

Options for Tribunal Reform in Scotland

Discussion Paper
June 2010



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

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Glossary of Abbreviations

AJSG – ADMINISTRATIVE JUSTICE STEERING GROUP

AJTC – ADMINISTRATIVE JUSTICE AND TRIBUNALS COUNCIL

ASNTS – ADDITIONAL SUPPORT NEEDS TRIBUNAL FOR SCOTLAND

DCA – DEPARTMENT FOR CONSTITUTIONAL AFFAIRS

EAT – EMPLOYMENT APPEAL TRIBUNAL

ECHR – EUROPEAN CONVENTION ON HUMAN RIGHTS

ETS – EMPLOYMENT TRIBUNAL SCOTLAND

JABS – JUDICIAL APPOINTMENTS BOARD FOR SCOTLAND

MHTS – MENTAL HEALTH TRIBUNAL SCOTLAND

MoJ – MINISTRY OF JUSTICE

PRHP – PRIVATE RENTED HOUSING PANEL

SCAJTC – SCOTTISH COMMITTEE OF THE ADMINISTRATIVE JUSTICE
AND TRIBUNALS COUNCIL

SCS – SCOTTISH COURT SERVICE

STA – SCOTTISH TRIBUNALS ADMINISTRATION

STS – SCOTTISH TRIBUNALS SERVICE

Executive Summary



Introduction

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

Background

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

Influencing Factors

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

Principles

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

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

Proposed System Models

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

Summary of Discussion Questions



Chapter 7: Principles

Distinctiveness of the Scottish Legal System

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

Independence

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

Hybrid Bodies

Paragraph 7.16 How should hybrid bodies be dealt with?

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

The Distinctive Nature of Tribunals

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

Remuneration

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

Party to Party Tribunals

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

Rights of Appeal

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

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

Routes of Appeal

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

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

Chapter 8: Tribunals System Models

Model A: Unified Administrative Support Service Only

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

Model B: Adoption of UK Tribunals Structure in Scotland

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

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

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

Model D: Collegiate Structure for all Devolved and Reserved Tribunals

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

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

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

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

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

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

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

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

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

Other Models

Paragraph 8.65

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

Chapter 1: Introduction



Scope

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

The Philip Report

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

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

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

Chapter 2: Background



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

2.2. The Philip Report noted that

“the present tribunals system in Scotland is extremely complex and fragmented, with policy responsibility for tribunals operating in Scotland split between the UK and Scottish Governments and significant differences in how the various tribunals are administered and run”

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

Franks Report

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

Leggatt Report

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

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

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

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

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

³ Tribunals Service (2010a) – The Senior President of Tribunals’ Annual Report: *Tribunals Transformed*. At: http://www.tribunals.gov.uk/Tribunals/Documents/Publications/SeniorPresidentReport_2010.pdf

2.8. Set in amongst the “bleak picture” which the Leggatt Report painted it is worth noting that he did suggest, in effect, a separate Scottish tribunals structure when he reported in 2001.⁴

2004 White Paper

2.9. The Leggatt proposals, which formed the basis for the UK Government’s 2004 White Paper – Transforming Public Services: Complaints, Redress and Tribunals⁵ – led directly to the Tribunals, Courts and Enforcement Act 2007. Importantly, the White Paper set out that neither it nor the Leggatt Report was concerned with tribunals in Scotland dealing with devolved subjects, but it noted that a new Tribunals Service would include some tribunals administered by central government throughout the UK or Great Britain; so the Tribunals Service would have a presence in Scotland.

The Tribunals Service

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

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

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

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

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

The Tribunals, Courts and Enforcement Act 2007

- 2.12. The Tribunals, Courts and Enforcement Act 2007⁷ (hereafter referred to as ‘the 2007 Act’) implemented the proposals of the 2004 White Paper. While the present paper does not set out in detail the content of the 2007 Act, a brief overview of the provisions insofar as they affected the tribunals system is provided.
- 2.13. The key elements of the regime established by and around the 2007 Act are:
- a guarantee of independence;
 - a unified judiciary with common recruitment and training characteristics;
 - a unified structure of tribunals at both first instance and appellate levels, identified by subject specific chambers with substantially common rules of procedure;
 - centralised administration and support for tribunals in the form of the Tribunals Service.
- 2.14. **A guarantee of independence** – Section 1 of the 2007 Act specifically extends to the tribunal judiciary the statutory guarantee of judicial independence contained in the Constitutional Reform Act 2005.⁸ The principle of independence of the judiciary is accordingly at the centre of the 2007 Act and, therefore, at the centre of the new tribunals system. The Judiciary and Courts (Scotland) Act 2008⁹ provides a similar guarantee in respect of the Scottish courts but this has not been extended to the devolved tribunals’ judiciary.
- 2.15. **A unified judiciary – the Senior President** – One of the most important changes to the overall tribunals system is set out in section 2 of the 2007 Act in which the post of Senior President is specifically created.¹⁰ While the role and functions of the post are not precisely defined in the Act the creation of the post signifies the development of the unified structure. As Lord Justice Carnwath has commented, the office of Senior President is a novel constitutional entity as an autonomous judicial office with UK wide responsibilities.¹¹ The 2007 Act did not contain a detailed “job description” for the office although some guidance was available through the Consultation paper *Transforming Tribunals*¹² which addressed the implementation of the 2007 Act (see below) and which drew together the Senior President’s functions.
- 2.16. **A unified structure of tribunals – First-tier and Upper Tribunals** – The third element in the reform package in the 2007 Act is the new structure of tribunals in which two new tribunals, which would effectively and progressively absorb all the pre-existing tribunals, are created.
- 2.17. The Act does not define the composition of the First-tier or Upper Tribunal in terms of subject areas etc. but concentrates on judicial composition and inter-relationship between the tiers. In the

7 At: http://www.opsi.gov.uk/acts/acts2007/ukpga_20070015_en_1 2007 c 15

8 At: http://www.opsi.gov.uk/acts/acts2005/ukpga_20050004_en_1 2005 c 4

9 At: http://www.opsi.gov.uk/legislation/scotland/acts2008/pdf/asp_20080006_en.pdf 2008 asp 6

10 2007 Act *Op. cit.*- s2

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

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

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

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

Implementation of the 2007 Act

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

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

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

¹³ *Ibid.* pg. 23

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

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

Scotland Act 1998 and Development of Scottish Tribunals Post-1999

- 2.24. While the Franks Report is the start of modern thinking on tribunals and the Leggatt Report is the starting point for the reforms flowing from the 2007 Act, intervening between the two is the Scotland Act 1998 which establishes the devolution settlement for Scotland within the United Kingdom. While it is clear that Leggatt, the Tribunals Service and the 2007 Act all have a UK or GB-wide incidence, it is also arguable that each of those and the new structures which emerged are most closely linked with English law and with the governance of the UK within England and Wales. Thus, for example, Leggatt is clear that the context in which his report is prepared is that of tribunals within England and Wales,¹⁵ while the Tribunals Service as an Executive Agency is integrated into the MoJ. The Tribunals Service also comprises tribunals which have a uniquely England and Wales jurisdiction. The tribunals' reform programme has, therefore, had an incidence in Scotland different to that which it has had within England and Wales.
- 2.25. While there has not been any process in Scotland similar to that provided for in the 2007 Act for England and Wales, there has been development of tribunals within Scotland in relation to devolved areas. Several tribunals have been established under devolved powers since 1999.¹⁶ However, those developments have to a large extent occurred in isolation from each other, and there has been no overarching strategy governing the development of tribunals or the administrative justice sector in Scotland.

¹⁵ See paragraph 1.1. of Leggatt, 2001 *Op. cit.*

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

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

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

The Administrative Justice Steering Group

2.28. As implementation of the 2007 Act gathered pace there was an increasing awareness that the disparity in treatment of tribunals between the UK/GB and the Scottish levels required to be addressed. In October 2008 the AJSG published its first report¹⁷ which set out the current arrangements for tribunals in Scotland, concerns about the current system, and posited five possible options for the future. Those options were:

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

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

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

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

Chapter 3: The Tribunal Landscape in Scotland



The Concept of a Tribunal

- 3.1. One of the difficulties of describing the tribunal landscape is in defining the term 'tribunal'. The term has been applied to a disparate collection of bodies, and there are other bodies generally regarded as tribunals which have not been given that title. It is not possible to provide a general definition which encompasses all the bodies which have been given the title of 'tribunal' and all other bodies, however titled, which have been regarded as tribunals. However, many of the bodies concerned have certain common features from which a definition of the concept of a tribunal may be inferred. The assumption that a tribunal has these features has also structured key official reports including the report of the Franks Committee¹⁹ and the Leggatt Review.
- 3.2. This Discussion Paper, therefore, proceeds on the assumption that a tribunal is a body which resolves disputes by making binding decisions according to law, and does so by a process of adjudication which is relatively informal and less adversarial as compared to the model of adjudication applied by the ordinary courts. Like the courts, tribunals are expected to be independent both of the executive and the legislature and of the parties appearing before them.
- 3.3. Many public bodies operating within the various UK legal systems satisfy this definition of a tribunal. However, this definition if applied rigorously, would exclude a number of bodies which fall under the supervision of the AJTC as 'listed tribunals' for the purposes of Schedule 7 to the 2007 Act. The Crofters Commission, for example, is an essentially administrative body which acts as a primary decision-maker. There is no dispute to resolve unless and until the Commission itself has made a decision adverse to a citizen's interests. Other bodies do not satisfy the definition because they are not sufficiently independent of the bodies against whose decisions they hear appeals, for example, the Education Appeal Committees which are convened by local authorities to hear appeals against decisions made by those local authorities themselves. A third group of bodies are hybrids which have both administrative and dispute resolution functions. The statutory functions of the Scottish Traffic Commissioner, for example, include licensing of operators of Heavy Goods Vehicles (HGVs) and of buses and coaches (PSVs), registration of local bus services, granting vocational licenses and taking action against drivers of HGVs and PSVs, these being administrative functions. However, the Traffic Commissioner for Scotland is also responsible for dealing with appeals against Scottish local authorities' decisions on taxi fares, and appeals against charging and removing improperly parked vehicles in Edinburgh and Glasgow. The proposals in this paper relate to conventional judicial tribunals and it follows that they may not be applicable to these hybrid bodies in their current form. However, it is necessary to decide the appropriate governance structure for such bodies and this is considered in Chapter 7.
- 3.4. Most tribunals in the UK resolve disputes between citizens and the state; others, such as the Employment Tribunals deal with disputes between private parties, while a third group including, for example, the Lands Tribunal for Scotland deal both with disputes between citizen and state and disputes between private parties. The geographical jurisdiction of tribunals reflects the complex relationships between the UK's legal systems. Some tribunals have jurisdiction in cases arising

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

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

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

Tribunal Functions

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

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

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

Territorial Jurisdiction

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

UK Tribunals Service

First-tier and Upper Tribunals

Structure and Organisation

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

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

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

3.11. The Upper Tribunal is divided into four chambers:

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

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

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

Appeals

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

Policy and Ministerial Responsibility

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

Appointment of Judges and Members

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

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

Independence

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

Judicial Leadership

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

Administrative Support

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

Training

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

Employment Tribunals and the Employment Appeal Tribunal

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

Other UK/GB Tribunals

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

Scottish Tribunals

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

Structure and Organisation

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

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

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

Appeals

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

Policy and Ministerial Responsibility

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

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

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

Appointment of Judges and Members

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

Independence

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

Judicial Leadership

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

Administrative Support

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

Training

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

Chapter 4:
Philip Recommendations
– Progress Towards
Implementation



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

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

Chapter 5: Scottish Civil Courts Review



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

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

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

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

The Review's Proposals

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

5.4. The main proposals were:

Structural reforms

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

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

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

Functional reforms

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

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

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

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

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

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

Implications of the Gill Recommendations for Tribunals

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

Sheriff Appeal Court

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

New simplified procedure

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

Allocation of Jurisdiction

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

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

Chapter 6: Arguments for Reform



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

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

(para. 1)

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

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

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

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

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

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

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

Responsibility for development of tribunal policy diffused among departments

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

Tribunals not independent of sponsoring departments

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

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

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

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

Training of chairs and members was under-resourced and inadequate

6.10. Research recently carried out on behalf of the Scottish Government²⁶ concluded that:

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

(page 42)

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

Inconsistent approach to provision of rights of appeal against administrative decisions

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

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

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

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

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

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

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

Inconsistent approach to the content of procedure rules for tribunals

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

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

(para. 8.9)

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

Lack of effective case management

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

Tribunals are not sufficiently user-friendly

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

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

Users are unable effectively to represent themselves

6.19. Several research reports have suggested that users are often unable to represent themselves effectively at tribunals.²⁹ However, the most recent research suggests that in recent years tribunals may have become better at performing an enabling role³⁰ thus reducing the need for representation, although this research also highlights the importance of pre-hearing advice. It is unclear whether the problem of users being unable to represent themselves effectively is equally pronounced in devolved and reserved tribunals.

The limited effectiveness of the Council on Tribunals

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

Conclusion

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

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

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

Chapter 7: Principles



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

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

Aims of Administrative Justice

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

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

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

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

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

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

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

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

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

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

Distinctiveness of the Scottish Legal System

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

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

Independence

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

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

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

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

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

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

Scottish Government administered tribunals

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

Local Authority Tribunals

7.11. Those tribunals that are convened by Local Authorities to hear appeals against decisions made by the Local Authority cannot be said to be properly independent. A report published in 2000 by the Scottish Committee of the Council on Tribunals concluded that the constitution and workings of Education Appeal Committees should be reviewed. In November 2006 the Scottish Executive issued a consultation paper³⁵ in which it agreed with the Scottish Committee's recommendations that Education Appeal Committees should be independent and should be seen to be so. While operating processes may have improved, issues of independence continue to arise in relation to these particular systems.

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

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

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

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

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

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

Hybrid Bodies

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

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

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

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

The Distinctive Nature of Tribunals

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

of an interventionist role by the panel³⁶ should ensure that *so far as reasonably possible* service users are enabled to prepare and present their own cases without representation or, at any rate, without representation by lawyers. This direct participation is an important aspect of tribunals. Their distinctiveness, and the advantages this bestows, compared to the ordinary civil courts should be acknowledged and safeguarded.

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

Remuneration

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

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

Party to Party Tribunals

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

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

Right of Appeal

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

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

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

Appeal Routes

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

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

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

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

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

Conclusion

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

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

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

Chapter 8: Tribunals System – Models For Discussion



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

Scottish Tribunals System Models

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

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

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

Model A: Unified Administrative Support Service Only

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

