
28. The regulatory and professional disciplinary aspect of the tribunal landscape is complex. While such tribunals are encompassed in our definition above they do not receive as much attention as many of the others under discussion. They are mainly concerned with exercising licensing or disciplinary functions. Some are accountable to central or local government while others are not. Some are

⁷ Appendices 2, 3 and 4

regulated by or under statute while many others rely on contractual obligations in governing the behaviour of their membership. Some are under AJTC oversight while many are not. We have included in our preliminary discussion below a number of such bodies (though not all) particularly where it could be said that their cases involve the public interest and that it is essential for them to be seen as independent.

29. The exercise of enquiring into the scope of tribunals operating in Scotland provides us with at least 48 bodies which we list in Annex A. As can be seen, taken together, they cover a very wide range of subject matter.
30. In addition we have attempted to give an indication of the volume of work for each tribunal mainly, but not exclusively, by using the figures in our 2007/2008 Annual Report⁸. Where these are not available we have been provided with figures from as many tribunals as possible. We have used as our comparator what we have for convenience called “referrals”. This covers the cases received by the system or cases decided where that would give a more accurate picture. The figures can only provide a broad brush picture. The lack of consistency in statistical data prevents anything more definitive.
31. Unfortunately the picture is not as complete nor as accurate as we would like. Published data do not always provide separate Scottish figures for GB tribunals. In addition obtaining comparative statistics for tribunals not under our oversight has proved difficult and therefore should be taken as approximations only. Access to comparable statistics is essential to any informed decision as to the structure of tribunals in Scotland. We are of the view that there should be a much more reliable and systematic collection of such figures in the future.
32. Given these reservations we set out below a categorisation of tribunals which we believe reflects the picture of which tribunals operate in Scotland.
33. We follow the three broad categories outlined by the Report at para 25 to look at the 48 bodies in more detail dividing them into –
 - **GB wide tribunals in Scotland**, including
 - those not supported by the Tribunals Service but which have jurisdiction and hearings in Scotland (Table 1)
 - Tribunals sitting in Scotland supported by the Tribunals Service (Table 2)
 - **Scottish tribunals existing before 1998** (Table 3), and
 - **Devolved Scottish Tribunals** (Table 4)

GB wide tribunals in Scotland

34. The following table (1) sets out GB tribunals not supported by the Tribunals Service but with hearings in Scotland, along with an estimate of the number of cases considered by each where this is available. We comment on this table in paras 35 to 40.

⁸ Report pages 30 – 33

Table 1

Civil Aviation Authority (limited tribunal functions)	Information Commissioner – (limited tribunal functions)
Competition Appeal Tribunal	Insolvency Practitioners Tribunal 0
Copyright Tribunal	National Savings Adjudicator (now abolished, functions subsumed by Financial Ombudsman Service)
Forestry Committees 0	Nursing and midwifery Council
General Dental Council	Patents, Designs, Trade Marks and Service Marks (Comptroller General) (limited tribunal functions)
General Medical Council	Pensions Appeal Tribunal for Scotland 254
Health Professions Council	Police Appeal Tribunals 5
The Betting Levy Appeal Tribunal for Scotland (abolished by Horserace Betting and Olympic Lottery Act 2004)	Traffic Commissioners for Scotland (limited tribunal functions) 57

35. The Leggatt Report did not regard the Civil Aviation Authority or the Comptroller General of Patents, Designs and Trademarks as tribunals but as regulatory bodies. We have included them since some of their functions bear a number of resemblances to tribunals and as such those parts are under AJTC oversight.
36. In addition Leggatt did not regard the Traffic Commissioners as a tribunal but as a licensing body which operates as a regulator⁹. It stated that “As the Commissioners have powers to hold public and private inquiries to inform their decision making... there is a question as to whether there should be a greater separation of their fact finding and decision making roles. This may be desirable but, as they do not exercise those functions as a tribunal ...”¹⁰. However, the Council on Tribunals considered the inquiries function as a tribunal.
37. The tribunals listed above vary in that some have separate Scottish arms denoted by “Scotland” in their title while the majority do not.
38. With the exception of the Traffic Commissioners for Scotland, the Pensions Appeal Tribunal for Scotland and the Police Appeal Tribunal the tribunals listed above have not sat or sit rarely in Scotland. The Betting Levy Appeal Tribunal for Scotland is nearly defunct although it may still maintain a twilight existence. The E&W equivalent was dropped from the list of tribunals under AJTC oversight as being obsolescent. We therefore do not include it in the list.

⁹ Tribunals for Users: One System , One Service, 2001.para 12.3

¹⁰ Ibid para 12.9

39. The Health Professions Council carries out a regulatory function with hearings similar to tribunals, and we think it right to include it Unfortunately we have no figures.
40. Given the reservations of the Leggatt Report and the very small presence in Scotland of some of these tribunals we are of the view that the following should be regarded as Scottish tribunals
- Pensions Appeal Tribunal for Scotland
 - Police Appeal Tribunals
 - Traffic Commissioners for Scotland
41. The following table (2) sets out those GB tribunals supported by the Tribunals Service, along with an estimate of the number of cases considered by each, where available. We comment on the table in para 42.

Table 2

Asylum and Immigration Tribunal 10,249 (2008)	Information Tribunal 0
Asylum Support Tribunal (jurisdiction now exercised by Social Entitlement Chamber of First-tier Tribunal) 0	Reserve Forces Appeal Tribunal. (from 1.4.09) 0
Criminal Injuries Compensation Appeals Panel (Social Entitlement Chamber, First-tier Tribunal) 92 (2008 only)	Social Security and Child Support Appeals (Social Entitlement Chamber, First-tier Tribunal) 28,575
Employment Tribunal for Scotland 33,000	Special Commissioners of Income Tax (transferred to Tax Chamber of First-tier Tribunal and Finance and Tax Chamber of Upper Tribunal on 1 st April 2009) 10
Financial Services and Markets Tribunal 0	The Commissioners Office (became part of the Upper Tier in November 2008) 663
Gender Recognition Panel 0	Transport Tribunal 55
The General Commissioners of Income Tax [jurisdiction transferred as per SCIT above] 142	VAT and Duties Tribunal (transferred as per SCIT above) 191

42. As with the list in Table 1 five of the above tribunals rarely if ever sit in Scotland and as such cannot be regarded as Scottish tribunals. They are the Asylum Support Tribunal, the Financial Services and Markets Tribunal, the Gender Recognition Panel, the Information Tribunal and the Reserve Forces Appeal Tribunal. We consider that all the others can be considered as Scottish.

Scottish Tribunals before 1998

43. The following table (3) sets out the Scottish tribunals which existed before 1998 along with an estimate of the number of cases considered by each, where available. We comment on these tribunals in paras 44 to 46.

Table 3

Children's Hearings 56,199 (6744)	Panel of Agricultural Arbiters 0
Crofters Commission 24	Parole Board for Scotland 1,300
Education Appeal Committees 529	Police Pensions Appeal Tribunal 0
General Teaching Council for Scotland	Private Rented Housing Panels (set up as Rent Assessment Panel) 202
Lands Tribunal for Scotland 131	Scottish Parking Appeals Service (set up in Nov. 98) 1432
Misuse of Drugs Tribunal for Scotland	Scottish Solicitors Discipline Tribunal 59
NHS Discipline Committees 2	Social Work Complaints Review Committees
NHS National Appeal Panel for Entry to the Pharmaceutical Lists 48	Valuation Appeal Committees 8,026 (447)
NHS Tribunal 3	

44. The Leggatt Report did not regard Agricultural Arbitrators (the England and Wales equivalent of Agricultural Arbiters) nor NHS Discipline Committees as tribunals in that they "do not hear appeals against decision makers, but who undertake arbitration, or are involved themselves in decision making process"¹¹. That approach does not reflect established practice in Scotland.

45. The larger figure for Children's Hearings includes all referrals made to the Reporter. The number of cases decided at a hearing (6744) is more indicative of the volume of tribunal work undertaken by the system. Similarly the figures above for the VACs can be slightly misleading as to volume in that a larger percentage of cases are withdrawn before a hearing than in most other systems. A clearer picture may be obtained from the fact that 447 cases were decided during the year. It is those figures that we shall take into account below. The figures for the Parole Board are taken pro rata from their latest annual report which covered 15 months.¹²

¹¹Tribunals for Users: One System, One Service, 2001.para 12.3

¹² figures provided by the Parole Board.

46. It should be noted that the General Teaching Council for Scotland, the Scottish Solicitors' Discipline Tribunal, the Parole Board for Scotland and the Social Work Complaints Review Committees are not at present under our oversight.

Devolved Scottish tribunals

47. The following table (4) sets out the devolved Scottish tribunals, being those established following the implementation of the Scotland Act 1998 along with an estimate of the number of cases considered by each and we comment on these tribunals in para 48.

Table 4

Additional Support Needs Tribunal for Scotland 76	Scottish Charities Appeal Panel (due for abolition) 2
Mental Health Tribunal for Scotland 3,164	Standards Commission 1

48. The Report does not include the Standards Commission, nor do we oversee it. We include it in the list because its hearing panels have all the hallmarks of a tribunal according to our definition.

A Scottish Tribunals Service

49. Having defined the scope of the tribunal system in Scotland it is appropriate to consider which we think should be included in a Scottish Tribunals Service as mooted in the Report. Having looked at that issue we will then consider the specific options advanced by the Report.
50. We recognise that opinion is divided on the inclusion of individual tribunals in the Scottish Tribunals Service. The onus on individual tribunals might properly be to argue non participation rather than the opposite.
51. It may be suggested that some tribunals should retain their individual entities because they are so specialised. It is, however, in the very nature of tribunals that they are specialised. This essential quality must be preserved. Care should, therefore, be taken in the implementation of any change that respect for the special qualities of individual jurisdictions is not lost in the drive towards greater coherence. We do not see this as a matter of underlying structure. Rather it relates to the organisation of the tribunals within whatever new structure is decided upon and as such should not be used as an argument for non-participation.
52. It may be argued that some tribunals have recently undergone radical changes and reconstruction and should be allowed to have time for these to bed down before further change is contemplated. There will never be an optimal point at which all tribunals are ready for change. Piecemeal development is one of the ongoing curses of the system and if used as a reason for exclusion will continue to blight it. Indeed the essence of a move to a Tribunals Service must be to facilitate development on a coherent basis across the board.
53. Professional discipline and regulation have traditionally been seen as being apart from the mainstream of tribunal work in that they are neither citizen versus state

nor party versus party. Many are first tier decision makers. The question of this section of tribunals is complex particularly but not exclusively in the field of health with its wide range of professions. It may well be a step too far for such tribunals to be included at the outset given the complexities of the landscape.. We have therefore not listed regulatory or discipline tribunals. (Within that group NHS Discipline Committees, the NHS Tribunal and the Police Appeal Tribunals are at present under the oversight of our Committee.) This is not to say that they should never be incorporated into a Scottish Tribunal Service, only that there needs to be further detailed consideration of their interaction before proposing such a move. We suggest that more work needs to be done in reviewing this area of tribunal activity

Tribunals which might constitute a Scottish Tribunals Service

54. We now consider which tribunals might properly be included under the umbrella of a Scottish Tribunals Service for the purposes of Option 4 were that Option to be recommended.

55. We have already indicated in para 40 above the three GB tribunals outwith the Tribunals Service which we think should be regarded as Scottish Tribunals. Of these two should be included while Police Appeal Tribunals should not for the reason that is concerned with discipline..

56. In para 42 we have indicated which of the Tribunals Service tribunals can be considered as Scottish, all of which should be included.

57. When considering Scottish Tribunals that existed before 1998 we are of the view that a Scottish Tribunals Service could be a real driver for the development of excellence across the board bringing with it real benefits to the user. This is particularly the case for several systems in which improvement in standards is essential. In our view local authority tribunals require urgent and significant reform which can be best achieved by their inclusion. We believe that until they are removed from local authority control, problems of lack of independence and impartiality will not be fully addressed. We expand on this argument in an Endnote in Annex B as well as giving our reasons for including the newly constituted local planning review bodies.

58. In conclusion we think that the following from Table 3 might properly be included:

- Children's Hearings
- Crofters Commission
- Education Appeal Committees
- Lands Tribunal for Scotland
- Misuse of Drugs Tribunal for Scotland
- Mental Health Tribunal for Scotland
- NHS National Appeal Panel for Entry to the Pharmaceutical Lists
- Panel of Agricultural Arbiters
- Parole Board for Scotland
- Police Pensions Appeal Tribunal
- Private Rented Housing Panels
- Scottish Parking Appeals Service
- Social Work Complaints Review Committees
- Valuation Appeal Committees

59. We are of the view that all four Devolved Tribunals should be included.

60. A comprehensive list of the 20 tribunals can be found at Annex C for reference.

Appeals

61. The Report makes brief mention of the establishment of the Upper Tribunal in para 8 and the appeal arrangements for the Employment and the Immigration Tribunals in para 9. It comments in para 24 that the “introduction of the upper tier tribunal for GB tribunals is likely to further complicate the arrangements in Scotland.” There is no further discussion of the subject. We consider that the entangled appeal routes require more attention than this.

62. We have read with interest the “Observations” by Douglas J May and Alan Gamble on the Report. We appreciate their analysis of the complexities involved in the present appellate arrangements.

63. Under Option 2 we consider that, irrespective of the desirability of change, the status quo would remain given that the changes proposed are small and in no way alter the structure of the individual entities.

64. Under Options 4 and 5 there would be a strong impetus for change in line with the goal of greater internal consistency, ease of access and understanding of the system. What form that change would take is a difficult question given the complex issues of jurisdiction and devolution. It is beyond the scope of this response to provide an answer but we recognise that this is a major problem and anticipate being involved in any future discussions on the matter.

Assessment of Options

65. In considering each of the options in the Report we consider

- *what is envisaged*
- *advantages and disadvantages*
- *obstacles and*
- *other relevant points*

before recording a conclusion.

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

66. ***What is envisaged in Option 2.***

a) We believe that the number of tribunals involved in this option is the total of those listed in Tables 2, 3 and 4 along with the three Scottish tribunals from Table 1 rather than the smaller number implied in para 76 of the Report which refers to those systems whose heads are members of the Scottish Tribunals Forum. This is because, with no proposed structural change, all would retain their separate identities which in turn would allow mutual interest to dictate how and to what extent any one system might engage with another in the process. The Report provides some detail at paras 76 to 84 as to the scope and content of the option. It proposes better co-operation citing opportunities for interchange of staff, increased sharing of training, premises and facilities.

b) The Report also proposes better integration but does not go into any detail as to what that might involve. We have more difficulty with this aspect in that

integration even to a very limited extent would bring with it structural changes which go beyond this option.

67. Advantages of Option 2

There is certainly no doubt that greater co-operation would be to the advantage of all, including users, who would benefit directly from improvements in venues, for example, and from the general raising of standards. There would be no need for legislative change. In detail Option 2

- would yield gains in the short term, both financially and in the quality of provision.
- could be initiated in the near future, building on the limited co-operation that exists at present.
- would go a short way to addressing current fragmentation and lack of coherence.

68. Disadvantages of Option 2

We agree with the Report that Option 2:

- does not address issues of independence and impartiality in relation to either the judiciary or administration
- does not address current concerns in relation to procedures for appointment of Scottish tribunal members,
- leaves open questions over the inconsistency of training of members of Scottish tribunals.

Separately we would add that Option 2:

- fails to address the fragmentary nature of the landscape, the confusion as to which avenue of redress is most appropriate, and the duplication of administrative and judicial provision in the present system
- would cast into even sharper relief the failure of government to address the problems identified by Leggatt so far as Scotland is concerned

69. Obstacles in relation to Option 2

Option 2 would require administrative support to facilitate proposed sharing arrangements. In other words it would require investment.

70. Additional points on Option 2

If Option 2 were selected, and we advise against that, there are a few modifications which might be suggested as capable of addressing some of the above criticisms.

- a) While all tribunals would remain isolated in their present form, both administratively and judicially, progress towards greater independence could be attained by removing national tribunals from their sponsoring department and by placing them in a newly established department in the Justice Directorate. This would not be as radical as establishing a separate service as in Options 4 or 5. It would be more akin to a half-way house.
- b) Progress could also be made in the realm of recruitment. As mentioned in para 58 of the Report we have previously expressed the view that there should be one centralised process for recruiting non- legal members of devolved tribunals which would be open, fair and transparent, perhaps along the lines of recruitment for the Children's Panel.
- c) With reference to the "Tribunal Training in Scotland" Report produced by Aberdeen University we note its proposals for the pooling of training expertise and resources for devolved tribunals and consider that they could

be incorporated into this model. We have already mentioned above that it would be necessary to set up a small administrative support unit to co-ordinate liaison with the Tribunals Service. Its remit could easily be extended to cover support for centralised recruitment and training.

- d) Improvements on these fronts would benefit users in a number of ways. They would find the hearing itself run by better trained and more confident panels who had been recruited in a fairer and more transparent way.

71. Conclusion on Option 2

While we are of the view that the modifications set out above would certainly address a number of the criticisms levelled against this option it would nevertheless fail as regards the need for a coherent system and for an independent judicial appointment body. In addition we consider that the option, dependent as it is on *ad hoc* solutions, fails to resolve most of the fundamental flaws inherent in the present provision, particularly with regard to local authority tribunals, and as such is not sufficiently different from the status quo to merit being adopted. It should, therefore, only be considered as a solution if more structural changes prove impossible.

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

72. What is envisaged in Option 4

- a) The Report's title implies that it is concerned with change only at an administrative level. After analysing the deficiencies of the present system it suggests however, in Options 4 and 5, improvements which go far beyond what such limited change could ever achieve. We agree with this approach and develop our argument in para 76 (b).
- b) The Scottish Tribunals Service should be composed of those tribunals listed by us in Annex C. This would give a total of 20 tribunals with a volume of approximately 14,500 referrals. To give an idea of scale we could compare it with the Tribunals Service's 635,106 referrals in 2007/2008¹³.
- c) The Report provides some detail at paras 92 to 97 as to the scope and content of Option 4. The new structure would be supported by one administration which would provide all the back-up at present provided by each individual tribunal. The administration would be entirely independent of the Scottish Government and local authorities.

73. Advantages of Option 4

This option would provide significant gains to the user and the tax payer flowing from:

- independent and impartial processes,
- greater coherence (in relation to rules of procedure as one example)
- consistent and high quality training which could also be more easily addressed in a larger unit,
- a more effective and efficient delivery of service than a piecemeal and disjointed structure, and
- economies of scale and financial gains from streamlining processes by reducing duplication of staff and facilities as well as through improvements in procurement and delivery contacts

¹³ Tribunal Service Annual Report 2007/2008. Annex E.

In addition:

- a) The existence of a Scottish Tribunals Service would raise the profile and standing of tribunals allowing them to take their rightful place in the justice system. This in turn would improve the recruitment and retention of panel members both because of greater public awareness of the system and because it would be seen by many more people as a rewarding way of performing a civic duty. This may be of particular relevance if it is decided to continue the present practice of not paying members who sit on certain tribunals.
- b) There is the potential for establishing easier access for claimants/appellants by the provision of a single contact point or portal for applications/appeals and information about the progress of a case. This would go a long way to answering the criticism that the present system is too confusing for users and would be particularly, though not exclusively, desirable in the realm of Education.

74. Disadvantages of Option 4

This option

- results in a relatively small scale organisation
- fails to provide an independent appointments system for the judiciary;
- poses problems in the context of devolution where some tribunals operating in Scotland remain under GB administration, and thereby gives rise to a split tribunal system within Scotland;
- could lead to differences in provision as between the two Services being highlighted. There are bound to be challenges in securing coherent and consistent approaches
- would require set up costs which might be significant in the early years; and
- might not resolve issues of confusion amongst users;

75. Obstacles to Option 4

- a) Although establishing a Scottish Tribunals Service in terms of Option 4 would involve changes which are substantially within the devolved competence and discretion of Scottish Ministers, operation of such a service, if that were to aim at consistency of approach between the UK and Scottish Services would require co-operation on a long term basis between the UK Government and Scottish Ministers.
- b) Separately, implementation of changes which involved removal of certain tribunals from local authority control and supervision might present problems.

76. Additional points on Option 4

- a) The Report suggests that the Scottish Courts Service might be an appropriate location for a Scottish Tribunal Service established under Option 4¹⁴ perhaps along the lines of the Courts and Tribunal Service in Northern Ireland. We do not think that any uncertainties over the position of the Scottish Courts Service given possible changes in light of the Gill Review or the Judiciary and Courts (Scotland) Act¹⁵ should deter further consideration of this model. Most machinery of government reform and change management takes place against a dynamic background. However we would caution that this possibility

¹⁴ Report para 94

¹⁵ 2008 asp 6; esp Pt 4 and Sch 3 Scottish Courts Service

should only be considered from its administrative aspect. We think that any greater integration as for example in the development of a Tribunal judiciary, procedures, expenses rules and, with a very few exceptions, venues etc might be overambitious for the immediate future. Care should be taken to preserve the present characteristics of tribunals as opposed to civil courts.

- b) We are of the view that the structural changes proposed in Options 4 and 5 will inevitably bring with them more than the provision of centralised administrative support. The 2007 Act itself goes further by providing for the two-tier system of judicial chambers and the consequential introduction of rules of procedure¹⁶ within those chambers. An administrative structure minus judicial reform is unlikely to give rise to anything more than the gains accruing from backroom change. Neither Option 4 nor 5 will have the effect of real reform if they touch only on administration. There is an analogy in the present arrangement by which the Employment Tribunals are supported by the Tribunals Service for administrative purposes only while retaining their jurisdictional independence. It is already clear that since the Tribunals Service controls the resources there is an impact which goes beyond administration. A single overall training budget for example means that judicial interaction is essential which inevitably extends into other aspects. Time will tell to what extent this develops in practice.
- c) Although the composition of the Scottish Tribunals Service will not mirror that of the Tribunal Service it is clear that the tendency for any future internal groupings of tribunals with similar subject matters would be the same. Whether this would be as radical as the establishment of judicial chambers is open to speculation¹⁷ and would require considerable further work in assessing the possibilities.
- d) Again, establishing a Scottish Tribunals Service with some form of judicial reform agenda built in will inevitably result in moves to harmonise judicial appointment processes and terms of office. This was implicit in the 2007 Act structure. This may well be an expensive and difficult process but we believe it to be inevitable under Options 4 and 5.
- e) It has been suggested that there are advantages to be gained from including the Employment Tribunal for Scotland in the Scottish Tribunals Service envisaged in this Option. Its separate jurisdiction and its status within the Tribunals Service would facilitate such a move. In addition its size (33,000 referrals per year) would lend substantial weight to what is a small entity of about 14,500 referrals. Without taking a definitive view at present we consider that this is a possibility which could bear more scrutiny.

77. Conclusions on Option 4.

- a) With its partial solutions to the problems of independence, impartiality and coherence this option goes a long way to improving the present provision. In general terms users would be less likely to feel that “every appeal is an away game”¹⁸. We believe, however that its failure to resolve the

¹⁶ s 22 of the Act

¹⁷ Eg There would be an opportunity, for example, to rationalise Education by uniting EACs and the ASNT; and to expand the role of the Private Rented Housing Panel to include other housing matters along the lines proposed by D O'Carroll and S Scott - A Housing Tribunal for Scotland; 2004 - while leaving others as they are at present.

¹⁸ Leggatt, Tribunals for Users: One System, One Service, 2001; Overview para 3.

question of judicial appointments must be addressed, possibly through the Judicial Appointments Board for Scotland as is suggested in the Report at para 80.

- b) The Option is also an inevitable stepping stone in the event that an incremental process towards Option 5 were to be adopted.

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

78. *What is envisaged in Option 5*

- a) The Report provides some detail at paras 98 to 105 as to the scope and content of this option. In short it would be a matter of taking all that is proposed under Option 4 and applying it to all tribunals in Scotland.
- b) The potential number of tribunals involved would be all those in Annex C in addition to twelve from Table 2 (taking into account mergers into the Tax Chamber and the Commissioners Office becoming part of the Upper Tribunal) and seven from Table 1 (omitting defunct as well as discipline and regulatory tribunals). This would give a total of 39 tribunals, listed at Annex D for convenience. The volume of work would be somewhere in the region of 87,000 referrals of which by far the greater volume would come from the Tribunals Service. The effect of this would be to produce a very different picture of the relative size and balance of individual tribunals compared with the much smaller body envisaged in Option 4.

79. *Advantages in Option 5*

- a) All the advantages listed under Option 4 would be gained.
- b) The criticism in Option 4 regarding the legal system would be resolved.
- c) The size of the new Service would provide it with sufficient authority to work with first tier decision makers to improve the end to end experience of the user.
- d) The benefits and experience of the Tribunals Service would be incorporated into the Service.

80. *Disadvantages in Option 5*

The following disadvantages are apparent:

1. The question of judicial independence is not addressed. We suggest in para 77 (a) above a possible solution.
 2. In the event that Option 5 were adopted without first going through the Option 4 stage then start – up and running costs would be significant. There would be a significant on-cost over Option 4;
 3. Issues of responsibility for tribunal procedure would be a more prominent concern especially in the GB context;
 4. Judicial harmonisation would be a greater challenge than in Option 4 in that this option would involve alignment between all Scottish tribunals. In theory at least this could lead to members and the judiciary in those tribunals at present in the Tribunals Service having less favourable terms than their previous colleagues;
 5. Issues of differential treatment as between Scotland and the rest of GB could be perceived as a more prominent concern. The potential for differential treatment of cases arises between tribunals supported by a
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Scottish Tribunals Service operating the same statutory code as in England and Wales. Such an arrangement could undoubtedly present serious challenges to ensuring coherent delivery across the separate jurisdictions.

81. *Obstacles in Option 5*

- a) We recognise first and foremost that this option would involve significant issues for negotiation between the UK Government and Scottish Ministers both on practical and on more strategic policy levels. It would also require amendments to Westminster primary legislation. This would be extensive given the number of tribunals involved.
- b) Differences of opinion between different tribunals are likely as to the desirability of the development of this version of a Scottish Tribunals Service. In general terms it might be unwelcome to some tribunals for a variety of reasons not the least of which would be the fear of being swamped by a much larger organisation and thus losing their specialised expertise.
- c) We recognise that Option 5 would present real issues in implementation and would be particularly challenging if proceeding in a single process.

82. *Additional points on Option 5*

- a) From the user's point of view there would be substantial gains though these would mostly occur with the improvements described under Option 4. One might go further and argue that a main difference between the two options from the user's perspective would be a one stop shop as opposed to a two stop shop and that only if the systems were designed to channel all claims/applications through one access point.
- b) With regard to the possible involvement of the Scottish Courts Service we consider that it would be much more of a challenge than with Option 4 because of the increased size of the new body. It is beyond our present remit to explore this further.
- c) We consider that Option 5 might be capable of being developed to satisfy all interests through the introduction of a Scottish Tribunals Service, in the widest sense of a service denoting administrative and judicial reform, operating as part of a broader Tribunals Service in which there was also a discrete English Tribunals Service, and possibly a Welsh Service. Those three services would be co-ordinated by a UK Tribunals Service which might be a cross border public body for the purposes of the Scotland Act.

83. *Conclusion on Option 5*

This option brings with it many gains, particularly if it is modified by including judicial independence. Whether these would, from the user's perspective, be sufficiently greater, in comparison with those in Option 4, to justify overcoming the considerable obstacles as well as the significant additional cost to the Scottish Block, is open to debate.

General Conclusion

84. We are invited, beyond responding to the specific issues remitted to us, to make any other points or suggestions we would like to make in relation to the future structure of tribunals in Scotland.
85. We have of course made comments throughout this paper which touch on the need for reform beyond the level of a Tribunals Service. There is a risk when addressing the issues in relation to each of the Options to treat shorthand references to a Tribunals Service as references to a support structure and thereby failing properly to notice the profound effect which the reforms in the GB Tribunals sector are achieving or are likely to achieve with the establishment of the Tribunals Service. We have already drawn attention to the scope of the 2007 Act and the essential nature of judicial as well as administrative reform. The Tribunals Service denotes not only a support structure which will bring a greater identity of practice and process across the board. It also denotes the introduction of a single judicial structure albeit segmented into chambers.
86. The benefits of such a structure are likely to be appreciated across England and Wales because the reforms will be present across much of the range of tribunals which operate within that jurisdiction. Confining the beneficial consequences of those changes within Scotland only to those tribunals which operate on a GB basis within the Scottish jurisdiction necessarily means that there would not be a Tribunals System in Scotland. At best, with anything short of Option 5, there would be two systems within Scotland, the first addressed to GB tribunals and the second to Scottish Tribunals.
87. As a consequence this would necessarily mean that differential practice might continue within Scotland. It must be unlikely that such differential practice would, if effective within England and Wales, be welcomed within those jurisdictions. It might be argued that there would be little incentive within - and no compulsion on - the Tribunals Service or the UK Government to adjust practice and procedure within the GB context to address issues raised within the Scottish jurisdiction in relation to Scottish tribunals outside of the Tribunals Service.
88. If the best possible service for Scotland were to be taken to be a tribunal structure which in operation appears seamless and with a common core – as is the case for England in consequence of the 2007 Act – then in seeking that for Scotland there will inevitably be a conversation to be had between the Scottish Government and the UK Government. The real question then is whether that conversation is more likely to produce the best result under Option 5 rather than Option 4 because the compulsion to indulge in meaningful negotiation is greater under Option 5. We believe that it is. In advancing this view we are aware that it is unlikely that the weight of opinion at UK level would assess option 5 as readily deliverable even when taking into account only issues of cost, administrative resources and the obvious difficulties in re-aligning structures and relationships. We do not underestimate the difficulties but we remain agreed that Option 5 must be the preferred option.
89. However in recommending Option 5 we do not underestimate the benefits which Option 4 would bring on its own or as part of a progression to Option 5. We consider that Option 4 offers the potential for significant advance and we recommend that steps be taken to develop proposals in relation to it as part of an overall strategy designed to implement Option 5.

90. We believe also that the mechanisms may exist in the context of the establishment of the Tribunals Service as a cross border public body that might enable the best of both worlds. Such a body might well be able to cater for separate although connected and co-ordinated structures across the separate jurisdictions within the UK covering both GB and devolved structures (both Scottish and Welsh) under the direction of an independent (effectively federal) body. We appreciate that such a solution has its own difficulties, but we think further work on such an approach might be useful.
91. Whatever the decision that is made regarding the final shape and composition of the Scottish Tribunals Service we counsel against a “big bang” approach. While there should of course be a guiding vision we believe that development can best be achieved incrementally. A view frequently expressed to us is that there is an impetus for change. Therefore a start should be made as soon as possible to capitalise on the goodwill and enthusiasm of those who work in the tribunal world. Much of the setting up of the Tribunals Service was completed without delaying until the necessary legislative time slots became available. The same can equally apply in Scotland.

The Future Role of the Scottish Committee of the AJTC.

92. The title of the Report includes the term “supervision” in relation to our role. In para 108 it uses the term “oversight” which more accurately describes the present role of the AJTC with regard to tribunals. The change of emphasis took place because it was felt that it was a more appropriate description of our new remit. We agree with the Report that in Option 5 we would need to be a separate Scottish entity while retaining close links with the Council. This would necessitate amendments to primary GB legislation as well as new Scottish legislation. The case in Option 4 is less clear cut. Given that the volume of work of the Tribunal Service would outweigh that of its Scottish counterpart by a substantial amount and that there would be an interface between the two, there could be a strong argument, not endorsed by the Report, that a GB body would provide more effective oversight of both systems. Equally a free standing Scottish Council could fulfil the demands of its new role by retaining close links with the AJTC in London.
93. Irrespective of the outcome more resources are essential. The recent reduction in the number of members of the Scottish Committee from seven to six has already put great strain on the Committee. Its remit now stretches over the wider field of administrative justice. The Council’s role vis a vis the Tribunals Service indicates that while the nature of the involvement has changed the level of commitment has not. We expect that an analogous situation would obtain in Scotland.
94. The Scottish Committee’s role will require greater consideration in the light of future developments.

Annex A.

Bodies sitting in Scotland considered under “Scope”.

1. Additional Support Needs Tribunal for Scotland
2. Asylum and Immigration Tribunal
3. Asylum Support Tribunal
4. Children’s Hearings
5. Civil Aviation Authority
6. Competition Appeal Tribunal
7. Copyright Tribunal
8. Criminal Injuries Compensation Appeals Panel
9. Crofters Commission
10. Education Appeal Committees
11. Employment Tribunal for Scotland
12. Financial Services and Markets Tribunal
13. Forestry Committees
14. Gender Recognition Panel
15. General Dental Council
16. General Medical Council
17. General Teaching Council of Scotland
18. The Commissioners Office (became part of the Upper Tribunal on 3rd November 2008)
19. Health Professions Council
20. Information Commissioner
21. Information Tribunal
22. Insolvency Practitioners Tribunal
23. Lands Tribunal for Scotland
24. Local Planning Review Bodies
25. Mental Health Tribunal for Scotland
26. Misuse of Drugs Tribunal for Scotland
27. NHS Discipline Committees
28. NHS National Appeal Panel for Entry to the Pharmaceutical Lists
29. NHS Tribunal
30. Nursing and Midwifery Council
31. Panel of Agricultural Arbiters
32. Parole Board for Scotland
33. Patents, Designs, Trade Marks and Service Marks (Comptroller General)
34. Pensions Appeal Tribunal for Scotland
35. Police Appeal Tribunals
36. Police Pensions Appeal Tribunal
37. Private Rented Housing Panels
38. Reserve Forces Appeal Tribunal
39. Scottish Charities Appeal Panel
40. Scottish Parking Appeals Service
41. Scottish Solicitors Discipline Tribunal
42. Social Security and Child Support Appeals
43. Social Work Complaints Review Committees
44. Special Commissioners of Income Tax (First Tier)
45. Standards Commission
46. Traffic Commissioners for Scotland
47. Transport Tribunal
48. Valuation Appeal Committees

Annex B

Issues with Local Authority Tribunals

- a) We commented adversely in a Special Report eight years ago on *Education Appeal Committees*¹⁹ and in successive annual reports about the failure of the regulations to be human rights compliant. In our 2006 -2007 Annual Report we wrote "Unless the composition of tribunals, with its inclusion of councillors who are there purely in that capacity, and the lack of mandatory training are addressed, hearings will not meet the required standard, no matter how well they are run"²⁰. The Report mentions EACs and comments on their fragmented approach to training in para 40.
- b) *Valuation Appeal Panels* and Committees have also been the subject of criticism in our annual reports. In our most recent we stated "... The selection of members of this system lack openness and transparency and is not open to public competition. That coupled with a complete lack of formal training of chairs and members leads us to urge that a complete review of the VACs is overdue..."²¹ .
- c) Although we do not have oversight of *Social Work Review Committees* we understand that they suffer from severe difficulties in recruitment and retention of members. Since there are few if any cases in any one year in any one local authority administrative staff and members become deskilled and must invest a disproportionate time in preparing for a hearing.
- d) From April 2009 local authorities have also been made responsible for new local review bodies in planning. They are tribunals according to our definition. As with other local authority tribunals they may be said to lack independence. In our response to the government consultation on the proposed planning changes we stated "Members (of the Scottish Committee) wish to reiterate their concern — expressed at various earlier stages- - that this proposal could be seen as removing the independent element from the appeal process. Whilst the Committee understands that is it in no-one's interest to have a costly, time-consuming appeal process for the least complex cases, this proposal does not lend itself to being fair, transparent and independent.

The Scottish Committee concludes that this aspect of the proposed development is flawed and could be open to successful legal challenge."

- e) The Leggatt Report specifically mentioned the inclusion of local government tribunals within the one organisation. In England and Wales progress in this area is uncertain in spite of having been mentioned in the white paper "Transforming Public Services: Complaints, Redress and Tribunals"²² as the next step for integration. We should be prepared to tackle the issues at an earlier stage in a different Scottish context.

¹⁹ Scottish Committee of the Council on Tribunals Special Report on Education Appeal Committees 2001

²⁰ The Scottish Committee of the Council on Tribunals Annual Report 2006/2007 para 17.

²¹ Scottish Committee of the Administrative Justice & Tribunals Council Annual Report 2007/2008. page 15

²² Transforming Public Services: Complaints, Redress and Tribunals, DCA July 2004, para 6.8

Annex C.

Tribunals which might properly be included in a Scottish Tribunal Service under Option 4.

1. Additional Support Needs Tribunal for Scotland
2. Children's Hearings
3. Crofters Commission
4. Education Appeal Committees
5. Lands Tribunal for Scotland
6. Local Planning Review Bodies
7. Mental Health Tribunal for Scotland
8. Misuse of Drugs Tribunal for Scotland
9. NHS National Appeal Panel for Entry to the Pharmaceutical Lists
10. Panel for Agricultural Arbiters
11. Parole Board for Scotland
12. Pensions Appeal Tribunal for Scotland
13. Police Pensions Appeal Tribunal
14. Private Rented Housing Panels
15. Scottish Charities Appeal Panel
16. Scottish Parking Appeals Service
17. Social Work Complaints Review Committees
18. Standards Commission
19. Traffic Commissioners for Scotland
20. Valuation Appeal Committees

Annex D.

Tribunals which might properly be included in a Scottish Tribunal Service under Option 5.

1. Additional Support Needs Tribunal for Scotland
2. Asylum and Immigration Tribunal
3. Asylum Support Tribunal
4. Children's Hearings
5. Civil Aviation Authority
6. Competition Appeal Tribunal
7. Copyright Tribunal
8. Criminal Injuries Compensation Panel
9. Crofters Commission
10. Education Appeal Committees
11. Employment Tribunal for Scotland
12. Financial Services and Markets Tribunal
13. Forestry Committees
14. Gender Recognition Panel
15. Information Commissioner
16. Information Tribunal
17. Insolvency Practitioners Tribunal
18. Lands Tribunal for Scotland
19. Local Planning Review Bodies
20. Mental Health Tribunal for Scotland
21. Misuse of Drugs Tribunal for Scotland
22. NHS National Appeal Panel for Entry to the Pharmaceutical Lists
23. Panel for Agricultural Arbiters
24. Parole Board for Scotland
25. Patents, Designs, Trade Marks and Service Marks (Comptroller General)
26. Pensions Appeal Tribunal for Scotland
27. Police Pensions Appeal Tribunal
28. Private Rented Housing Panels
29. Reserve Forces Appeal Tribunal
30. Scottish Charities Appeal Panel
31. Scottish Parking Appeals Service
32. Social Security and Child Support Appeals
33. Social Work Complaints Review Committees
34. Special Commissioners of Income Tax (First Tier)
35. Standards Commission
36. Traffic Commissioners for Scotland
37. Transport Tribunal
38. Valuation Appeal Committees
39. VAT and Duties Tribunal