

# A New Tribunal System?

The Scottish Legal Action Groups' response to the Scottish Government's recent consultation

The *Consultation on the Scottish Government's Proposals for a New Tribunal System for Scotland* was held from 23<sup>rd</sup> March until 15<sup>th</sup> June 2012. Details and downloadable versions of the papers are available from the Scottish Government web site (at [www.scotland.gov.uk/Publications/2012/03/8967](http://www.scotland.gov.uk/Publications/2012/03/8967)).

**Question 1:** *Should the distinctive tribunals system be capable of reconsidering decisions and hearing appeals and, if so, what grounds of appeal from the First-tier Tribunal to the Upper-tier should be allowed?*

The First-Tier Tribunal ought to have the power to review its own interlocutors in order to correct clerical errors. The First-Tier Tribunal ought to have a power to repon an interlocutor dismissing an application/appeal which was granted in a party's absence, provided that the party applying to repon can show that there was a reason for their absence which amounts to an excusable failure to appear, and it is in the interests of justice to repon the interlocutor.

The Upper Tribunal ought to have the power to allow an appeal on the grounds of a material error of fact or an error of law. This is particularly important as many applicants to Tribunals may not be represented by a legally qualified or experienced representative.

**Question 2:** *Which functions of judicial leadership in the tribunals system should be exercised by the Lord President, the President of Scottish Tribunals and the Chamber Presidents, respectively?*

The Lord President's role for non-Court of Session judges ought to be akin to the former constitutional role of the Lord Chancellor, i.e., to ensure the judicial independence of the judiciary. The overall administrative role of leadership ought to be done by the President of the Scottish Tribunals, who should be a separate person from the Lord President. That person would be responsible for running the system, responsible for the allocation of resources and ensuring an appropriate level of consistency of organisation, and for promulgation of rules and practice directions. The Chamber Presidents ought to be responsible for day to day administration of their own specialist Chambers, subject to the oversight power of the Tribunals President.

**Question 3:** *Should any restrictions be placed on the ability of an appointed member to sit and hear cases in a chamber other than the chamber of their primary assignment? If so, what restrictions?*

Tribunal judges ought to be specialists in their own areas. This would tend to mitigate against any assumption that a judge in one tribunal could be deployed to another tribunal, although an individual tribunal judge might be considered as being suitable for holding a nomination for more than one tribunal. Sitting in more than one Chamber should only be on an assumed, voluntary basis. The specialisation of Chambers and tribunal judges would also preclude the assumption that sheriffs or Court of Session judges should automatically be ex officio members of the Tribunals, although particular judges or sheriffs may be considered suitable for nomination as a tribunal judge to a nominated chamber. If that is the case such members should be expected to sit a minimum number of days in their nominated tribunal Chamber (say 25 days per calendar year) in order to maintain an appropriate level of knowledge and experience. The same rule would apply to any

tribunal judge appointed to sit in more than one Chamber.

**Question 4:** *Is this the most appropriate option for judicial remuneration and if not, what other options are there to remunerate fairly the judicial members of the Scottish tribunal system?*

The Group does not consider that it has the experience to comment on remuneration levels for judicial appointments.

**Question 5:** *How should procedural rules for the new tribunal system be made?*

The Group has a concern that reform may be driven by 'top down' administrative convenience, rather than by a 'bottom up' concern for the needs of the user. The 'top down' approach assumes that there ought to be a single set of rules, drafted by parliamentary draftsmen or civil servants. The Group believes that there is likely to be little overlap between users of tribunal Chambers, and that there is only limited scope for a standard set of rules. An attempt to produce a unified set of rules for Tribunals in England has not been successful. Each Chamber ought to be allowed to be responsible for drafting its own rules, subject to an over-riding approach to ensure that the procedures result in procedural and substantive fairness. With that aim in mind the procedures should be as simple as possible while ensuring that all parties have a reasonable opportunity to make their case and be heard. It is important that Tribunal applicants have the opportunity to be represented in the process of procedural rule making. Primary responsibility for procedural rules ought to be in the hands of Chamber Presidents, co-ordinated by the Tribunals President, and subject to input and approval by an advisory panel made up of tribunal judges but also containing a significant proportion of applicants/representative organisations/users amongst its members. The Scottish Parliament does not have the time or expertise to adequately oversee the minutiae of Tribunal procedures, so its involvement should simply be to act as a long-stop where there is a significant concern about what has been proposed, and to scrutinise any legislative change that the Scottish Government proposes to impose on Tribunals.

**Question 6:** *What issues/opportunities do the proposed changes raise for people with protected characteristics (e.g. age, disability, gender reassignment, race, religion or belief, sex and sexual orientation) and what action could be taken to mitigate the impact of any negative issues or to capitalise upon opportunities?*

The tribunals are a potential opportunity to broaden out judicial experience, and make it more diverse than exists at present amongst the sheriff and Court of Session judiciary. This is a further reason why the Group is opposed to an assumption that existing members of the Court of Session and sheriff judiciary should automatically be de-facto members of the tribunals, and why it is considered inappropriate for the Lord President to be the judicial head of the Tribunals. Such measures are likely to restrict opportunities for recruitment and advancement within the Tribunal system, and could put off capable or experienced applicants who might be disincentivised to apply for posts or more senior positions within the Tribunals because of a perception that they lacked the contacts/background expected, or because they did not satisfy what (in reality) amounted to an artificial criteria for a more senior post.