



## Scottish Civil Justice Council

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2 August 2013

Dear Convener,

### TRIBUNALS (SC) BILL 2013

I write on behalf of the Scottish Civil Justice Council ("SCJC").

The SCJC welcomes the opportunity to provide evidence to the Justice Committee on the implications of Tribunals (Sc) Bill 2013. The evidence provided by the SCJC is restricted to consideration of the sections relevant to its work and the implications that the Bill will have on its operations.

#### *Membership and committee structure*

The SCJC notes the proposed changes to its membership under schedule 9, paragraph 12(6), which increases the overall membership to "not more than 22 members" to take account of the inclusion of the Tribunals President as an *ex officio* member and the tribunal representative member as a judicial member. The SCJC is content with these proposals and welcomes the categories of membership under which the additional members have been included.

Schedule 9, paragraph 12(9), which inserts section 13A into the 2013 Act, specifies the creation of a "tribunals committee". This specification does not sit comfortably with the overall terms of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 ("the 2013 Act") which currently reads:

- "13(1) The Council may establish committees.  
(2) A person who is not a member of the Council may be appointed to be a member of any committee established by it."*

It is understood that section 13 was drafted in this way to ensure that the Council has flexibility to undertake its business. It is therefore of some concern that the establishment of this committee has been specified as detailed in section 13A. We consider it appropriate that, following commencement of the relevant provisions conferring functions on the SCJC in relation to tribunal rules, such a committee should be established, but in keeping with the general tenor of the 2013 Act, we are of the view that the question of which committees should be established, and the remit and membership of each, should be for the SCJC to determine.

The transitional provisions contained in schedule 9 allow for the making of tribunal rules by the Scottish Ministers until such time as the provisions conferring responsibility on the SCJC and the Court of Session for the making of tribunal rules are brought into force. It is not entirely clear, however, from the terms of the Bill and its accompanying documents, when the Scottish Ministers intend to commence the various provisions in respect of the SCJC. The SCJC does not see any merit in increasing its membership and creating a tribunals committee in advance of the commencement of the rule-making functions for the tribunals. We are of the view that, when commenced, paragraph 12 of schedule 9 should be commenced in its entirety.

#### *SCJC tribunal rule-drafting function*

We are content with the proposed rule-making functions as detailed in the Bill. However, we have some concerns regarding the proposal in section 68(5) to the effect that Practice Directions issued by the President of Tribunals, Chamber President in the First-tier Tribunal or Vice-President of the Upper Tribunal may include instruction or guidance on “the application or interpretation of the law”. Such judicial office holders may require to hear certain appeals on points of law, and we would suggest that it would not be appropriate for a judge to be providing instruction or guidance on the application or interpretation of the law, where that point may come to the same judge on appeal.

It is clear from the terms of the Bill, and in particular the Financial Memorandum, that it is the Scottish Ministers’ intention to retain the tribunal rule-making function until the SCJC is in a position to take over this function. The reason given in the Financial Memorandum for delaying these provisions is that the SCJC “will be concentrating on court business”. It may be helpful to the committee if we expand on this. The SCJC is unable to take forward this function in the short term as a consequence of the proposed introduction and subsequent implementation of the Court Reforms (Sc) Bill. As committee members will be aware, the Scottish Government consultation on the draft Court Reforms (Sc) Bill recently closed. This is an enabling Bill which, if passed, would leave the majority of the detail to be implemented through court rules. It is expected that the SCJC will be focusing on

this rules drafting project for the next 3-4 years, and therefore the SCJC do not feel that it is resourced to take on a further project in respect of the tribunal rules simultaneously. For this reason, we agree with the proposed approach to delay commencement of the provisions to transfer the tribunal rule-drafting functions to the SCJC.

We are not clear as to the meaning of the statement in paragraph 28 of the Financial Memorandum "As the Scottish Government does not intend to rewrite tribunal rules comprehensively the Scottish Government does not expect there to be a substantial workload for the Council to undertake". If the Scottish Government is not intending to undertake a comprehensive rewrite of the tribunal rules, this would be a matter which would require to be considered in detail by the SCJC. If such a rewrite were to be considered necessary, this would result in a substantial workload. Delaying commencement of these provisions would ensure that the SCJC would have sufficient time and resources to consider such a project in detail.

As to whether the financial provision as detailed in the Financial Memorandum is accurate, we would refer to the Lord President's response to the Finance Committee. There is likely to be a cost implication involved in implementing the provisions of schedule 9, paragraph 12, falling upon the SCJC, should this happen at an earlier date than the commencement of the rule-making functions. This does not appear to have been accounted for in the Financial Memorandum.

Yours sincerely,

*Roddy Flinn*

**Roddy Flinn**  
**Secretary to the Scottish Civil Justice Council**