

Future arrangements for carrying out the functions of the Scottish Tribunals and Administrative Justice Advisory Committee (STAJAC)

The Scottish Tribunals and Administrative Justice Advisory Committee (STAJAC), as an interim body, will reach the end of its lifespan in November 2015. As part of our remit, one of the functions of the STAJAC is “to recommend how the functions of the Committee should be carried out in the longer term.”

This paper briefly outlines the current and previous arrangements, and sets out our considerations and recommendations in line with our remit. In coming to these recommendations, we have referred to the Administrative Justice and Tribunals Council (AJTC) Scottish Committee report of 2013: [Remit and Capacity of a Non Statutory Advisory Committee on Administrative Justice and Tribunals in Scotland](#). The AJTC report was drawn up following comprehensive stakeholder engagement. Due to restraints of time and resources, we have undertaken limited further consultation with stakeholders. A brief summary of the responses is included as Appendix A.

1. Background

The predecessor to the STAJAC was the Scottish Committee of the Administrative Justice and Tribunals Council (AJTC). The Council and its Scottish Committee were established by the Tribunals, Courts and Enforcement Act 2007. The Schedule to that Act set out the Council’s core functions: to keep under review a) the administrative justice system b) listed tribunals, and c) statutory enquiries. The Scottish Committee carried out these functions in relation to Scotland.

The Cabinet Office of the UK Government carried out a review of Arm’s Length Bodies in 2010, with a view to reducing the number and cost of public bodies and to increase transparency and accountability. A consultation was held which demonstrated that a majority of respondents thought that the AJTC should be retained. Ultimately, however, the Secretary of State for Justice recommended that the AJTC should be abolished. The Council and its Scottish Committee were formally abolished in August 2013.

Upon abolition of the AJTC by the UK Government, the Scottish Government committed to developing a ministerial advisory committee on administrative justice and tribunals.

2. Current Arrangements

The STAJAC was established in November 2013 by the then Minister for Community Safety and Legal Affairs, Roseanna Cunningham MSP. It was established as an interim committee with a lifespan of two years, ending in November 2015. The Committee is non-statutory in nature. It was established to play a vital role championing the needs of users across the administrative justice and tribunals system in Scotland, to provide external scrutiny of the system in devolved areas, and to highlight any issues to Scottish Ministers.

A wide ranging remit was agreed for the Committee:-

- to promote the interests of system users and champion an administrative justice system that is accessible, responsive and has users' needs at the centre
- to focus on engaging with decision makers to improve rules, procedures and the complaints handling processes within the administrative justice system
- to encourage better decision making within the administrative justice system with the emphasis on getting the decision right first time to support early and appropriate dispute resolution
- to build networks and encourage the sharing of good practice amongst practitioners
- to provide scrutiny of the whole of the administrative justice system in devolved areas, including the development of the proposals to merge the Scottish Tribunals Service and the Scottish Court Service and the new structure following the Tribunals Bill
- to advise Ministers on the development of the Strategy for Administrative Justice and the future direction and priorities of the strategy
- to engage across Government and identify to Ministers any policy and practice issues affecting the administrative justice system in devolved areas which may require Government attention
- to monitor developments in reserved areas of administrative justice and tribunals pre and post referendum that affect citizens in Scotland
- to recommend how the functions of the committee should be carried out in the longer term

In establishing the membership of the Committee, the Minister appointed the Chair and it was for the Chair to select the remainder of the membership. Care was taken to ensure that relevant skills, expertise and experience from a number of different backgrounds and perspectives are well represented. In particular, the aim has been that overall membership

should allow for the perspectives of users, advice providers, decision makers and experts/academics to be represented.

The current Workplan is a reflection of the Committee's priorities, given the limited time and resources afforded to it. The plan was drawn up under three broad headings – Reactive Work; Proactive Work; and On-going Engagement.

- a) Reactive Work: this has involved responding and contributing to policy and legislative developments. The Committee has, for example, been very actively engaged in monitoring the development of the Welfare Funds (Scotland) Act 2015 and its regulations.
- b) Proactive Work: this involves the Committee carrying out its own work and research. In particular, the Committee is engaged in a project with Audit Scotland which is examining the financial and other impacts for Local Authorities of not getting decisions "right first time"; is in the development stages of a Tribunals user research project; and is carrying out its own project to map out and describe, as comprehensively as possible, the administrative justice and tribunals landscape in Scotland.
- c) On-going Engagement: the Committee is continuing to engage with key stakeholders, contributing to and ensuring representation on a number of relevant forums and committees – for example, the UK Administrative Justice Forum, the UK Administrative Justice Institute advisory board, the Scottish Tribunals Forum and the Scottish Legal Aid Board Access to Justice Reference Group.

The Committee's lifespan ends in November 2015. Ministers will now need to consider whether, and if so what, future arrangements should be put in place to continue to carry out the functions of the Committee.

The following sections of this paper set out (1) the considerations which we believe should be taken into account and (2) our recommendations for any future arrangements.

3. Considerations to be taken into account for Future Arrangements

3.1 *Is there a need for a committee such as STAJAC?*

We believe that there is a clear need for a committee such as STAJAC. Administrative Justice (including tribunals) is the aspect of the justice system which affects a large number of people in many aspects of their lives, and which citizens are most likely to encounter in their lives. It is an important area of policy in which there is a need for Government to receive expert advice. It is vital that there is independent oversight of the system and ability to analyse the interaction between different jurisdictions, with the overarching aim of ensuring

that there is public and user confidence in the system and that it is continually improving to the benefit of users, and the taxpayer.

There are significant changes on the horizon for the administrative justice and tribunals system in Scotland – not least the introduction of new devolved tribunal jurisdictions and the proposals in the Scotland Bill 2015 which include the likely further devolution of reserved tribunals and of powers in relation to certain welfare benefits. Scrutiny of administrative justice and tribunals will be all the more important in that context, and the involvement of a committee such as STAJAC will support the development of an efficient and expanded system through expert oversight.

3.2 *Successes and Limitations of the STAJAC Model*

a. *Successes:-*

The Committee's clear and focused 2-year Workplan has had limited priorities in the context of a wide ranging remit but has allowed it to achieve a lot despite constraints in terms of time and resources. The Committee has managed to develop strong working relationships with stakeholders and this has further increased its reach and influence.

The Committee has given advice on a number of policy areas to the Scottish Government and this has had a significant influence on policy development. Furthermore, the Committee has managed to take a proactive approach in shaping and commissioning research and becoming involved at the forefront of administrative justice project steering groups in partnership with other stakeholders.

b. *Limitations:-*

Whilst the Committee has dealt well with the broad range of work to be done, it has been difficult with a lack of dedicated policy staff. In the longer term, this is not a sustainable approach. This may result from the Committee's status – it cannot employ staff directly or contract in its own right – and this is something which requires to be considered should the Minister decide that the functions of the Committee should be continued.

Given that the Committee is established on an interim basis, it was necessary to delineate a lifespan. Whilst the Committee has achieved much in a short period, the prescribed period of two years has limited the work that it would like to have pursued. It is also apparent that some of the proactive work that the Committee has undertaken with stakeholders will not be completed by the end of its lifetime.

We also believe that the work of the Committee would have benefited from a stronger link with the Scottish Parliament. The Committee has had very little interaction with the Parliament or its committees. As a consequence, we believe that administrative justice

policy has not been subject to the same degree of parliamentary scrutiny as civil justice or criminal justice. Part of the difficulty may lie in the way in which the remit of the Justice Committee is expressed. This is stated on the Scottish Parliament's website as being:

‘To consider and report on a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice and b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.’

While there is specific reference to criminal and civil justice, there is no specific reference to administrative justice, which falls under "other matters falling within the responsibility of the Cabinet Secretary for Justice".

4. Recommendations for future arrangements

4.1 Main functions of a future Committee

The functions of a future Committee can usefully be set against the definition of the administrative justice system as set out in the Tribunals, Courts and Enforcement Act 2007:

‘..the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including: the procedures for making such decisions, the law under which such decisions are made and the systems for resolving disputes and airing grievances in relations to such decisions.’

Against that background, the *primary purpose* of a future Committee should be

- to promote the interests of system users and champion an administrative justice and tribunals system that is accessible, responsive and has users` needs at its centre.

A future Committee should have the following functions:

- providing scrutiny of the whole of the administrative justice and tribunals system in devolved areas
- raising awareness of administrative justice amongst policy makers and decision makers and encouraging coordination of administrative justice developments across government
- engaging across Scottish Government and advising Ministers on any policy and practice issues affecting the administrative justice and tribunals system in devolved areas which may require Scottish Government attention

- monitoring developments in the administrative justice and tribunals system in reserved areas and advise Ministers on matters which may require Scottish Government attention
- engaging with decision makers to improve rules, procedures and the complaints handling processes within the administrative justice and tribunals system
- providing advice and making recommendations to the Scottish Civil Justice Council on matters relating to the Scottish administrative justice and tribunals system as fall within the Council's functions
- contributing to scrutiny of future Tribunal Rules for Scottish tribunals
- encouraging better decision making within the administrative justice and tribunals system with the emphasis on getting the decision right first time and supporting early and appropriate dispute resolution
- encouraging the sharing of information and best practice amongst practitioners
- encouraging, initiating or commissioning research to inform its advisory functions

The functions for a future Committee set out above echo, in part, those of the Scottish Civil Justice Council in relation to the civil justice system. Amendments to SCJC's functions introduced by the Tribunals (Scotland) Act 2014 gave the SCJC the functions of 'reviewing the practice and procedure followed proceedings in Scottish tribunals,' and of 'drafting tribunal procedure rules'. However, they do not expressly confer on the SCJC the duty to keep the *whole administrative justice system* under review - an important role that we believe is at the heart of a future Committee's functions and which would enable a Committee to provide advice to the SCJC on relevant matters.

In addition we believe that a future Committee could make an important contribution to the scrutiny of future draft tribunal rules. We understand that from 2017, the Tribunals Committee of the Scottish Civil Justice Council (SCJC) will take on responsibility for drafting new tribunal rules. We believe that there would be merit in ensuring that a future Committee is involved in consideration of any new rules, perhaps through the co-option of one of its members to the Tribunals Committee of the SCJC.

4.2 Key characteristics of a future Committee

We recommend that a future Committee should be:

- a) Independent, and seen to be independent, of both the Scottish Government and the Scottish Courts and Tribunals Service.
- b) Accountable, and achieve this by formulating workplans and reporting formally to Ministers/the Scottish Parliament annually. The Committee should also sit clearly within the remit of the Scottish Parliament Justice Committee. Scrutiny of

administrative justice policy should be seen as a core element of the Justice Committee's function in the same way as civil and criminal justice.

- c) Proactive and Visible: a future Committee should not just be reactive, but should be able to take a proactive approach – through active and regular engagement with stakeholders.
- d) Knowledgeable, by being made up of members with experience of many different aspects of the administrative justice system
- e) Well informed, by seeking and collating stakeholder views, using existing research or initiating new research – and having the resources to do so as well as the ability to deploy them (e.g. to enter into contracts/ commission research and employ staff in its own right, if at all possible).

Consideration should be given to establishing the Committee in such a way that it can deploy resources effectively, in its own right (i.e. by it having some form of legal personality). While we are aware that this may be unlikely given the Scottish Government's policy approach to such bodies, consideration should be given to establishing a future Committee on a statutory footing. This would give it a more secure status, and would send a clear signal about the priority that the Scottish Government gives to its role. This would also allow for the statute to specify the remit of the Committee and could set out the interests that should be represented in the membership.

4.3 Membership of a future Committee

Irrespective of the basis on which a future Committee is established we recommend that:-

- appointments, including that of the Chair, should be through an open and transparent selection process. A process akin to a public appointments process would lend greater legitimacy and transparency as well as credibility, and would also allow for a greater pool of people with relevant skills and experience to be considered for membership.
- following from this, appointments should be for a set period of time – between 3 and 4 years – with the possibility of renewal.
- membership should demonstrate a balance across administrative justice and tribunals – for example academics, users and user interests, service providers and decision makers, those with experience in the tribunal judiciary/administration etc. It should seek a range of skills and experience.
- there should be provision for members to be remunerated
- a future Committee should make use of sub-committees or portfolios, based on members' skills and experience, and should have adequate policy support for this.

4.4 *Resource, support and other arrangements that need to be in place for a future committee to be able to be effective*

Irrespective of the basis on which a future Committee is established we consider that:-

- sufficient provision of resources will be required to ensure the Committee is supported by permanent, dedicated staff. This can be modest, but must include a policy/research capacity as well as an administrative capacity.
- a budget will be required which is sufficient to: pay fees and expenses where appropriate; arrange conferences, events and meetings; establish and maintain a website and publications; and should include a modest research capacity.
- a future Committee also needs to have the ability to employ staff and enter into contracts – this would ideally be in its own right, but could be achieved through a clear arrangement with its sponsor body, the Scottish Government.
- finally, there should be a clear framework agreement between the Committee and its sponsor body.

STAJAC

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Appendix A – Summary of consultation

The consultation on the future arrangements for carrying out the functions of the STAJAC ran for six weeks from the 8th May until the 17th June 2015. It was a targeted consultation exercise, aimed at stakeholders with an interest in the administrative justice system (evidenced for example through subscription to the Scottish Government newsletter, or through attendance at STAJAC's stakeholder event).

The consultation received 17 responses. The vast majority of responses (14/17 responses, 82%) expressed the view that there is a need for a body such as the STAJAC in Scotland. Two responses (2/17, 12%) expressed the contrary view. One response, from Children's Hearings Scotland, made no comment on the consultation questions, and instead questioned whether the Children's Hearings System would be included within the remit of any successor body.

Of the responses which expressed a view that a body such as STAJAC was necessary, one of the main messages was the desire for any future body to have a more permanent standing and to be seen to be independent.

The majority of positive responses on this also endorsed the suggestion that any future body would benefit from stronger links to the Scottish Parliament; with some responses suggesting that the use of annual reporting would ensure accountability and transparency.

All of these responses supported the proposed functions of a future committee in principle; a few respondents suggested that a research function could be carried out by existing bodies and research channels.

Similarly, all responses on this issue supported the proposed membership requirements. One respondent suggested that membership should also include someone with suitable experience of disability issues, and another suggested that membership should specifically exclude those who are members of the judiciary or are ombudsmen to avoid potential conflicts of interest.

Two respondents did not agree that a body such as STAJAC was necessary, stating that the functions of the STAJAC could be carried out elsewhere and by existing bodies. One of these respondents suggested that the Scottish Courts and Tribunals Service could accommodate a body to carry out such functions.