

SCOTTISH TRIBUNALS & ADMINISTRATIVE JUSTICE ADVISORY COMMITTEE

WRITTEN SUBMISSION

This is the written evidence of the Scottish Tribunals & Administrative Justice Advisory Committee (STAJAC) in relation to the Infrastructure and Capital Investment Committee's call for views on the Housing (Scotland) Bill as part of their Stage 1 scrutiny.

Scottish Tribunals & Administrative Justice Advisory Committee was created by Scottish Ministers as an interim advisory committee in November 2013 (following the abolishing of the Administrative Justice and Tribunals Council (ATJC) and its Scottish Committee), to provide external, expert scrutiny of the devolved administrative justice and tribunals system in Scotland.

The Housing (Scotland) Bill covers an extensive range of topics within the overarching subject of housing including abolishing the right to buy, social housing tenancies and the allocation of social housing, establishing a registration system for letting agents, and amending site licencing requirements for mobile home sites with permanent residents.

Of particular interest to this Committee are the provisions in Part 3 of the Bill relating to the transfer of existing Sheriff Court jurisdiction to the new first-tier Tribunal in private rented sector cases. This aspect of the Bill (relating to question 7 of the Call for Views) will be the focus of STAJAC's comments.

Q7: Do you have any comments on the proposals for transferring certain PRS cases from the Sheriff Courts to the new First-Tier Tribunal?

The Benefit of Tribunals

The Scottish Tribunals & Administrative Justice Advisory Committee welcomes the movement of (private rented sector) housing cases from the Sheriff Court to the new First-Tier Tribunal. Tribunal-administered justice offers many advantages to users over court-administered proceedings in housing disputes: not least the characteristic hallmarks of specialism and accessibility.

The development of a specialist jurisdiction dealing with housing cases has achieved clearly stated support in recent years from organisations forwarding the user (tenant) perspective. The Civil Justice Advisory Group, established by Consumer Focus Scotland and chaired by Lord Coulsfield, recommended that there should be a specialist jurisdiction to deal with housing cases and suggested in their final report that a more interventionist, specialist and less formal forum would be a better way of identifying and resolving the issues

faced by users¹. This was also reflected by the Scottish Committee of the Administrative Justice and Tribunals Council.²

In sum, these elements create an accessibility which court does not offer users. In cases involving landlords and tenants, there is likely to be an imbalance of power between the parties. It is important that any dispute resolution process is specialist in nature and can redress that imbalance of power through taking an inquisitorial approach.

Specialism allows a forum to develop where the decision makers are experts and are aware of the complex issues a user may be navigating – including but not limited to the immediate legal issue before them (for example, those in housing debt are likely to have other debt problems, problems with benefits or other housing problems). An interventionist approach allows parties to present their own case without the need for lawyers with the expert (inquisitorial) decision makers adept at asking the right questions in order to elicit the information necessary to make an informed, reasoned and fair decision.

The less formal nature of the tribunal forum underpins this specialist and interventionist approach: holding the hearings outwith daunting court buildings and with greater flexibility in their rules and procedures. A tribunal is likely to be less intimidating for users than a court. The public associate courts strongly with criminal cases, and research has found that their perception of courts as institutions which deal with crime contributed to their reluctance to become involved in civil court proceedings.³ Going to court can cause real fear and anxiety for defenders in housing cases, as found by Consumer Focus Scotland/Scottish Legal Aid Board research ‘The Views and Experiences of Civil Sheriff Court Users’ from 2009.⁴ One defender in a rent arrears case said, for example:

‘I was actually shaking to be quite honest with you....What was going to happen to me, was I going to go to jail?... I was sitting outside the court room and I was biting my nails...and I was actually crying.... Nobody had said what would happen to me’.

¹ Civil Justice Advisory Group Report *Ensuring Effective Access to Appropriate and Affordable Dispute Resolution* (2011)
<http://webarchive.nationalarchives.gov.uk/20130129065030/http://www.consumerfocus.org.uk/scotland/files/2011/01/Civil-Justice-Advisory-Group-Full-Report.pdf>

² Scottish Committee of the Administrative Justice and Tribunals Council Report, *Tribunal Reform in Scotland – A Vision for the Future* (2011); Scottish Committee of the Administrative Justice and Tribunals Council Report, *Right to Appeal* (2012)

³ Genn, H. and Paterson, A. (2001) *Paths to Justice Scotland: What People Do and Think About Going to Law*, Oxford – Portland Oregon: Hart Publishing

⁴ available at <http://www.consumerfocus.org.uk/scotland/files/2010/10/Court-Users-Research-Final-Ipsos-MORI-report.pdf>

In the housing context, the characteristic hallmarks of tribunals (user centred, affordable and expeditious) are important for landlords as well as tenants. Most private landlords in Scotland operate on a small scale- around 70% own only one property, while 95% own five properties or fewer.⁵ There has been long-standing support for a specialist housing forum from the Chartered Institute of Housing, who first argued for the change to a tribunal in 2004⁶ for both the private rented and social rented sectors.

The Social Rented Sector

The Private Rented Sector (PRS) Tribunal should, for cases within the private rented sector, provide a forum of specialism, interventionism and accessibility. It is disappointing that the same benefit is not being extended to cases within the Social Rented Sector (SRS) at this stage.

Paragraph 123 of the Policy Memorandum which accompanies the Bill highlights the reasons the current dispute resolution mechanism (the sheriff court) is not working. These include:

- the length of time taken for a case to reach court
- frequent delays
- low priority of housing cases within the court system
- difficulty understanding/following process and procedure made worse by lack of representation
- inconsistent and unpredictable decisions

These issues are not exclusive to the PRS. They are shared equally with tenants in the SRS.

The Policy Objective, outlined at paragraph 104 of the Policy Memorandum, makes the benefit of a PRS tribunal clear: “to provide more efficient, accessible and specialist access to justice for both landlords and tenants in that sector.” While the proposals in the Bill will provide access for PRS tenants to a more specialist and less formal dispute resolution mechanism, it will be the minority of tenants in Scotland who are afforded access to this improved dispute resolution system and the vast majority of tenants in Scotland will still need to go to court.

In their consideration of a housing tribunal, the Civil Justice Advisory Group were clear in their belief that **all** housing cases should be dealt with by this new forum - including cases relating to social tenancies and mortgage

⁵ Scottish Government (2013) *A Place to Stay, a Place to Call Home: A Strategy for the Private Rented Sector in Scotland*, Edinburgh: Scottish Government

⁶ O’Carroll & Scott. *A housing tribunal for Scotland: Improving rented housing dispute resolution* (2004) commissioned by Chartered Institute for Housing. Discussed further in Chartered Institute for Housing, *Housing Dispute Resolution – Improving Access and Quality* (2012) available at <http://www.cih.org/resources/PDF/Scotland%20Policy%20Pdfs/Dispute%20Resolution/Housing%20dispute%20resolution%20improving%20access%20and%20quality%20Nov%202012%20final.pdf>

repossessions⁷. We endorse this view. And although the Civil Courts Review did not propose that housing cases be moved away from the courts, it did believe that all housing cases should be heard in the same forum.⁸ This is important in terms of consistency of approach, and also in the interests of users, for the reasons stated above.

The intention is that the new summary sheriffs proposed in the current Courts Reform (Scotland) Bill will take an interventionist approach, and will specialise in certain types of civil cases, including housing cases. Presumably this will apply only to cases relating to housing outwith the private rented sector. In reality, however, this will be a very small part of their caseload- the Scottish Government has estimated that 70-80% of their time will be spent on summary criminal cases.⁹ It therefore seems unlikely that summary sheriffs will have the opportunity to develop the level of specialism in this area that would exist within a specialist tribunal. It may also be difficult for judges who spend the majority of their time dealing with criminal cases in an adversarial environment to switch to a more inquisitorial approach when dealing with housing cases.

We therefore believe that in only transferring private rented sector business to a specialist housing tribunal, there is a risk of a disparity of approach in how tenants are dealt with in the civil justice system, depending on the type of tenancy they have, and in particular of putting SRS tenants at a disadvantage.

There is accordingly a missed opportunity to improve access to justice for many vulnerable tenants in Scotland in limiting the tribunal to the PRS. It is not clear when, or if, SRS tenants will experience the benefits of similar accessibility to a specialist jurisdiction in the future.

Preparedness of the PRS Tribunal

In 2012, the Private Rented Housing Panel (PRHP) dealt with around 270 cases in total. It received 232 new repairing standard applications, and dealt with 37 rent cases.¹⁰ We understand, however, that the number of cases dealt with in 2013 was in excess of 300. In absolute terms, the number of cases which the Policy Memorandum suggests the increased caseload could reach is not substantial. The most significant addition to the jurisdiction is the transfer of actions for possession. This by itself would, on current figures, add 500 cases to the current PHRP case-load of 300 plus. This produces a total of

⁷ Civil Justice Advisory Group Report *Ensuring Effective Access to Appropriate and Affordable Dispute Resolution* (2011)
<http://webarchive.nationalarchives.gov.uk/20130129065030/http://www.consumerfocus.org.uk/scotland/files/2011/01/Civil-Justice-Advisory-Group-Full-Report.pdf>

⁹ Scottish Government (2010) Response to the Report and Recommendations of the Scottish Civil Courts Review, Edinburgh: Scottish Government. Note: this refers to 'district judges' rather than summary sheriffs- the terminology used by the Scottish civil courts review, but the role they will perform is the same.

¹⁰ Private Rented Housing Panel and Homeowner Housing Panel Annual Report 2012:
<http://www.prhpscotland.gov.uk/prhp/files/hohp%20and%20prhp%20annual%20report%2012%20to%202013.pdf>

only 800+ cases for the PRS Tribunal which is not especially high (although it should be noted that these are estimated numbers). None of the other transferred functions or the new functions are likely to be on the scale of the transfer of possession cases so the projected annual case-load would be unlikely to exceed 1,000 cases in the short term.

While this does not represent a large figure overall, it is more than triple the caseload of the current PRHP. The caseload also represents a sizable expansion of the current jurisdiction, introducing the need to consider new areas of law including (but by no means limited to) recovery of possession, right to adapt, houses in multiple occupation and registration of landlords. The majority of these will be party-to-party cases, as is currently the case with PRHP.

There will be a need to recruit and train further specialist housing tribunal members to carry out this work. At present, the same members sit on both the private rented housing panel and the homeowner housing panel (HOHP), which deals with disputes between homeowners and property factors. HOHP began business in October 2012, and we understand it dealt with around 350 cases in 2013. Both panels are overseen by the same tribunal president, and are also supported by the same secretariat. It would make sense to build on these arrangements when introducing the new tribunal. Given the likely numbers of potential tribunal judges and members in Scotland who possess the relevant housing knowledge, this could also impact on the recruitment of summary sheriffs with specialist housing knowledge and vice versa.

It is also of note that there are a number of unknown and unpredictable elements in regard to the PRS. The economic climate has had a substantial impact on the PRS. Today, 12% of all households in Scotland are privately rented¹¹ which is double the number ten years ago. This increase would have been hard to predict ten years ago, and it is equally hard to predict how the PRS will develop over the next 10 years. In turn, the future number of cases before the tribunal is uncertain.

It is essential that the Scottish Government and the Scottish Tribunal Service have a clear plan for managing this increase in the caseloads and the expansion of jurisdiction, covering for example recruitment and training of members, provision of venues for hearings, case administration etc. With many unknown factors, it will also be crucial to the success of the tribunal that there are effective oversight and review processes in place to monitor the development of the forum.

Availability of Legal Aid and pre-hearing advice

A key factor highlighted in the Policy Memorandum as a barrier to court was difficulty understanding and following process and procedure, which is made worse by a lack of representation. While tribunal procedure is generally held

¹¹ Housing Statistics for Scotland, published 26th August 2013 available through <http://www.scotland.gov.uk/Publications/2013/08/2641>

to be more user-friendly, accessible and understandable¹², there remain clearly evidenced benefits in access to advice, and in some cases advocacy or representation¹³.

Much of the past research has suggested that representation (not necessarily legal representation) tends to increase the prospects of success of appellants/parties. However, a more recent study¹⁴ did not find the same 'representation premium' as earlier studies but did find that pre-hearing advice was crucial to unrepresented applicants; those who neither received advice nor were represented had lower success rates than those who had either advice or representation. That research concluded that the main reason the 'representation premium' was so much lower than in the past was that tribunals have increasingly adopted an 'active, interventionist and enabling' approach. This allows them to elicit the necessary information from parties without the need for representation. In order to benefit fully from this approach, however, unrepresented parties need access to pre-hearing advice.

One effect of the Bill is likely to be to take away an existing opportunity for legal aid funded representation in a serious matter – eviction from one's home – from a large number of persons. The Scottish Government must therefore be satisfied in relation to the jurisdictions to be exercised by the PRS Tribunal, but especially in eviction cases, that: 1) the tribunal will take an 'active, interventionist and enabling approach' and 2) the tenant has a fair chance to defend or assert their interests, whether this be through legal aid funded representation or through the availability of readily accessible pre-hearing advice. While, provided the tribunal takes the right approach, it is likely that pre-hearing advice will be sufficient in many cases, this may not be the case for some tenants. We therefore welcome the flexibility over the availability of legal aid funding that the Policy Memorandum suggests, but consider that paragraph 160 of the Policy Memorandum takes too narrow a view of when publicly funded assistance might be desirable to ensure a fair process and outcome.

We consider that there should be a clear strategy for the funded provision of advice, advocacy and, where necessary, representation going beyond legal aid availability. 'Advice' should be considered widely to include accessible information and toolkits as well as traditional telephone or face-to-face

¹² As highlighted in the Policy Memorandum at paragraph 147

¹³ See for example:

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

L. Dickens, *Dismissed: a study of unfair dismissal and the industrial tribunal system* (Oxford: Blackwell, 1985).

J. Baldwin, N. Wikely and T. Young, *Judging Social Security* (Oxford: Clarendon press, 1992).

R. Sainsbury, *Survey and Report into the Working of Medical Appeal Tribunals* (London: The Stationery Office, 1992)

¹⁴ M, Adler, 'Tribunals Ain't What they Used to Be', available at:

<http://ajtc.justice.gov.uk/adjust/articles/AdlerTribunalsUsedToBe.pdf>

services, and the availability of pre-hearing advice for the PRS tribunal perhaps along the lines of that currently provided by in-court advisers.

Fees

We note from the Policy Memorandum¹⁵ that there will be scope to charge fees for parties to bring a case before the PRS Tribunal (under the FTT provisions in the Tribunals (Scotland) Bill).

While there may be an argument for charging landlords a fee to bring a case, as they are currently required to do in the courts, it must be ensured that fees can never be charged to tenants who are defending an eviction case, or those who bring a repairs case. Charging a fee in such circumstances could inhibit the exercising of a right that enables a tenant to stay in their home. While introducing an exemptions policy, as suggested in the Policy Memorandum, would help, this introduces an extra layer of complication for tenants, which may deter some, and those whose income is just above the threshold may also be deterred from defending their case.

Dispute Prevention and Resolution Mechanisms

It is disappointing that the Bill does not include more specific reference to alternative dispute resolution (ADR). At no point is ADR mentioned in the Bill itself or in the Explanatory Notes and, while mentioned, no committed plan is forwarded in the Policy Memorandum.

The consultation previous to this Bill, the Scottish Government's *Better Dispute Resolution in Housing*, consulted specifically on the potential for the increased use of mediation. This was welcomed by the majority of respondents to the consultation,¹⁶ which is a positive recognition of the benefits mediation can offer to all in resolving cases earlier or more proportionately – tenant, landlord and the tribunal itself.

STAJAC supports the use of dispute prevention and alternative dispute resolution (ADR) mechanisms as a complement to formally administered justice. While the Committee notes the Scottish Government's intention to increase the use of mediation in housing disputes,¹⁷ it is not clear what the implication of this will be for users of the new PRS tribunal. At present the PRHP offers mediation in some cases. There is an in-house mediation service for repairs cases to which appropriate cases are referred, if both parties agree. If no agreement is reached or either party is unwilling to try mediation, the case is referred to a committee for determination. The HOHP has also recently launched a pilot mediation service. It is not clear how an increased caseload which represents an increased variety of case type will impact on this resource, for example in terms of the availability of trained mediators.

¹⁵ Policy Memorandum at paragraph 151

¹⁶ As noted in the Policy Memorandum at paragraph 156

¹⁷ Paragraph 153 of the Policy Memorandum

Accessibility of mediation is a key factor in embedding this form of ADR in the civil justice and tribunals systems. With such clear support for increased use of mediation already expressed, we believe that practical measures to facilitate that demand should be openly considered as part of, or in parallel to, this Bill.

Scottish Tribunals and Administrative Justice Advisory Committee
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