

To Scotland Office
UK Government

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Scotland in the United Kingdom: An enduring settlement
Comments by the Scottish Tribunals and Administrative Justice Advisory Committee (STAJAC)

Introduction

1. In accordance with the invitation contained in the UK Government's command paper, "Scotland in the United Kingdom: An enduring settlement", the Scottish Tribunals and Administrative Justice Advisory Committee (STAJAC) submits the following comments on proposals for the transfer of powers over the management and operation of reserved tribunals to Scotland. In the light of our remit we have a particular interest in the Smith Commission's proposals contained in paragraphs 63 and 64 of their report and in the UK Government's more detailed implementation proposals contained in chapter 6.3 of the command paper and in clause 25 of the draft clauses annexed to it.
2. STAJAC was established under the auspices of the Scottish Government in 2013, following the abolition of the UK Administrative Justice and Tribunal Council and its Scottish Committee. Our principal remit is to promote the interests of the users of the administrative justice and tribunals system in Scotland and to champion that system as being accessible and responsive and as having users' needs at the centre. Included in our remit is monitoring developments in reserved areas of administrative justice and tribunals pre and post the Scottish independence referendum that affect citizens in Scotland. As will be seen from our website,¹ or membership covers a wide area of expertise and specialist interest in this field.
3. We make the following comments on the command paper and on the clauses referred to above and ask that they be taken into account in further consideration of the proposed changes.

Tribunals in Scotland – the present position

4. There are at present two parallel tribunal regimes in Scotland. Those tribunals which are reserved to the UK and administered by H M Courts and Tribunals Service but which cover Scottish cases include in particular employment tribunals and those dealing with social security, tax and immigration appeals. Those devolved to

¹ <http://www.adminjusticescotland.com/>

Scotland and administered by the new Scottish Courts and Tribunals Service² include in particular the Lands Tribunal for Scotland, the Mental Health Tribunal for Scotland and the Private Rented Housing Panel. The reserved tribunals are administered under a unified framework in terms of the Tribunals Courts and Enforcement Act 2007, which was implemented within a short timescale. No similar unification was introduced in Scotland until the Tribunals (Scotland) Act 2014, which is intended to streamline administration, ensure that tribunals are independent of government and introduce consistency in the appointment of tribunal chairs and members. This legislation also provides for a unified two tier structure supervised by a President of Scottish Tribunals under the overall guidance of the Lord President of the Court of Session. While a start has been made on the introduction of these changes, the timescale is an extended one.

5. The Smith Commission agreement for further devolution of tribunals in Scotland and the UK Government's proposals for implementing them must therefore be considered against the process of simplification, harmonisation and increased efficiency intended to be achieved by these ongoing changes.

The Smith Commission proposals

6. The Smith Commission's proposals in so far as they relate to this further devolution, are contained in paragraphs 63 and 64 of their agreement. Paragraph 63 provides that with only a small number of exceptions³ all powers over the management and operation of the reserved tribunals will be devolved to the Scottish Parliament. Paragraph 64 provides that the substantive laws relating to the rights and duties covered by these tribunals will however continue to remain reserved, although they may be applied by the newly devolved tribunals.

The command paper and the draft Scotland Clauses 2015

7. As explained in chapter 6.3 of the command paper, clause 25 of the draft clauses annexed to it delivers paragraphs 63 and 64 of the Smith Commission agreement. It provides that the transfer of functions from each specified reserved tribunal to a specified devolved tribunal will be effected by an Order in Council according to an agreed timescale. A draft of each Order will have to be laid before, and approved by, each of the two parliaments prior to the transfer. The extent to which the underlying substantive law which will be reserved, which will vary in respect of each affected area, will be specified in each Order. In each case there will be an accompanying transfer of existing resources supporting the currently reserved tribunal.
8. Each Order in Council will set out the limits, constraints and requirements on the exercise of the powers transferred that are necessary to ensure consistency of national (i e UK) policy. The commentary in chapter 6.3 states that these matters are

² This was formed through a merger of the former Scottish Courts Service and Scottish Tribunals Service on 1 April 2015

³ Notably the Special Immigration Appeals Commission and the Proscribed Organisations Appeals Commission, both of which are stated to have implications for national security.

likely to differ between tribunals. It also states that there will need to be discussion between the two governments as to the application of clause 25 to relevant tribunals that sit in Scotland, for example those dealing with social security, criminal injuries and information rights, and that these discussions will need to include extensive engagement with the judiciary in both jurisdictions. These needs are reflected in sub-clause 6(b) of clause 25.

Issues and concerns

9. **The mechanism of transfer of powers** – In terms of sub-clauses (5) and (6) of clause 25, the transfer of each specific tribunal will require an Order in Council containing specific restrictions and conditions. Each Order may contain a specific definition of what is a Scottish case and may specify the exact function to be transferred differently. It seems to us that this is likely to result in piecemeal transfer and fragmentation, likely to conflict with the objective of increased simplification, harmonisation and efficiency. We are also concerned at the timescale likely to be involved and the resources which will need to be committed by both governments and the judiciary on both sides of the border.
10. **Restrictions and conditions** – Sub-clauses (5) and (6) also explicitly provide that such an Order may make such provisions as are considered necessary relating to the composition or rules of procedure of the relevant Scottish tribunal, or to its staff and accommodation. It seems to us that this provision may inhibit the ability of the newly formed Scottish Courts and Tribunals Service to integrate the operation and administration of newly devolved tribunals (1) with the ways of working it believes most suitable in a Scottish context and (2) in ways which are consistent, where appropriate, with the operation of the existing devolved tribunals, including the use of technology, the use of its estate, etc. It is also apparent from the commentary in chapter 6.3 that much of the detailed operation of clause 25 will remain subject to agreement between the two governments. There is no definition of who will be the arbiter of what, in the wording of sub-clause 6, is stated to be “any provision which Her Majesty considers necessary or expedient.....”. We think that this needs to be clarified.
11. **Resources** – It is stated in chapter 6.3.6 of the command paper that the transfer of tribunal functions will be accompanied by an appropriate transfer of existing resources involved in maintaining those tribunals. We understand this to refer to the cost of operating the tribunals that are to be devolved net of any fees that are currently charged (such as those in employment tribunals). This could create a possibly significant financial shortfall for the Scottish tribunals, if a Scottish government were to take a different approach from the UK government in respect of the charging of fees.

12. Fees - The stated policy position of the current Scottish administration is to oppose the charging of fees, as is done at present for employment tribunals, and we think it likely that this would also be their position if it were suggested that fees should be charged in respect of other tribunals once they are devolved. As the charging of such fees, and the perceived benefits to business (in respect of cases brought before employment tribunals) in reducing the expense of defending such cases, appears to be a matter of policy on the part of the UK Government, this seems likely to create tension between the Scottish and UK Governments. We think this would be a particular problem if the UK Government were to impose fee charging requirements on Scottish tribunals in terms of sub-clauses 25(5) and (6) of the draft clauses (see paragraph 10 above).

1. **Other divergences** – We are also concerned that other divergences may arise as a result of different policy approaches between the Scottish and UK Governments in respect of the tribunals which are to be devolved. We fear that, again, this could result in conditions unacceptable to the Scottish Government being imposed upon them in terms of sub-clauses 25(5) and (6) of the draft clauses. This is illustrated by the present problems which we understand are being experienced by applicants in social security benefit applications, who are obliged to request a mandatory reconsideration of a refusal before they can appeal to a tribunal. We understand that delays caused by this process are resulting in real hardship to applicants, something likely to be of concern in the Scottish context.⁴ There has also been a dramatic and unexplained drop in the number of social security appeals being heard by the first-tier Tribunal and this has raised concerns that the recent reforms to the appeal system (mandatory reconsideration and direct lodgement of appeals) may be impeding access to justice.⁵

12. Capacity – We are particularly concerned about possible problems relating to the capacity of the Scottish Courts and Tribunals Service to handle the volume of cases likely to result from the devolution of the reserved tribunals and we think this will need very careful handling. We understand from figures provided by the Scottish Government⁶ that in 2012 the devolved and reserved tribunals in Scotland together handled some 80,000 cases and it has been estimated⁷ that in the same year only some 5000 of these cases were handled by the devolved tribunals. While this

⁴ See article by Lauren Wood, Policy Officer, Citizens Advice Scotland, in *Journal of the Law Society of Scotland*, October 2014, at <http://www.journalonline.co.uk/Magazine/59-10/1014569.aspx#.VTpfkZOSzYh>

⁵ See (1) Citizens Advice Bureaux, *The cost of a second opinion* (July 2014), available at:

and (2) Low Commission on the Future of Legal Advice 333 The Low Commission research also covers delay in decision-making.

⁶ Consultation on the Scottish Government's Proposals for a New Tribunal System for Scotland, accessible at www.gov.scot/Resources/0039/0039027.pdf

⁷ UK Administrative Justice Institute: *Analysis: Scottish Tribunals : Smith Commission Proposes Major Transfer of Jurisdiction to Scotland.* – Gill and Mullen.

number is likely to increase following the introduction of the tax and first-tier private housing tribunals, there is, and will, apparently be, a very significant imbalance between the caseloads of the two jurisdictions. Again, it has been estimated⁸ that the number of cases might increase by 40,000 if the transfer were made now. As stated in paragraph 4 above, we are concerned at the lengthy timescale involved in the implementation of the Tribunals (Scotland) Act 2014 and we fear that similar issues may arise in the transfer of the administration of the reserved tribunals to Scotland. We think reassurance needs to be given by both governments that adequate resources will be made available, and adequate transitional arrangements put in place, to avoid problems in this respect.

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13. **Conclusion** - The general purpose of devolution is accepted as allowing the Scottish Parliament and Government to diverge from UK policy and to develop and implement solutions to social and political problems in a distinct political and social context. The scope for achieving this under these proposals appears to be limited, and the benefits for users (as well as for the system itself, in terms of greater efficiency, less complexity, opportunities for reform etc.) are uncertain. Our primary remit is to champion the interests of users. Without detail of the actual transfer of each tribunal it is difficult to know whether these proposals will in fact be of benefit to users. However, on the basis of the proposals as they stand we do not think it is immediately evident that they will be. The operation of tribunals and the quality of service do not improve just because the functions are devolved and jurisdictions transferred. Increased fragmentation and complexity in the system seem likely to have the opposite effect, which would be to the detriment of tribunal users in Scotland. As stated in the Leggatt Report of 2001, “It is important to remember that tribunals exist to serve the users, not the other way around.”

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⁸ See Gill and Mullen, *ibid*