

## **OPTIONS FOR TRIBUNAL REFORM IN SCOTLAND**

### **DISCUSSION PAPER FROM THE SCOTTISH COMMITTEE OF THE ADMINISTRATIVE JUSTICE AND TRIBUNALS COUNCIL JUNE 2010**

#### **RESPONSE BY THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND**

##### **Distinctiveness of the Scottish legal system**

*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?*

The Mental Health Tribunal for Scotland (“the Tribunal”) strongly supports the proposition that in creating a coherent tribunals system for Scotland, the distinctiveness of the Scottish legal system should be preserved. This distinctiveness of the Scottish legal system is reflected in the development of Scots law, Scottish legal thinking and the appellate structure in relation to civil and criminal cases. In any system which creates a coherent tribunal system for Scotland and any resulting appellate structure, it is important to maintain the distinctiveness of the Scottish legal system and ensure that appellate courts making decisions on appeal from Scottish tribunals dealing with devolved subject matters continue to apply Scottish law to those cases.

In relation to reserved tribunals operating in Scotland, the appellate courts require to continue to determine appeals in a manner which is consistent with Scottish legal thinking.

##### **Independence**

*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*

It appears to the Tribunal that the best method of dealing with such tribunals would be to make the necessary structural changes which would ensure that such tribunals operated compatibly with the ECHR. This requires an independent appeal mechanism. The Tribunal has no in-depth knowledge of the current arrangements operating within these tribunals and therefore feels unable to offer specific suggestions as to what changes should be made.

## **Hybrid Bodies**

*7.16 How should hybrid bodies be dealt with?*

*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 Tribunal would support removing the appeal functions of existing hybrid bodies if those functions could be easily separated from the other administrative functions. Those appellate functions of the existing hybrid bodies could then be brought within the Scottish tribunals system. This could be done by creating a new judicial entity to deal with those appeals or, where possible and logical, by adding those appellate functions to the remit of an existing tribunal.

Clearly, there would require to be detailed consultation with the existing hybrid bodies, with any tribunal which it was thought likely could take on the appellate functions of those bodies and with the users of the hybrid bodies, to ensure that relocation of the appellate functions meets the needs of tribunal users.

## **The Distinctive Nature of Tribunals**

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

The Tribunal wholeheartedly agrees with the proposition that the distinctive way in which tribunals operate should be safeguarded. In any reform of tribunals, it is of the utmost importance that the specialist nature of tribunals is maintained and that the culture and ethos of individual tribunals is not lost. The Tribunal is the principal forum for the granting, approving and reviewing of compulsory measures for the detention, care and treatment of people in Scotland who have a mental disorder. When discharging its functions under the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”), the Tribunal must have regard to the principles set out in section 1(3) of the 2003 Act. These principles include the importance of the patient participating as fully as possible and the importance of providing maximum benefit to the patient. The requirement to have regard to the principles ensures that the patient is placed at the centre of Tribunal proceedings and is able to participate as fully as possible in those proceedings. The Tribunal therefore requires to

operate within a culture of sensitivity and flexibility. The Tribunal is an example of what can be called “therapeutic jurisprudence in action”. What is meant by this is that the Tribunal is, and is perceived as, part of the process for the care and treatment and recovery of the patient. The Tribunal proceedings should not have an anti-therapeutic effect on the patient. The Tribunal proceedings are conducted in a way which is sensitive to the patient’s needs and which will not have an adverse effect on the patient. That involves a whole number of “soft” skills which Tribunal members require to use in tribunals, to ensure that while due regard is had to the legal process and the nature of the judicial decision to be made – and it must be remembered that the Tribunal is involved in making decisions which affect the liberty of patients and also, in restricted patient cases, decisions where there are significant public safety issues – a culture of sensitivity and flexibility operates.

The tribunal system also allows the significant expertise in tribunals to be utilised. The Tribunal, for example, consists of a legal convener, a medical member (a consultant psychiatrist with experience in mental disorder) and a general member (either a service user or someone who has experience of working with persons who have a mental disorder). The Tribunal has a semi-inquisitorial role, and the specialist expertise it contains means that the Tribunal can act in an enabling way and focus the issues which require to be addressed. Care requires to be taken in any reform of tribunals that the clear strengths of tribunals, e.g. informality, user friendliness, economy and specialisation, are not diluted.

## **Remuneration**

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

The Tribunal agrees that all tribunal members should be appropriately remunerated. The question of what “appropriately remunerated” means may need to be considered in further detail. It is not necessarily the case that every tribunal member sitting on every tribunal requires to receive the same remuneration. In setting remuneration rates, some consideration will require to be given to the nature of the work carried out by the particular tribunal.

Of more importance than the question of remuneration is the question of perceived independence of tribunal members. The Tribunal would advocate that, as a matter of urgency, consideration be given to the conditions of service and remuneration of tribunal

members in Scotland. It would be appropriate if at an early stage a statement was made and action taken to establish the devolved tribunal appointments as having a status in line with those appointments made by the Judicial Appointments Board in England and Wales. It seems to the Tribunal that it would be an unfortunate position if the existing two class appointment system, whereby tribunal appointments in England and Wales are judicial appointments but in the main in Scotland tribunal appointments are made by way of a public appointments process, remains in place any longer than necessary. It is desirable that Scottish devolved tribunal appointments are made and clearly recognised as judicial appointments in line with the way in which appointments are carried out in England.

### **Party to Party Tribunals**

*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?*

This matter is clearly a matter for those involved in, for example, employment tribunals to consider carefully and express their preferred view. The Tribunal has no strong views either way. It would be entirely possible for the Employment Tribunal Scotland to be hived off and re-designated as a court and absorbed into the Scottish courts system as a specialist court. There is however, as noted, no immediately obvious issue which would preclude ETS from being fully incorporated into any Scottish tribunals system. This could be done, for example, by the ETS becoming a separate pillar of a particular Chamber, as is the case with the Employment Tribunal in England.

### **Right of Appeal**

*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?*

The Tribunal supports the proposition that most decisions made by public bodies which affect the rights of individuals should be subject to a right of appeal. It may be that there are particular decisions which, while having some effect on the rights of individuals, have only a minimal effect and an appeal against the decision may be disproportionate given the nature of the decision made.

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

The Tribunal has not considered in detail what areas might require a right of appeal to be established, but one example might be decisions taken by Local Authorities under homelessness legislation. The Tribunal understands that such decisions are currently subject to judicial review. It might be preferable for such decisions to be subject to a right of appeal. This is on the basis that this should provide a faster and more cost effective way to challenge such decisions.

### **Routes of Appeal**

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

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

The Tribunal is of the view that there should be some rationalisation of routes of appeal against decisions of tribunals in Scotland. The Tribunal's preference is that appeals should be retained to the Scottish courts and tribunals should be maintained within the Scottish courts system. At present, appeals from the Mental Health Tribunal for Scotland go to the Sheriff Principal with an onward appeal to the Court of Session (there is an immediate appeal to the Court of Session in restricted patient cases). This appeal route has served the Tribunal and patients well. The appeal mechanism to the Sheriff Principal has allowed appeals against Tribunal decisions to be dealt with quickly and appropriate guidance to be given to the Tribunal and those involved in Tribunal proceedings from the Court. In the restricted patient cases, appeals to the Court of Session have taken more time, but the decisions of the Court of Session have been extremely useful in clarifying the law, for example complex issues of statutory interpretation in relation to the legislation related to restricted patients under the 2003 Act.

One point of note is that, under the 2003 Act, the Tribunal is entitled to be a party to any appeal. This provision has proved very useful and has allowed the Tribunal to enter proceedings and put forward relevant arguments or simply to act as a contradictor. The Tribunal would wish to retain the right to enter an appeal as a party whatever route of appeal is finally adopted for tribunals.

Initially, the Tribunal saw no need or benefit in appeals being made to an Upper Tribunal. On reflection, however, the Tribunal has been persuaded that there would be no detriment in appeals from Scottish tribunals going to an Upper Tribunal. The Tribunal is aware that appeals from the Mental Health Review Tribunal for Wales already go to the Administrative Appeals Chamber of the Upper Tribunal.

## **Chapter 8: Tribunals System – Models**

### **Model A: Unified Administrative Support Service Only**

*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?*

While the Tribunal supports the moves made by the Scottish Government to begin to create a unified administrative support service for tribunals operating in Scotland, the Tribunal does not believe that this is sufficient to address the problems of perceived lack of independence, coherence and user friendliness. As noted, it is a step in the right direction and should allow the administration of tribunals to be improved. It does not, however, allow for any direct judicial input into the administration of tribunals. Without appropriate judicial input, the result may be a Scottish tribunals administration which is not sufficiently responsive to the needs of the judiciary and to judicial decision making, which is the business of tribunals.

### **Model B: Adoption of UK Tribunals Structure in Scotland**

*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?*

The Tribunal is of the view that we should be slow to simply replicate the structure for reserved tribunals in England and Wales in Scotland. The chamber structure may be harder to operate in Scotland, as it may be difficult to fit easily the tribunals operating in Scotland into a chamber structure.

The Tribunal is not adverse to the appointment of a judicial head who would have overall responsibility for tribunals in Scotland. The Tribunal is not convinced that there is a clearly

identified need for the creation of an appellate body akin to the Upper Tribunal. As previously outlined in this response, the current system of appeals in Scotland has served the Tribunal well. That said, as previously discussed, the Tribunal is not resistant to appeals going to an Upper Tribunal, if that is thought to be more appropriate.

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

*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?*

The Tribunal considers that this option is redundant. The Tribunal understands that there are likely to be further developments and discussions in relation to reserved tribunals operating in Scotland. That, taken with the announcement that the Tribunals Service is to merge with HM Courts Service, means that this option cannot be seen as a realistic proposition.

### **Model D: Unified Administration and Collegiate Structure for all Devolved and Reserved Tribunals**

*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?*

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

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

*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?*

It is easier to answer these questions together. The Tribunal is of the view that the collegiate approach would work. The Tribunal supports the idea of a Standing Conference or a Council of Tribunal Presidents/Conveners, as this would provide a real connection between tribunals

and the Scottish Tribunals Service. Judicial input into the delivery of administrative support to tribunals is necessary, to ensure the effective delivery of administrative justice.

The Tribunal is not supportive of a Tribunals Board Scotland being established. A Board such as this seems too formal a structure at this time, given the uncertainties about future developments and service delivery.

The Tribunal is not convinced that it is necessary for any Board created to be a statutory body at this stage. Careful consideration requires to be given to the role of the body and the language used to express those roles will also require to be carefully considered, to ensure that the perceived independence of tribunals is not compromised. For example, any use of the word “direction” could be construed as a power which would impinge on the ability of individual tribunal members to exercise judicial discretion.

The head of the governance body would not require to be a judicial head of a tribunal. In the view of the Tribunal, however, a judicial head would be preferable as he/she would be able to provide appropriate judicial input and direction to the Scottish Tribunal Administration. In any unified system of tribunals in Scotland, it would be appropriate for the judicial head to be someone with a similar status to the Senior President of Tribunals in the UK tribunals system, e.g. a judge of the Inner House of the Court of Session.

### **Model E: Merger of all tribunals in Scotland with the Scottish courts**

*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 tribunals to retain their distinctive features?*

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

*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?*

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

It is easiest to answer these questions in the round. At present, the Tribunal is of the view that it is too soon to consider a merger of tribunal administrations in Scotland with the

Scottish Courts Service. It seems to the Tribunal that this is something which may require to be considered in the future, but at this stage work should concentrate on creating a unified Scottish tribunals system. There is a danger that if the administration of tribunals and courts in Scotland is merged, the unique strengths of tribunals may be diluted and tribunals will simply become more akin to the courts.

The Tribunal would not support full integration of tribunals with the administration and structures of the Scottish courts. It is important that tribunals continue to be seen as a forum which is separate from the general courts. Merger with the Scottish courts might lead to the perception by service users that the strengths such as user friendliness of the tribunals would be compromised.

In the Tribunal's view, model D: collegiate structure for all devolved and reserved tribunals, for the reasons outlined, would best advance the interests of users of tribunals in Scotland.

### **Other models**

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

No.

**Mental Health Tribunal for Scotland**

**2 September 2010**