

## **Scottish Tribunals: Smith Commission Proposes Major Transfer of Jurisdiction to Scotland**

*While tribunal reform was hardly the hot topic of last year's referendum on Scottish independence, the "vow" by the three main UK political parties to deliver further devolution to Scotland and the Smith Commission's subsequent proposals, are now set to have significant consequences for the delivery of administrative justice in Scotland. In short, the changes that are proposed represent a major transfer of jurisdiction and caseload to the Scottish Tribunal Service which, when implemented, will empower Scottish Tribunals to determine citizens' appeals in key areas of public policy such as social security, tax and employment. The underlying laws and policy areas being adjudicated upon will, however, remain reserved.*

### **The "Vow" – more powers for Scotland**

In a dramatic moment during last year's Scottish independence referendum campaign, the three main UK political parties made a "vow"<sup>1</sup> to the people of Scotland, that substantial further powers would be devolved to Scotland in the event of a 'No' vote. To deliver the vow, Lord Smith of Kelvin was appointed to convene cross-party talks and facilitate an inclusive engagement process leading to recommendations for further devolution of powers to the Scottish Parliament within the UK. The Smith Commission<sup>2</sup> report proposed enhancing devolved powers over a wide range of areas including tribunals.

### **The existing tribunal landscape in Scotland**

Before discussing the Smith Commission's proposals for tribunals, we should sketch the existing landscape of tribunals in Scotland.

Currently, two sets of tribunals operate in Scotland: those administered on a UK or GB-wide basis by Her Majesty's Courts and Tribunals Service (HMCTS) ('reserved tribunals') and those administered on a Scotland-only basis by the Scottish Tribunals Service (STS) ('devolved tribunals'). The reserved tribunals administered by HMCTS currently include those covering major areas of public administration including social security benefits, taxation and immigration control and important party v party tribunals such as the employment tribunals.

The devolved tribunals administered by STS include the Lands Tribunal for Scotland, the Mental Health Tribunal for Scotland and the Private Rented Housing Panel. The Leggatt Report<sup>3</sup> which eventually led to the creation, by the Tribunals, Courts and Enforcement Act 2007 ('TCEA'), of a unified tribunal framework for reserved tribunals did not cover the devolved tribunals in Scotland and no equivalent reforms of them were made at the time of TCEA.

However, since then, the Scottish Government has been leading a programme of administrative justice reform as part of its *Modernising the Civil Courts and Tribunal Systems* policy stream.<sup>4</sup> The major initiative has been the re-organisation of devolved tribunals provided for by the Tribunals

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<sup>1</sup> <http://www.dailyrecord.co.uk/news/politics/david-cameron-ed-miliband-nick-4265992>

<sup>2</sup> <https://www.smith-commission.scot/smith-commission-report/>

<sup>3</sup> Tribunals for Users: One System, One Service (2001):

<http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm>

<sup>4</sup> <http://www.scotland.gov.uk/Topics/Justice/policies/civil-courts>

(Scotland) Act 2014.<sup>5</sup> The Act responds to the criticisms and recommendations of existing arrangements made by the Administrative Justice Steering Group's report, *Options for the Future Administration and Supervision of Tribunals in Scotland*<sup>6</sup> and to advice from the AJTC's Scottish Committee. Criticisms included that:

- The tribunal system in Scotland was extremely complex and fragmented;
- Many Scottish tribunals were not completely independent of the Scottish Government;
- There was no consistent system for appointing tribunal chairs and members; and
- Many of the tribunals worked in isolation, leading to duplication, a variation of standards and performance, and a lack of good value.

The Tribunals (Scotland) Act 2014 tried to address these issues by providing for the creation of a unified two-tier tribunal structure, essentially similar to that already operating for reserved tribunals under TCEA, supervised by a new office, the President of Scottish Tribunals, under the overall leadership of the Lord President of the Court of Session. The timetable for implementation of this legislation is extremely protracted with the First-tier Tribunal for Scotland to be set up (initially to hear housing appeals only) in December 2016 and the complete integration of all tribunals not planned to be complete until August 2023. In a separate development, the Scottish Tribunal Service is intended to be merged with the Scottish Court Service to create a Scottish Courts and Tribunals Service by April 2015.

The context for the Smith Commission's proposals is, therefore, one of the Scottish Government seeking simplification, harmonisation, and increased efficiency of devolved tribunals. These aims echo those which motivated reform of reserved tribunals and represent an example of convergence in approach between the jurisdictions.

### **The Smith Commission – proposals on tribunals**

The Smith Commission's report set out heads of agreement for further devolution across three 'pillars'.<sup>7</sup> Pillar 2 - *Delivering prosperity, a healthy economy, jobs, and social justice* – included heads of agreement in relation to tribunals at paragraphs 63 and 64.

Paragraph 63 proposes that "all powers over the management and operation of all reserved tribunals" should be transferred to the Scottish Parliament with limited exceptions (the Special Immigration Appeals Commission and the Proscribed Organisations Appeals Commission). Paragraph 64 proposes that the laws underlying the reserved rights and duties upon which newly devolved tribunals would adjudicate should remain reserved.

While tribunal reform was not a prominent issue in the Scottish independence referendum, there had nonetheless been calls previously for the devolution of reserved tribunals to Scotland. The Scottish Government's consultation on tribunal reform in 2012, for example, had argued that there

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<sup>5</sup> <http://www.legislation.gov.uk/asp/2014/10/enacted>

<sup>6</sup> [http://ajtc.justice.gov.uk/docs/Tribunals\\_in\\_Scotland.pdf](http://ajtc.justice.gov.uk/docs/Tribunals_in_Scotland.pdf)

<sup>7</sup> [https://www.smith-commission.scot/wp-content/uploads/2014/11/The\\_Smith\\_Commission\\_Report-1.pdf](https://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf)

were strong arguments in terms of accountability and efficiency for bringing reserved tribunals under the jurisdiction of the (at that time) newly created Scottish Tribunal Service.<sup>8</sup>

### **The command paper – draft clauses on tribunal jurisdiction transfer**

On 22 January 2015, the UK Government published a command paper, *Scotland in the United Kingdom: An Enduring Settlement*<sup>9</sup> stating how it intended to implement the Smith Commission's proposals, including draft bill clauses. Chapter 6 explains how the proposals on tribunals are to be implemented and clause 25 sets out the proposed primary legislation that will be required.

The command paper covers three areas:

- The mechanism by which powers for reserved tribunals will be transferred to Scotland;
- The mechanism by which powers will be limited to ensure the consistent delivery of national policy and consistency of practice between devolved and reserved tribunals; *and*
- The reserved tribunals which will not be devolved.

### **The mechanism for transfer of tribunal powers**

The command paper does not, despite the breadth of the Smith Commission's proposals, suggest a simple devolution of all legislative and executive powers in relation to currently reserved tribunals. Rather, Clause 25 confers on the UK Government power to make an Order in Council transferring the functions of any specified reserved tribunal to a specified Scottish tribunal. Such Orders in Council must be laid for approval before the UK and Scottish Parliaments. Once approved by both Parliaments, competence as defined in the order will be transferred in respect of the tribunal in question, according to a timetable agreed between the UK and Scottish Governments. The transfer of functions will be accompanied by an appropriate transfer of existing resources supporting currently reserved tribunals.

### **Limitations on the powers transferred to tribunals**

The UK Government's general aim is to achieve a broad transfer of responsibility for management and operation of currently reserved tribunals without undermining the aims and effect of substantive policy in the transferred areas. Thus, whilst powers over social security tribunals<sup>10</sup> may be transferred, social security law, as a reserved matter, will remain the same across the UK. Moreover, the command paper makes clear that the substantive law which creates rights of access to tribunals will remain reserved. It will, therefore, continue to be for the UK Parliament to decide whether there should be a right of appeal to a tribunal in respect of any reserved administrative function. It goes on to say that "matters critical to the delivery of reserved policy will continue to be reserved to Westminster to the extent that the relevant Order in Council so provides. These matters are likely to differ between tribunals depending on the reserved policy area and will be set out in the relevant Order in Council."

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<sup>8</sup> <http://www.scotland.gov.uk/Resource/0039/00390274.pdf>

<sup>9</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/397079/Scotland\\_Enduring\\_Settlement\\_acc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397079/Scotland_Enduring_Settlement_acc.pdf)

<sup>10</sup> Currently, social security appeals are heard by the Social Entitlement Chamber of the First-tier Tribunal.

The approach may, therefore, be a piecemeal one under which the details of the transfer of responsibility for tribunals vary from one policy area to another. Each Order in Council will set out the precise nature of the matters that will be heard by a Scottish tribunal, which tribunal within the devolved system will hear those matters and any limits or constraints on the exercise of transferred powers “that are necessary to ensure the continuing effective delivery of the overarching national policy.” Such limits may include procedural requirements designed to ensure devolved tribunals maintain consistency with those features of reserved tribunals required to support the enforcement of policy. Orders in Council will also provide a vehicle for ensuring judicial cooperation between jurisdictions to ensure consistency in tribunal practice and procedure.

### **Tribunals which will remain reserved**

In addition to setting out the mechanism by which powers are to be transferred, the command paper specifies the tribunals to be excluded from further devolution proposals. These are the two tribunals specifically named in the Smith Commission report (above) plus the Pathogens Access Appeals Commission and the Investigatory Powers Tribunal on the basis that the rationale for exclusion - which is that these tribunals deal with matters of national security for the whole of the UK – applies to all four.

### **Significance of the proposals**

These proposals raise a number of significant issues. We analyse three of those issues here:

- The scale of the caseload which results from the transfer of tribunal jurisdictions and the resource questions that raises;
- The tension that may exist between pursuing distinctive Scottish approaches to administrative justice and the requirements for the consistent application of reserved policy; *and*
- How much tribunal users will benefit from the changes.

### **How many cases are currently being dealt with by devolved Scottish tribunals?**

Figures about the number of tribunal cases received by devolved tribunals and about the number of cases received by reserved tribunals from Scottish citizens are hard to be precise about as not all are published. This makes assessing the scale of the proposed transfer somewhat difficult. In 2012, a Scottish Government consultation paper stated that devolved and reserved tribunals in Scotland, together, received over 80,000 cases a year.<sup>11</sup> The bulk of these receipts related to reserved tribunals, but the split between devolved and reserved tribunals was not given in the paper. Figures provided for the most recent reporting years, in annual reports or otherwise, for the eight tribunals currently managed by the STS suggest that cumulatively they received 5,043 appeals and applications. Our best estimate is, therefore, that devolved tribunals in Scotland received around 5000 appeals and applications in 2013-2014. These numbers are bound to increase in the near future as a result of the creation of new appeal rights, e.g. those in the Housing (Scotland) Act 2014

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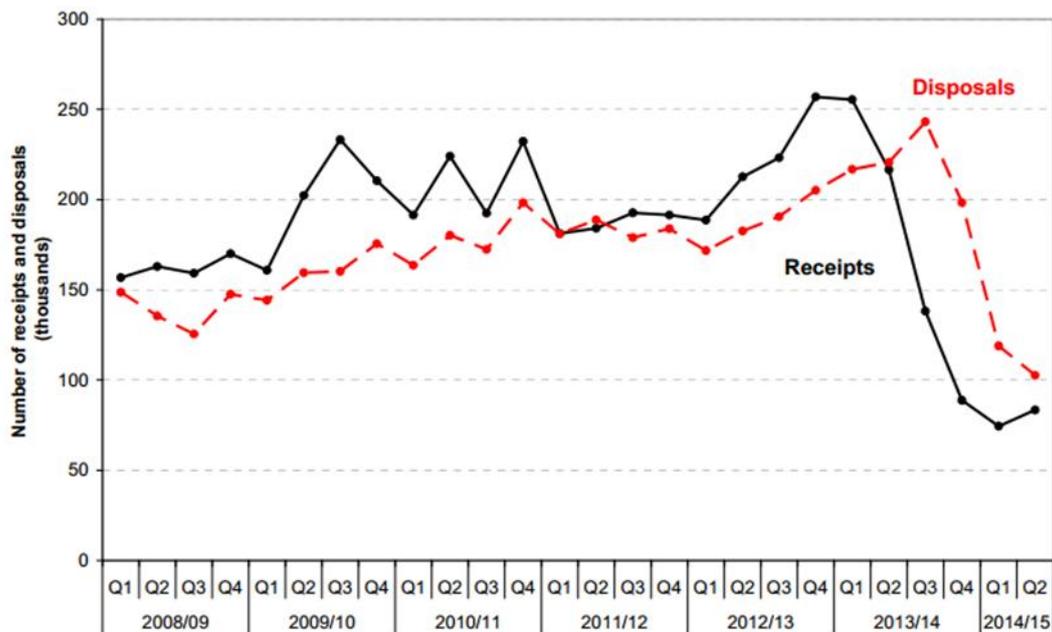
<sup>11</sup> <http://www.scotland.gov.uk/Resource/0039/00390274.pdf>

and the Revenue Scotland and Tax Powers Act 2014, although the scale of the increase is not likely to be dramatic.

### How many Scottish cases are currently being dealt with by HMCTS?

If we accept that the current caseload for Scottish tribunals is around 5,000 a year, and that the figure of 80,000 in the 2012 consultation paper is a good guide, then we might expect the transfer of all currently reserved jurisdictions to lead to an increase in caseload of up to 75,000 cases a year. However, at least in the near future, the actual figure would probably be substantially less.

The main reason is that there has been a sharp drop in the in the number of cases received by HMCTS tribunals over the last year or so. In total, 83,500 cases were received in July-September 2014 in all jurisdictions compared with 214,300 cases in July-September 2013 (a 61% decrease). The chart below, which shows receipts and disposals for the period between 2008-9 and 2013-14 provides a stark visual representation of this decrease.



Source: HMCTS Quarterly Tribunal Statistics July-September 2014, p.5 (published December 2014)<sup>12</sup>

The overall drop is due mainly to drops in the case loads of three major tribunal jurisdictions (social security and child support, employment, immigration and asylum) which in turn are a consequence of policy changes introduced by the UK government in the course of 2012-13. First, the introduction of mandatory reconsideration by the Department of Work and Pensions (DWP) (a process by which officials must review challenged decisions before they proceed to appeal) appears to have led to a dramatic drop in the number of appeals heard by the Social Entitlement Chamber of the First-tier

<sup>12</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/385759/tribunal-grc-statistics-quarterly-jul-sep-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385759/tribunal-grc-statistics-quarterly-jul-sep-2014.pdf)

Tribunal. Receipts for July to September 2014 were down 81% on the same period of 2013. Secondly, the setting of much higher fees for applications to employment tribunals appears to have led to a sharp drop in tribunal receipts in that area, with single claims received in July to September 2014 down 61% on the same period of 2013. Thirdly, there was also a 20% decline in immigration and asylum appeals compared to the third quarter of 2013, this probably being due to restrictions on the appeal rights of certain categories of person.

### **How big is the increase in cases likely to be for the new Scottish Courts and Tribunal Service?**

So can we predict what the case load for SCTS would be if it took over management of currently reserved tribunals today? Unfortunately, HMCTS statistics do not provide a regional and national breakdown of receipts for any tribunals except employment tribunals. Here, HMCTS statistics allow us to calculate that for the period January to September 2014, out of a total 69,384 cases received across Scotland, England and Wales, 8,260 cases were lodged in Scotland (11.9% of cases).<sup>13</sup> While it is no doubt overly simplistic to assume that caseloads in other tribunal jurisdictions reflect the same split between Scotland, England and Wales as employment tribunal cases, this figure can provide the basis for an estimate of the likely scale of the caseload which will transfer to Scotland.

Using the figures for tribunal receipts between July – September 2014 (83,500 cases) suggests that the Scottish Tribunal Service would have received approximately 9940 cases during that period. Quarterly statistics are subject to significant variation. With that further caveat, we might suggest a ‘ball park’ figure of around 39,760 additional cases per year as a result of the transfer of reserved jurisdictions. The total number of tribunal cases received by the Scottish Courts and Tribunals Services (including those dealt with by the currently devolved tribunals) might, therefore, be in the region of 45,000 cases per year if the transfer were made now.

This means that the caseload of Scottish Tribunals would increase roughly nine-fold. Whilst there is an intention to transfer resources with the new jurisdictions, the scale of the task obviously raises questions as to the capacity of the Scottish Tribunal Services to deliver such changes. The very lengthy timetable for the implementation of the reforms in the Tribunals (Scotland) Act 2014 (a much more modest exercise in terms of caseload) suggests that the transfer of jurisdiction may have to take place over a very long period.

### **The tension between a distinctively Scottish approach to administrative justice and consistent application of reserved policy**

While the scale of the changes is important to quantify, it is also important to consider how far the proposals in the command paper will permit the Scottish Government and Parliament to pursue a distinctively Scottish approach to administrative justice. However, under the approach proposed in the command paper the potential for a distinctive approach to tribunals in Scotland appears to be fairly limited. This is largely because the major policy areas which give rise to the cases on which tribunals will adjudicate will remain reserved and the Smith Commission and the command paper have both been clear in stressing the need for consistency in approach between Scotland and the rest of the UK in order to allow for the fulfilment of reserved policy goals, and the desire to take a different approach to administrative justice might conflict with UK policy goals in some area.

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<sup>13</sup> <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-july-to-september-2014>

One such area is the mandatory reconsideration of cases in which appeals have been made against decisions by DWP officials. Whilst this policy may be good news for citizens to the extent that adverse decisions are revised without the need for appeals to be heard, mandatory reconsideration might also present a barrier to justice if citizens whose cases are reconsidered, but who do not get a favourable outcome, give up through 'appeal fatigue' rather than seeking further redress.

Assuming the Scottish Parliament was concerned by this possibility, would it be able to do anything about it? The answer would seem to be, 'no'. The way in which DWP officials take and review decisions (although closely related to the operation of the tribunal system) would remain a reserved matter. Therefore, even if the Scottish Parliament were to feel that mandatory reconsideration, as a practice, represented a barrier to Scottish citizens accessing Scottish tribunals, it would not have the power to take a distinctive approach. Whilst this makes sense in terms of the consistent application of UK social security policy, it makes less sense from the perspective of a holistic view of administrative justice and tribunal policy in Scotland, as the nature and quality of internal reconsideration and review processes have a direct impact on the operation of external appeal mechanisms.

Another potential area of conflict is tribunal fees for employment cases. These fees, which can reach up to £1200 for individuals wishing to pursue appeals,<sup>14</sup> have been seen by many as creating a major barrier to access to justice. The case for allowing the Scottish Parliament to legislate on employment tribunal fees seems much stronger than the case for allowing it to legislate on internal review of decisions in reserved areas. After all, fees for the ordinary courts are a devolved matter and they deal with reserved areas of law. However, this matter is politically controversial. The increase in fees is part of the current government's strategy of decreasing regulatory burdens on business, something to which it is strongly attached, and the dramatic drop in caseload amounts to a major change in the impact of employment law on employers. The UK government may not be willing to give up the 'gain' achieved for employers and would probably be supported in that by many Scottish businesses. The UK government would be perfectly free to transfer responsibility for employment tribunals while reserving the question of fees. The approach to transferring jurisdiction set out in the command paper contemplates precisely this sort of ad-hoc approach - potentially driven by political considerations - to devolving tribunal functions.

## **Benefits to Users**

The final question is how far the devolution of currently reserved tribunals would benefit the users of tribunals. This is a large question that cannot be fully discussed here. As noted above, the Scottish Government, in its 2012 consultation, suggested that the transfer of reserved tribunals to Scotland would bring about benefits in terms of accountability and efficiency of the Scottish Tribunal Service. That does not follow automatically. The operation of tribunals and, in particular, the quality of service to users will not improve merely because some jurisdictions are transferred. That will require specific innovations in the running of tribunals which have not yet been specified. At present, all we can say is that increasing efficiency and accountability and improving the user-experience are major challenges which an expanded Scottish Tribunal and Court Service would have to meet.

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<sup>14</sup> <http://hmctsformfinder.justice.gov.uk/courtfinder/forms/t435-eng.pdf>

## **Conclusion**

These proposals for a major transfer of jurisdiction and caseload from the current reserved tribunals to the Scottish tribunal system represent an important extension of devolved government. How far they will lead to improved administrative justice in Scotland remains to be seen. There is likely to be further debate, as Orders in Council are drafted, regarding the limitations to be placed on the jurisdictions of the tribunals to be transferred. There may well be conflict between the Scottish and UK Governments here over the particular balance to be struck between what is needed to ensure that reserved policy continues to be delivered consistently, and a desire to leave room for a distinctively Scottish approach where appropriate. Operationally, the large increase in caseload which will result from the transfer represents a major challenge for the newly expanded Scottish Courts and Tribunals Service. Whilst further devolution also provides an opportunity for gains in efficiency and accountability and an improved user experience in the longer term, it cannot be assumed that these gains will materialise. Further devolution is neither a necessary nor a sufficient condition of such gains.

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