



JUSTICE 2 COMMITTEE

AGENDA

1st Meeting, 2007 (Session 2)

Tuesday 9 January 2007

The Committee will meet at 2.00 pm in Committee Room 4.

1. **Decision on taking business in private:** The Committee will decide whether to take item 4 in private.
2. **Tribunals, Courts and Enforcement Bill (UK legislation):** The Committee will take evidence on the legislative consent memorandum from—

Alistair MacLeary, Chairman, Scottish Committee of the Council on Tribunals

and then from—

Johann Lamont MSP, Deputy Minister for Justice, Paul Cackette, Justice Department, William Fox, Education Department, Jane McLeod and Beth Elliot, Office of the Solicitor to the Scottish Executive, Scottish Executive.

3. **Custodial Sentences and Weapons (Scotland) Bill:** The Committee will consider correspondence from the Scottish Executive.
4. **Tribunals, Courts and Enforcement Bill (UK legislation):** The Committee will consider the main themes arising from the evidence session, to inform the drafting of its report.

Tracey Hawe
Clerk to the Committee

Papers for the meeting—

Agenda Item 2

Written submissions	J2/S2/07/1/1
Lines of questioning (PRIVATE PAPER)	J2/S2/07/1/2
SPICe briefing	J2/S2/07/1/3

Agenda Item 3

Scottish Executive response	J2/S2/07/1/4
-----------------------------	------------------------------

Documents circulated for information—

Draft Children's Services (Scotland) Bill Consultation, published by the Scottish Executive, 19 December 2006

Chair appointed to Scottish Law Commission, Scottish Executive press release, dated 28 December 2006

Scottish Police Services Authority, Scottish Executive press release, dated 18 December 2006, plus supplementary information on the appointment of a convener to the SPSA

JHA Post – Council Report, 4-5 December 2006

Document not circulated—

Scottish Legal Aid Board Annual Report 2005-2006, published 20 December 2006:
http://www.slab.org.uk/annual_report_2005_2006/index.htm

Copies of the above publication are available from Document Supply

Forthcoming meetings—

- Tuesday, 16 January 2007, 2pm

Justice 2 Committee

**Legislative Consent Memorandum on the Tribunals, Courts and
Enforcement Bill**

Written Submissions

The following written submissions on the Legislative Consent Memorandum on the Tribunals, Courts and Enforcement Bill have been received—

- Scottish Committee of the Council on Tribunals
- National Galleries of Scotland
- Scottish Council of Jewish Communities
- Law Society of Scotland

Written submission by the Scottish Committee of the Council on Tribunals

The Scottish Committee

Membership

1 The Council on Tribunals is an advisory NDPB established under the Tribunals and Inquiries Act 1992. The body is under the auspices of the Department for Constitutional Affairs.

2 The Act provides for a Scottish Committee of the Council. This comprises a Chair, Professor Alistair MacLeary, and six other members from Scotland. Two of those members, together with Professor MacLeary, are also members of the full Council which is based in London. Members are appointed under the public appointments system by Scottish Ministers: the appointment of those members also sitting on the Council on Tribunals is carried out jointly with the Lord Chancellor. Members receive a set rate of remuneration based on 65 days per year for the Chair: 35 days per year for members appointed only to the Scottish Committee and 44 days per year for those also members of the Council.

3 The Parliamentary Ombudsman and the Scottish Public Services Ombudsman are also members of the Scottish Committee by virtue of their office.

4 The Scottish Committee has a small secretariat based in Edinburgh, staffed by Scottish Executive civil servants on secondment to the Department for Constitutional Affairs.

5 Although the Bill relates to the abolition of the Council on Tribunals and its replacement with an Administrative Justice and Tribunals Council, existing members will complete their periods of appointment under the agreed terms and conditions and will in due course become members of the new organisation. No immediate changes are envisaged for the Scottish Committee's secretariat.

Activities

6 Under existing Tribunals and Inquiries legislation the Council on Tribunals is required to keep under review and report on procedures relating to tribunals and to some statutory inquiries. Westminster or Scottish Ministers, as appropriate, are required to consult the Council, or its Scottish Committee, before approving or amending procedural rules relating to the operation of any tribunal listed in the Act. Following implementation of the Scotland Act 1998, Scottish Ministers can add to or modify the tribunals on that list if the relevant provision is included in new Scottish primary legislation. Most recently, the Scottish Committee has been involved in the preparation of procedural rules relating to Mental Health Tribunals for Scotland, Additional Support Needs Tribunals and Scottish Charity Appeals Panels. Work is about to commence on scrutinising proposed rules for the Private Rented Housing Tribunal.

7 The Tribunals and Inquiries Act provides for the Scottish Committee to have *direct* supervision over a number of tribunals, generally those which operate under separate Scottish legislation. These include tribunals relating to health, education, land as well as certain particularly Scottish areas such as Children's Hearings and public hearings held by the Crofters Commission. The Scottish Committee also supervises, *on behalf of the Council*, a number of mainly GB-wide tribunals which hold hearings in Scotland. These include tribunals relating to asylum and immigration, criminal injuries and those concerning social security matters administered by the Appeals Service.

8 Scottish Committee members make some 50-60 visits each year to a wide range of hearings held throughout Scotland to observe the procedures in operation. A report on those observations, noting how the hearing measured up to the Council's published framework of standards for tribunals, is sent to the president of the relevant tribunal or Scottish Executive Departmental head.

9 The Scottish Committee publishes an annual report which is presented to Scottish Ministers. The report for 2005-2006 was distributed to MSPs in November 2006.

The proposed Administrative Justice and Tribunals Council

10 The Council on Tribunals welcomes the proposals in the Bill for its transition to an Administrative Justice and Tribunals Council (AJTC). Its status will continue as an advisory NDPB under the auspices of, and funded by, the Department for Constitutional Affairs.

11 The Council and the Scottish Committee believe firmly that it is necessary to maintain a single consistent mechanism for supervision of all tribunals, whether reserved or devolved. We agree with the Executive's view that it would not be in the interests of the users of devolved tribunals for there to be a change to the present structure of supervisory duties.

12 The Council's long-standing values of openness, fairness and impartiality remain as key elements of the proposed AJTC and the Council is keen to place a very strong emphasis on the needs of the user in any tribunal system, which was one of the key recommendations of Sir Andrew Leggatt in his Review of Tribunals in 2001. In particular, the Council welcomes the proposed expansion of its remit to embrace administrative justice as a whole rather than be restricted only to tribunals. This will allow the Council and its Scottish Committee to promote collaboration and the sharing of good practice across a much wider sector including all aspects of complaint handling and the increasingly wide advice sector. We are also looking carefully at current developments in proportionate dispute resolution, including the use of mediation in some of the new tribunal processes. Scottish Committee members are always mindful of the fact that an individual is much more likely to become involved with an arm of administrative justice than with any other aspect of justice.

13 The Bill provides for the AJTC to carry out the important role of scrutinising and commenting on proposed administrative justice legislation; no other organisation has that statutory role or the breadth of understanding of a wide range of tribunals to be able to recommend best practice to the Scottish Executive and other Departments and to warn of potential difficulties or conflicts of interest. A welcome expansion of the scrutiny role in the Bill is that it will cover existing, as well as proposed, legislation and for the first time will apply to primary as well as secondary legislation. Work is expected to start on the establishment of a new Code for Consultation between the Department for Constitutional Affairs and the Council on Tribunals/AJTC.

14 The AJTC will continue to make visits to tribunal hearings; the independent observation of actual hearings' practice is an essential element in ensuring that the user's needs are being met and that the system is delivering justice fairly in the way Ministers and the Scottish Parliament intended it should happen. Details of what is observed will continue to be provided to those charged with administering the relevant system.

15 The Council on Tribunals has also welcomed the creation of the Tribunals Service. As part of its statutory function to keep the administrative justice system under review, the AJTC will play a role as a 'critical friend' of the Tribunals Service. The Council on Tribunals believes that the Tribunals Service will offer a number of benefits to its hitherto individual constituent tribunals, not least in terms of consistency of practice, training for panel members and administration.

16 The Scottish Committee notes the proposal to bring the appeals jurisdiction of the Criminal Injuries Compensation Appeals Panel within the Tribunals Service. We agree with the conclusion of the Scottish Executive Justice Department, that there will be a number of benefits of integration and that it would not be in the interest of Scottish users of CICAP for it to remain outside the Tribunals Service.

17 The Scottish Committee notes the consequence of proposals under the Bill whereby the office of General Commissioner of Income Tax is likely to cease and, consequently, Scottish Ministers' current role in appointment to that office. The Council has long advocated

the restructuring of the tax appeals system and has been involved in the working up of detailed proposals. The structure envisaged by the Bill, involving the abolition of General Commissioners as presently constituted, is consistent with the Council's general approach.

18 The Scottish Committee notes the changes to the power of the Lord President of the Court of Session to appoint some tribunal members. However it is also noted that consultation with the Lord President is still required under the Constitutional Reform Act 2005 when appointment competitions are held and this will ensure a consistent and fair approach to new appointments and will enable the differences in legal practice north and south of the border to be taken fully into account.

George House
Edinburgh
4 January 2007

**National Galleries of Scotland
Tribunals, Courts and Enforcement Bill**

Response to Scottish Parliament Justice 2 Committee

Introduction

The National Galleries of Scotland welcomes the opportunity to respond to the Justice 2 Committee on the Immunity from Seizure section of the Tribunals, Courts and Enforcement Bill.

Immunity from Seizure

Anti-Seizure legislation is essential to bring the UK in line with other countries and to maintain the UK's position as a major centre for world-class exhibitions. Immunity from seizure is a real and current problem. Loans from certain countries are becoming increasingly difficult and time consuming to negotiate. The UK is falling behind other governments in not having this protection for cultural property. Similar legislation now exists in America, Canada, France, Germany, Belgium, Switzerland and Austria.

The reality of the situation is that if the immunity is not given, objects which might be claimed will not be lent to this country. Lenders are already very reluctant to lend works of art or other cultural objects to the UK if they believe that a claim might be made. Exhibitions bring objects in public and private collections into the public domain which may otherwise remain unrecognised or unknown. Inclusion in exhibition catalogues, publications and websites, mean information on these items is accessible to many more people than will see them in the exhibition.

Automatic Immunity or Advance Application

We support the idea of automatic immunity from seizure rather than a system of application. We believe there is little benefit in the 'advanced application' system for reasons outlined below.

- Such a system would be both complicated to set up and manage and would create a considerable operational overhead for both museums and the government agency granting such immunities.
- An application system would require not just publication of a list of works on the website, but completion of an application in relation to loans required for a particular exhibition, considerably before the exhibition with information on each work for which protection is required. It would add significantly to the administrative burden particularly at a time when the final list of works is not likely to be known. Loans agreed a relatively late stage may be too late to fall under an application regime. While most loans are agreed well in advance of an exhibition opening, most major shows will have one or two late additions.

- A potential claimant is more likely to become aware of an object through a high-profile exhibition – potentially leading to a claim in the country of custodianship – than by monitoring an Official Register.
- The important factor is cultural exchange, and it should be clear that this legislation is not designed to nullify individual claims but to enhance that exchange.
- Private collectors are likely to be very concerned about details of works privately owned by them being publicised. This is likely to mean that loan offers are withheld or withdrawn

Restitution of Cultural Property

We are aware that this proposed legislation means that potential claimants will not have the opportunity to object to the grant of immunity in relation to a particular object. There is still a need for diligent research on provenance of items on loan and we take our moral obligations regarding illicit trade and Nazi-looted objects seriously. We would decline the loan of any object where we have good cause to believe that the current holder is not legitimately entitled to retain the object or the object was stolen, illegally exported or illegally imported. We are also aware that lenders have a duty of care to ensure that they are legally and legitimately entitled to agree to lend a work.

Over the past 8 years, national and regional museums have worked hard to research and publish details of any works in their collections with uncertain provenance during the 1933-45 period. Many hundreds of hours of work have gone into this at museums and galleries across the UK. There are now details of over 6,500 works listed on-line at www.nationalmuseums.org.uk/spoliation.html.

We agree with DCMS legal advice that the proposed legislation, in preventing a potential claimant from seeking a particular form of relief in this jurisdiction for a limited period of time, strikes a fair balance between the rights of the claimant and the public interest in promoting cultural exchanges and enhancing understanding of other cultures by facilitating public access to works of arts and cultural objects from other countries through major exhibitions.

Conclusion

The National Galleries of Scotland welcomes the proposal to introduce automatic immunity from seizure to works of art which are loaned to temporary exhibitions in the UK.

Elaine Anderson

On behalf of the Management Group, National Galleries of Scotland

4 January 2007

Legislative Consent Memorandum: Tribunals, Courts and Enforcement Bill

Evidence from the Scottish Council of Jewish Communities

The Scottish Council of Jewish Communities welcomes the opportunity to provide written evidence to inform the Justice 2 Committee's consideration of the Legislative Consent Motion in relation to the Tribunals, Courts and Enforcement Bill. Our evidence is confined to Part 6 of the Bill, 'Protection of Cultural Objects on Loan' and relates to the possibility that, as currently drafted, the Bill could deny the rightful owners of works of art stolen by the Nazis the opportunity of recovering them.

General objections

The provisions of Part 6 of the Bill which relate to the Protection of Cultural Objects on Loan are an abrogation of customary law, policy and practice and run counter to the public interest.

A curtailment of Holocaust survivors' legal and moral rights would be incompatible with UK support for the Principles laid down at the 1998 Washington Conference on Holocaust Era Assets principles¹ and would undermine the moral and ethical guidelines set out in the National Museums Directors Conference (NMDC) Statement of Principles and Proposed Action on the Spoliation of Works of Art during the Holocaust and World War II Period².

The Bill also creates a potential conflict between immunity from seizure legislation and legislation relating to the enforcement of judgements made in other jurisdictions, for example, Chapter III of Council Regulation (EC) 44/2001. This Regulation provides for judgments delivered in one EU jurisdiction to be enforceable by the local courts in other member states as if they originated from that jurisdiction. If, therefore, title to an item on temporary exhibition in the UK were the subject of a judgment in another EU state, a question would arise as to whether the proposed statutory immunity should defeat the duty to enforce that judgment. If so there would be significant implications for EU law well beyond the field of cultural property.

We appreciate that museums and galleries experience difficulties in negotiating loans from certain countries, but do not believe that exhibitions should be mounted at the expense of "*removing, from people who have already had mercy, justice and decency removed from their lives, the potential right to their property*" (Lord Janner of Braunstone, House of Lords, 29 November 2006). There is clearly a distinction between cultural property that may be subject to lien as security for an unrelated debt, for which it may be reasonable to grant immunity from seizure, and cultural property that was stolen (and perhaps stolen again – by the Communists from the Nazis) and so is not the property of the lender in the first place.

Alternative proposals

Lord Janner's view has received support in the House of Lords where two amendments³ relating to the exercise of 'due diligence' have been debated in Grand Committee⁴. These would have required museums and galleries to investigate thoroughly the provenance of proposed loans, but were subsequently withdrawn following assurances from the Parliamentary Under-Secretary for Constitutional Affairs that she '*accept[s] the principle behind the amendments.....and will be looking at that carefully in conjunction with colleagues at the DCMS.*'

'Due diligence' could be enhanced by the creation of an independent, publicly available register of proposed loans similar to that currently required in Switzerland. (The Swiss system⁵ requires museums to make a separate application in relation to each item of cultural property for which they wish to obtain immunity from seizure. The application must be submitted at least three months prior to the intended import date, and must include a precise description of the property concerned, its origin, and current owner. This information is published in the Federal Bulletin, after which there is a 30-day period during which objections to the granting of immunity can be registered. The decision to grant immunity from seizure is made by a specialist body and immunity may be granted provided that no-one claims ownership and that the loan agreement stipulates that the cultural property will be returned to the country of origin following the conclusion of the exhibition.)

However, even in combination, 'due diligence' and an independent register would only resolve matters to a limited extent. We are concerned that the Bill would prevent the UK courts from intervening if the true provenance of items of spoliated – which is to say stolen – cultural property from abroad only came to light after they were already on temporary exhibition in the UK. We do not believe that the sovereignty of the courts should be curtailed in this way.

ECHR compliance

We have, moreover, received legal advice that the Bill may be in breach of the ECHR. Provisions governing protection of property on loan engage Convention rights of access to a Court (ECHR Article 6) and protection of property (ECHR First Protocol, Article 1). The ECHR requires that any limitation to these rights must serve a legitimate aim, be proportionate to that aim and in the case of Article 1, Protocol 1 must strike a fair balance between the demands of the community and the protection of the individual's interest.

It is entirely disproportionate to deny access to justice, particularly when the object of a Holocaust survivor's claim may be the only tangible reminder of their lost family or home. It would also be entirely unjust to prioritise cultural exchange over moral rights. The government's position (Explanatory Notes 611) that the Bill merely provides '*a temporary limitation on one form of relief available to a claimant in this jurisdiction*' is not tenable, as it is only valid if the item of cultural property were afterwards returned to a jurisdiction in which a

claim could be made – and even then the greater cost of pursuing a case in another jurisdiction may prevent a claimant from pursuing a claim.

The advice we have received suggests that the Bill may be in contravention of Article 6 because the restriction of an individual's right to access UK courts is not proportionate to the stated aim of '*assisting museums and galleries, protecting the welfare of an important sector of the UK economy and of facilitating public access to works of art and cultural objects from other countries*' (Explanatory Notes: 611).

We have also been advised that the Bill may be in breach of Article 1, Protocol 1 because, contrary to the view expressed in the Explanatory Notes (612) the Bill is not proportionate and does not '*strike a fair balance between the rights of the claimant and the public interest*', especially since the situation in point is that the true owner may not even have been aware of the whereabouts of the stolen cultural property (or even aware that it had not been destroyed) prior to its public appearance in an exhibition. More limited anti-seizure regulations (for example to exclude criminal claims) might satisfy the requirement of museums and galleries for immunity, and, in combination with a proper notification or information scheme, would go further to strike a fair balance between the demands and the community and the protection of an individual's interest.

The issue for the Scottish Parliament

The Scottish Parliament is required by the Scotland Act to legislate in accordance with ECHR, and this responsibility should not be disregarded when delegating legislation to the UK Parliament by means of a Legislative Consent Motion.

We therefore urge the Committee to recommend to the Scottish Parliament that the Legislative Consent Motion should only be passed on condition that Ministers press for amendments to the Bill to ensure ECHR compliance and protection for the rights of the true owners of stolen works of art. This compliance – and the demands of natural justice - could be facilitated by:

- The exclusion from immunity to seizure of all title-based claims relating to cultural property of which the claimant was dispossessed contrary to law; and the power for the UK Courts to intervene where satisfied there are grounds for a claim.
- A statutory obligation to research the provenance of proposed loans to appropriate audit standards including the power to compel full disclosure of that provenance and the identity of the lender. Immunity should be provided only on condition that the works of art in question are not stolen.
- The creation of a publicly available full independent register of loaned art to enable the owners of stolen cultural property to locate it and submit a claim.

- A requirement to publish lists of any potential loans found to be stolen etc even where the loan does not go ahead.
- The introduction of a power to prevent sale of cultural property that is the subject of a claim and temporarily on exhibition in the UK to ensure laundering does not take place.

We would be pleased to respond to any questions from the Committee about the implications of Part 6 of the Tribunals, Courts and Enforcements Bill, and will gladly provide additional information to help inform their consideration of the Legislative Consent Motion

Note: The Scottish Council of Jewish Communities is the representative body of all the Jewish communities in Scotland comprising Glasgow, Edinburgh, Aberdeen and Dundee as well as the more loosely linked groups of the Jewish Network of Argyll and the Highlands, and of students studying in Scottish Universities and Colleges.

Appendix

Lord Janner of Braunstone QC in the House of Lords (29 November 2006)

Hansard col. 787:

<http://www.publications.parliament.uk/pa/ld199697/ldhansrd/pdvn/lds06/text/61129-0006.htm>

Lord Janner of Braunstone: My Lords, I listened with interest to my noble friend Lord Howarth of Newport. He referred to the *Times* correspondence page, which today carries a very interesting letter from him occupying a column. I am only sad that he does not understand that the key to this legislation should be justice, decency and morality. It should not be about removing now, from people who have already had mercy, justice and decency removed from their lives, the potential right to their property.

At present, if a Holocaust survivor sees a painting or object that belonged to his or her family, they can go and claim. If the Bill becomes law in its present form, if they see such property, they will be unable to prevent the people who have brought that property and exhibited it in this country at least keeping it, hiding it or taking it home. That is totally wrong and immoral and is not a fair balance.

Yes, my noble friend is right to refer to the misery suffered by people in the Holocaust. Yes, I declare an interest. My entire family that lived on the Continent, with the exception of those in Denmark, was wiped out by the Nazis. Yes, I declare an interest. I served in the British Army of the Rhine as a war crimes investigator. We know what the Nazis did. We know how property was stolen. We know who bought it. Yes, I have an interest. I recently came back with the noble Lord, Lord Hunt of Wirral, from another attempt to get the Vatican to hand over property. It has not handed over any of the items that were put into its care by people who knew they were being taken away by the Nazis and would probably be murdered. Not one item has been returned by the Vatican.

Yes, I am referring also to visits to Austria, which has passed a law stating that property taken from people who were murdered in the Holocaust should be handed back to their families. But that has not prevented a range of excellent painting, which belonged to people who now live in this country and who provided us with the details, being put by the Austrians into a gallery that is open to the public, but is privately owned so that the law does not affect it. But 50 per cent of the directors of that gallery are appointed by the Viennese, so the family cannot get the paintings back. This is not justice and, with respect, neither is it justice to say, "The rights you have now are going to be diminished". It is not justice to say, "This Bill will retain certain rights and you can take action in the international court". That is not the way to treat people.

The provisions are hidden away in Part 6 of a Bill that mainly deals with other matters, as this debate has done today. That is not the way to obtain decency, fairness and justice. Part 6 provides British institutions with immunity from potential prosecution or seizures of objects brought to the United Kingdom for public display and temporary exhibition for up to 12 months, either at one location or many. The potential is that spoliated, stolen artwork cannot be restored to the true owners, if they turn up, unless an order has been made by a court. Meanwhile, people can take those objects—it is theirs. Why? The answer we are given is, "If we can't do this, we will not get exhibitions in this country. People will not want to bring their art here". Well, if it is stolen art, I do not want them to bring it here, and I am sure that other Members of this House do not want that.

The Bill does not define which objects are protected. They should be cultural objects. The period of protection is not carefully thought through. There is nothing to ensure that items on loan are not brought into the United Kingdom on a semi-permanent basis. Items can be sold while they are on display in the United Kingdom. The safeguards for the true owners of such property, who have been robbed of them, are totally insufficient. It is not justice, it is not fair and it is certainly not something that I would have expected to happen in this country.

In many ways, the Bill is incompatible with the United Kingdom's support for the principles laid down in the 1998 Washington Conference on Holocaust-Era Assets, which I attended. It overrides our existing law, policy and practice on illicitly traded works of art, and art stolen by the Nazis. Britain stood up

against the Nazis when no one else did. My father was a Member of the other place for years, a leader of the Jewish community who stayed through the Blitz with my mother while I was shipped off to Canada for four years because they believed the Nazis were going to invade—thank God they did not. Do not give them something back like this.

How could it be right, if an artefact is proved to be stolen property, that it is not attacked when it comes here for an exhibition? “Well, maybe they would not want to put artwork into exhibitions here if they knew they were in that danger”. Well, too bad. We do not want to be a place which exhibits stolen art. This part of the Bill should be removed, not least because this county stood alone against the Nazis. To allow it back in is a disgrace.

¹ Washington Conference on Holocaust Era Assets

http://www.lootedartcommission.com/lootedart_washingtonprinciples.htm

² NMDC Statement of Principles and Proposed Action on the Spoliation of Works of Art

during the Holocaust and World War II Period

http://www.nationalmuseums.org.uk/spoliation_statement.html

³ Amendments 131 and 132

<http://www.publications.parliament.uk/pa/ld200607/ldbills/005/amend/ml005-ic.htm>

⁴ Hansard col GC128

<http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/61214-gc0007.htm>

⁵ Swiss Federal Office of Culture information about ‘Return Guarantee’

http://www.vms-ams.ch/fileadmin/vms-ams/docs/Info_R_ckgabegarantie_2005_11_23_e.pdf

Submission from Law Society of Scotland

I attach a copy of a letter which I sent to all Scottish Peers re the above Bill for your information.

Yours sincerely

Michael Clancy



The Law Society of Scotland

Direct Dial: 0131 476 8147
Direct Fax: 0131 225 4243
Direct E-mail: lyncrozier@lawscot.org.uk

26 Drumsheugh Gardens
EDINBURGH EH3 7YR

27 November 2006

LRB79/MPC/LC

To all Scottish Peers

Dear

**Tribunal, Courts and Enforcement Bill
Second Reading – 29 November 2006**

I am writing about this Bill which is due to have its second reading on 29 November 2006.

The Society has considered the Bill and has the following general comments to make.

Part 1 (Tribunals and Inquiries), Part 2 (Judicial Appointments), Part 6 (Protection of Cultural Objects on Loan) and Part 8 (General) together with the relevant schedules apply to Scotland, England, Wales and Northern Ireland, on the other hand Parts 3 (Enforcement by taking control of goods), 4 (Enforcement of judgements and orders), 5 (Debt management and relief) and 7 (Miscellaneous) apply only to England and Wales.

It may have been more appropriate for this Bill to have been more structured inasmuch as those parts of the Bill which apply to the United Kingdom could perhaps have constituted a separate bill whereas the remaining parts could have been placed in a bill for England and Wales only.

The Society has the following comments to make on specific clauses:-

Clause 4 (Judges and other members of the First-tier Tribunal)

This clause is an improvement on the analogous clause as it appeared in the draft bill. The split between clauses 4 and 5, dealing respectively with first tier tribunal judges and other members and upper tribunal judges and other members is an improvement, however the bifurcation of the tribunals does highlight some anomalies. For example, employment tribunal chairmen and members are located within the first tier tribunal, but the legally qualified members of the Asylum and Immigration Tribunal and the Social Security Commissioner are not included as members of the first tier tribunal.

Clause 7 (Chambers: jurisdiction and Presidents)

Clause 7 is vague in terms of what exactly is meant by “a chamber”. There is a lack of definition of who may preside over a “chamber”. Where two members are chosen to preside over the same chamber, there is no specification regarding the respective roles which these two Presidents may exercise. Furthermore, Clause 7 does not provide any detail as the objectives which the Lord Chancellor may have in mind when making provision for the organisation of each of the first tier tribunal and upper tribunal into a number of chambers.

Clause 9 (Review of decision by First-tier Tribunal)

Clause 9 indicates that the First-tier Tribunal may review a decision made by it on a matter in a case other than a decision which is an excluded decision for the purposes of Section 11(1).

This would appear to include not only questions of law, but also questions of fact. This power has the potential to undermine the normal judicial process, particularly in relation to Clause 9(3) where the First-tier tribunal may not only correct accidental errors in the decision or the record of the decision and amend the reasons given for the decision, but also set the decision aside. This is a very broad-ranging power and is not restricted to errors of law alone.

Clause 11 (Right to appeal to Upper Tribunal) and Clause 12 (Proceedings on Appeal to Upper Tribunal)

It is clear that the right to appeal to the Upper Tribunal is on a point of law only. There appears to be no provision which would allow the possibility that the Upper Tribunal could make a decision which it considers appropriate in the light of further findings in fact.

Clause 13 (Right to appeal to Court of Appeal)

This provision is different from the analogous provision on the draft Bill inasmuch as it provides in sub-clause (9) that the Upper Tribunal can specify the court which is to be the relevant appellate court as respects the proposed appeal. In terms of sub-section (10) that “relevant court of appeal” could, in Scotland be the Court of Session.

It is therefore potentially a mis-match in terms of the rights of appeal if under clause 13(6) the Lord Chancellor may make provision for leave or permission not to be granted where the relevant Court of Appeal is the Court of Appeal in England and Wales or the Court of Appeal in Northern Ireland but there is no analogous provision in respect of the powers of the Lord President as regards the Court of Session.

Clause 14 (Proceedings on appeal to Court of Appeal etc)

The Society notes that the relevant appellate court in deciding an appeal under clause 13 should decide on the basis of an error of law. In the Society’s view this is appropriate.

Clause 15 (Upper Tribunal’s “judicial review” jurisdiction)

The Society notes that Clause 20 (transfer of judicial review applications from the Court of Session) defines those aspects where an application is made to the supervisory jurisdiction of the Court of Session.

The Society approves of this provision.

Clause 21 (Upper Tribunal's "judicial review" jurisdiction: Scotland)

This clause makes provision for there to be a judicial review jurisdiction for the Upper Tribunal arising from cases in Scotland.

Clause 22 (Tribunal Procedure Rules)

The Society notes that the Tribunal Procedure Rules are to be made by the Tribunal Procedure Committee and that the Committee will consist of members appointed from each of the jurisdictions of the United Kingdom appointed by the respective heads of the judiciary.

Clause 22(4) provides that the power to make tribunal procedure rules is to be exercised with a view to securing:-

“

1. that the tribunal system is accessible and fair;
2. that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently;
3. that the rules are both simple and simply expressed; and
4. that the rules, where appropriate confer on members of the First-tier Tribunal or Upper Tribunal responsibility for ensuring that proceedings before the Tribunal are handled quickly and efficiently”.

It is concerning that “the achievement of the interests of justice” does not feature in this list of objectives, nor that the Tribunal Procedure Rules should seek to reinforce best practice in respect of compliance with the European Convention on Human Rights.

Chapter 3

With regard to Chapter 3 (Transfer of Tribunal Functions), this causes some concern to the Society. In Scotland staff and accommodation are currently provided for some Tribunals including the Social Security Commissioners and Customs and Excise by the Scottish Executive. It is not clear from Chapter 3 and the role which the Lord Chancellor has in that Chapter, the extent to which these arrangements are recognised or account is taken of them. That position is underlined in terms of Clause 38 (Tribunal staff and services), Clause 39 (Provision of accommodation) and Clause 40 (Fees).

The Society is concerned at the lack of requirement to consult relevant stakeholders in relation to many aspects of these provisions including failure to consult in respect of tribunal procedure rules, the provision of accommodation, tribunal staff and services and fees.

In particular, Clause 38(3) would appear to disallow the provision of a legal officer for the use of the Upper Tribunal in Scotland. This sits uneasily with the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers) Order 1999. (S1.1999/1750).

Part 2 (Judicial Appointments)

The Society has no comments to make.

Part 3 (Enforcement by taking control of goods)

The Society has no comments to make.

Part 4 (Enforcement of judgements and orders)

The Society has no comments to make.

Part 5 (Debt management and relief)

The Society has no comments to make.

Part 6 (Protection of cultural objects on loan)

The Society has no comments to make.

Part 7 (Miscellaneous)

The Society has no comments to make.

Part 8 (General)


Clause 136 (Power to make supplementary and other provision)

The Society is concerned that there is no requirement on the Lord Chancellor to consult relevant stakeholders on any order to make supplementary, incidental, consequential, transitory, transitional, or other saving provisions. There should be an obligation to consult with interested parties on the face of the Bill.

I hope this is helpful but if you have any questions, please do not hesitate to contact me.

Yours sincerely

Michael P. Clancy
Director, Law Reform

<p>Agenda item 2 9 January 2007</p>		<p>J2/S2/07/1/3</p>
---	--	---------------------

JUSTICE 2 COMMITTEE
BRIEFING PAPER ON UK LEGISLATION
TRIBUNALS, COURTS AND ENFORCEMENT BILL

INTRODUCTION

The Tribunals, Courts and Enforcement Bill (the [Bill as introduced](#)) had its First Reading in the House of Lords on 16 November 2006. Much of the Bill only applies to England and Wales. It is divided into eight parts:

- Part 1: tribunals and inquiries – includes various provisions on tribunals and inquiries, including provision to replace the Council on Tribunals with a new body called the Administrative Justice and Tribunals Council
- Part 2: judicial appointments – amends the law relating to judicial appointments, including amendments to the minimum eligibility requirements for judicial appointments in England and Wales (and for some posts where the office-holder may sit in Scotland or Northern Ireland)
- Part 3: enforcement by taking control of goods – includes provisions relating to the activities of enforcement agents when taking control and selling goods to enforce court judgements, etc
- Part 4: enforcement of judgements and orders – amends existing court-based methods of enforcing debts in the courts and adds new powers, including powers to obtain information about debtors
- Part 5: debt management and relief – contains provisions about the management and relief of debt
- Part 6: protection of cultural objects on loan – contains provisions to protect cultural objects from seizure where they are on loan from a country outwith the UK as part of a temporary exhibition open to the public at a museum or gallery in the UK
- Part 7: miscellaneous – includes provisions amending the law relating to the taking of possession of land affected by compulsory purchase and altering the powers of the High Court (for England and Wales) in judicial review applications
- Part 8: general – includes provisions on the territorial extent of the Bill and its commencement

The Bill had its Second Reading in the House of Lords in November 2006 – see Lords Hansard for [29 November](#) (at columns 759 to 805). The Bill's Committee Stage in the House of Lords took place in December 2006 – see Lords Hansard for

[13 December](#) (at columns GC43 to GC80) and [14 December](#) (at columns GC81 to GC138). The [Bill as amended in committee](#) was published on 15 December 2006. At the time of writing, no date has been set for the Report Stage in the House of Lords.

Clause 138 of the Bill provides that parts 1, 2, 6 and 8 of the Bill extend to England and Wales, Scotland and Northern Ireland, but that the other parts only extend to England and Wales. Not all of the provisions applying to Scotland deal with devolved matters. However, the Bill does seek to legislate in a number of areas which have been identified as being within the devolved competence of the Scottish Parliament. A [Legislative Consent Memorandum](#) ('LCM'), lodged by the Minister for Justice on 30 November 2006, sets out the following draft legislative consent motion:

*"S2M-XXXX Cathy Jamieson: Tribunals, Courts and Enforcement Bill Legislative Consent Motion - UK Legislation - That the Parliament agrees that the relevant provisions of the Tribunals, Courts and Enforcement Bill, introduced in the House of Lords on 16 November 2006, (a) relating to the establishment of a new Tribunals Service and an Administrative Justice and Tribunals Council and (b) providing immunity from seizure for international works of art on loan to exhibitions in this country, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament."*¹

DEVOLVED AREAS

Tribunals (Part 1 of the Bill)

The Executive's LCM highlights the following areas in which the Bill impacts on devolved issues:

- provisions abolishing the Council on Tribunals (including its Scottish Committee) and replacing it with a new body to be known as the Administrative Justice and Tribunals Council (which would also have a Scottish Committee)
- the proposal to use order making powers in the Bill to bring the substantive appeals jurisdiction of the Criminal Injuries Compensation Appeals Panel within the new Tribunals Service

A review of the delivery of justice through tribunals was carried out by Sir Andrew Leggatt in 2000 and 2001. The Executive's LCM notes that the scope of the review did not cover tribunals in Scotland operating within devolved areas.² The review was followed by the publication of a UK Government White Paper '[Transforming Public Services: Complaints, Redress and Tribunals](#)' (Department for Constitutional Affairs 2004). Provisions on tribunals were included in a draft Bill published in July 2006.

¹ Legislative Consent Memorandum, para 1.

² Legislative Consent Memorandum, para 3.

Administrative Justice and Tribunals Council

Information about the work of the [Council on Tribunals](#) and its [Scottish Committee](#) is available on their websites. They are advisory bodies, with approximately 80 tribunals under their oversight, and must be consulted on the procedural rules for those tribunals.³ The website of the current Scottish Committee states that it:

“oversees, on behalf of the Council, the procedures of those UK-wide tribunals which take place in Scotland. In addition the Committee has direct supervision over some twenty tribunals which operate in Scotland and which are constituted under separate Scottish legislation. These cover a wide range of subjects including education appeal committees and National Health Service discipline committees in Scotland as well as those tribunals which apply only in Scotland such as children’s hearings and tribunals held to consider crofting matters.”⁴

The [Explanatory Notes](#) published along with the Bill (para 5) state that the Administrative Justice and Tribunals Council (AJTC) will have a broader remit over the whole of the administrative justice system than is currently held by the Council on Tribunals. The website of the Council on Tribunals states that:

“The Department for Constitutional Affairs’ 2004 White Paper ‘Transforming Public Services: Complaints Redress and Tribunals’ proposed the evolution of the Council on Tribunals into an Administrative Justice Council, with the following additional functions:

- keeping under review the performance of the administrative justice system as a whole, drawing attention to matters of particular importance or concern;*
- reviewing the relationships between the various components of the system (in particular ombudsmen, tribunals and the courts) to ensure that these are clear, complementary and flexible;*
- identifying priorities for, and encouraging the conduct of, research;*
- providing advice and making recommendations to government on changes to legislation, practice and procedure which will improve the workings of the administrative justice system.”⁵*

It goes on to note that the Bill contains provisions to enact the White Paper’s proposals. The Executive’s LCM notes that:

“As with the Council on Tribunals at present, the Administrative Justice and Tribunals Council is proposed to have a Scottish Committee established by statute, on which will be conferred functions in relation to the operation in Scotland of the Council. It is proposed that the supervisory duties of the Scottish Committee should relate to Scottish Tribunals regardless of whether they are reserved or devolved (...).”⁶

³ Website of the Council on Tribunals at: <http://www.council-on-tribunals.gov.uk/about/about.htm>.

⁴ Website of the Scottish Committee at: <http://www.council-on-tribunals.gov.uk/scottish/scottish.htm>.

⁵ Website of the Council on Tribunals at: <http://www.council-on-tribunals.gov.uk/about/about.htm>.

⁶ Legislative Consent Memorandum, para 14.

The LCM goes on to state that whilst it would be possible to restrict the functions of the AJTC in Scotland to reserved tribunals, this would remove an important part of the supervisory structure for tribunals in Scotland.

During the Committee Stage in the House of Lords, Baroness Ashton of Upholland noted that it is the Government's intention that members of the Council on Tribunals on the day that it is abolished will become members of the AJTC and serve out the remainder of their term in office. She also stated that the Government is aiming to implement the provisions in this area in June 2007.⁷

Criminal Injuries Compensation Appeals Panel

The Criminal Injuries Compensation Scheme provides payment to victims of crimes of violence. It is a cross-border scheme with the Home Secretary and the Scottish Ministers having joint responsibility for its general oversight. It is administered by the [Criminal Injuries Compensation Authority](#) (CICA) and the [Criminal Injuries Compensation Appeals Panel](#) (CICAP). The Home Secretary is obliged to consult the Scottish Ministers prior to amending the scheme.

Decisions on individual applications are made by the CICA. The CICAP deals with appeals relating to decisions made by the CICA. The CICAP's website notes that it is:

“a tribunal with around 75 part time panel members at any one time, including the chairman, together with a secretariat (with generally around 75 staff) with offices in London and Glasgow, comprised of Department for Constitutional Affairs staff.”⁸

As noted above, the Bill seeks to bring the substantive appeals jurisdiction of the CICAP within the new Tribunals Service.

The [Tribunals Service](#) was established, on an administrative basis, in April 2006. It is an executive agency of the Department for Constitutional Affairs and provides common administrative support to more than 20 central government tribunals. The UK Government has indicated that all new, non-devolved, central government tribunals will be established as part of the Tribunals Service. Although its current scope does not cover wholly devolved tribunals operating in Scotland, some of the tribunals which it does cover have a Great Britain or UK wide presence. The CICAP is one of the tribunals already covered by the Tribunals Service on an administrative basis.

Amongst other things, Part 1 of the Bill seeks to create a new unified structure for tribunals by creating two new tribunals – the First-tier Tribunal and the Upper Tribunal. The Explanatory Notes published along with the Bill state that, in response to the recommendation for a single tribunal system made following the review of tribunals carried out by Sir Andrew Leggatt, the UK Government has decided to:

⁷ Lords Hansard for 14 December 2006, column GC86.

⁸ Website of the Appeals Panel at: http://www.cicap.gov.uk/about_us/about_us.htm.

*“create two new, generic tribunals, the First-tier Tribunal and the Upper Tribunal, into which existing tribunal jurisdictions can be transferred. The Upper Tribunal is primarily, but not exclusively, an appellate tribunal from the First-tier Tribunal.”*⁹

The Bill gives the Lord Chancellor the power to transfer the jurisdiction of existing tribunals to these new tribunals. The Executive’s LCM states that, in relation to the CICAP, the Lord Chancellor will have the power to transfer its functions to the First-tier Tribunal. The use of this power will require the consent of the Scottish Ministers.

Protection of Cultural Objects on Loan (Part 6 of the Bill)

The Executive’s LCM states that the following provisions impact on devolved issues:

- provisions in the Bill providing immunity from seizure to international works of art which have been loaned to exhibitions taking place in the UK would extend to Scotland

Thus, for example, objects on loan from a country outwith the UK, as part of a temporary exhibition open to the public at a museum or gallery in Scotland, could be protected from seizure. This is provided for in Part 6 of the Bill (clauses 126 to 129).

Development of the provisions in Part 6 of the Bill included a consultation carried out by the UK Government’s Department for Culture, Media and Sport in 2006. Further information, including the consultation paper and a summary of responses to the consultation is available on the UK Government’s [website](#). Responses to the consultation included one from the National Museums of Scotland stating its support, in principle, for UK-wide anti-seizure legislation set within a general framework which takes into account the need for an ethical approach to such matters. (Provisions on this topic were not included in the draft Bill published in July 2006.)

At present, cultural objects on loan from another country may be liable to seizure as a result of both civil proceedings (eg where there is a dispute over the ownership of an object or where creditors are trying to enforce a debt against the owner) and criminal proceedings (eg where the police believe that an object may have been obtained as a result of a criminal offence).

The Executive’s LCM states that:

*“At the moment the UK has no legislation granting immunity from seizure to works of art which are loaned to temporary exhibitions in this country. In this, it is becoming increasingly unusual. The United States (and some of the individual states), some Canadian provinces, France, Germany, Austria, Belgium and Switzerland have enacted such legislation.”*¹⁰

⁹ Explanatory Notes, para 13.

¹⁰ Legislative Consent Memorandum, para 36.

It goes on to state that a number of countries are now demanding that cultural objects should not be liable to seizure whilst on loan to museums and galleries in the UK. It indicates that important exhibitions may be threatened if the UK does not have legislation allowing such guarantees.

The Scottish Council of Jewish Communities has highlighted a concern that the Bill might deny the rightful owners of works of art stolen by the Nazis the opportunity of recovering them. This concern relates to a wider issue – how to ensure that any concerns about the provenance and ownership of objects, which museums and galleries might receive on loan, are properly dealt with? On this point, it should be noted that the above protection would only apply to some museums and galleries. Clause 128(3) of the Bill provides that it will only apply to institutions approved for this purpose by the Secretary of State. Scottish Executive officials have advised that a Government amendment is being drafted for the Report Stage in the House of Lords which will provide for Scottish institutions to be approved by the Scottish Ministers.

During the Committee Stage in the House of Lords, members sought more information on what would be done to try and ensure that there are no concerns about the provenance and ownership of objects which would be protected from seizure. For the Government, Baroness Ashton of Upholland stated that:

“It is right that the Secretary of State must have regard to the procedures followed by museums and galleries for establishing the provenance and ownership of objects that may qualify for protection under the Bill in deciding whether they should be approved for the purposes of immunity.

With regard to the role already played by museums, due diligence does not come with the legislation as part of the requirements. It exists already. In that sense, they are funded to do it. We are talking about the major national museums, plus the main large regional museums that mount exhibitions – that is fewer than 60 in total. In my view they should be practising due diligence already. The question is whether we need to recognise that in the Bill.”¹¹

She went on to state that:

“It is fundamental that any museum that benefits from immunity from seizure needs to have the strict controls that noble Lords seek to ensure that it does not borrow items of dubious origin. (...)

Under our proposals, museums will be invited to apply for immunity from seizure and to submit evidence of their due diligence procedures (...) and associated documentation to assure us that they are conducting appropriate checks into the provenance and ownership of items they propose to borrow for temporary exhibitions.”¹²

She also indicated that the Government would give consideration to proposals from members that the Bill should include specific reference to museums and galleries needing to show that they have suitable measures in place to investigate the provenance and ownership of any objects which might be received on loan from

¹¹ Lords Hansard for 14 December 2006, column GC134.

¹² Lords Hansard for 14 December 2006, column GC134.

outwith the UK, before being granted approval by the Secretary of State. She indicated that the Government would respond on this issue in time for debate during the Report Stage in the House of Lords.

Although the provisions in the Bill provides immunity from seizure, clause 127(2) of the Bill states that such protection does not affect any liability for an offence of importing, exporting or otherwise dealing with the object.

Frazer McCallum
SPICe Research
3 January 2007

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament Committees and clerking staff. They provide focused information or respond to specific questions and areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.



SCOTTISH EXECUTIVE

Minister for Justice
Cathy Jamieson MSP

St Andrew's House
 Regent Road
 Edinburgh EH1 3DG

Telephone: 0845 774 1741
scottish.ministers@scotland.gsi.gov.uk
<http://www.scotland.gov.uk>

Mr David Davidson MSP
 Convenor
 Justice 2 Committee
 The Scottish Parliament
 Edinburgh
 EH99 1SP

08 January 2007

Thank you for your letter of 22 December enclosing the Committee's Stage 1 report on the Custodial Sentences and Weapons (Scotland) Bill, published on that day. I welcome the Committee's support for our proposals on weapons and for its agreement to the general principles of the Bill. I will of course consider all of the issues raised in the report.

The Committee invited the Executive to consider and respond to the substance of its conclusions, recommendations and requests for clarification. In particular, the Committee has requested a full response before Stage 2 begins to a number of questions. I can confirm that a detailed reply covering all the points raised in the report will be provided before the end of January.

In the meantime, you may find it helpful to have an interim response to some of the more straightforward points before the Stage 1 debate.

Given the concerns of the Subordinate Legislation Committee, the Committee recommends that the Minister looks again at subsection 6(10) of the Bill.

The Scottish Ministers' policy is that all community and custody prisoners will spend a period on licence in the community. This seeks to assist offenders in rehabilitating back into the community while subject to a number of relevant and testing licence conditions.

Future data may indicate that alternative custody periods are more appropriate for certain offenders. For example certain types of offender, might be more effectively dealt with, and resources better targeted by a shorter custody element and longer community element.

Section 6(10) gives the Scottish Ministers the power to amend subsection (3) by substituting a different proportion of the sentence for the proportion mentioned (which is one-half). This is the minimum proportion of the sentence which the court must specify as the custody part. The Committee has pointed out that the provisions of subsection (10) may be in tension with subsection (6), which prevents the court from specifying a custody part of more than 75%. The intention here is to provide the Scottish Ministers with the power to vary the custody part to take account of sentencing trends but it will never be more than 75%. That is why the power relates only to subsection (3).

The Minister is asked whether conditional sentences could be considered as a form of early release.

As I understand the Committee's comments about "conditional sentences", this device is intended as an alternative to custody. The Executive has no power to impose an alternative sentence once it has been imposed by the courts. As emphasised in earlier correspondence from Scottish Ministers and the Justice Department, nothing in the Bill is intended to alter or affect the overall sentence which the judge or sheriff imposes. The judge will have decided (as he/she would do now), having regard to all the information available at the time of conviction about the circumstances of the offence and the offender, that a period of custody is the most appropriate disposal. Previous exchanges have highlighted the variety of non-custodial disposals available already to the courts where it considers that one of these would be the appropriate disposal in any given case.

Clarity is required about the circumstances in which reference is being made to the risk of re-offending, risk of harm or the risk of serious harm.

The proposals in the Bill allow for a new sentence management system to be put in place. The new arrangements are about enabling effective and efficient targeting of resources tailored to risk and needs. As we have confirmed, while the Bill provides the legislative framework, the detailed implementation work is being taken forward by a top level Planning Group, which includes members from the SPS, RMA, Association of Directors of Social Work, COSLA, Sacro, ACPOS and the voluntary sector. Implementation will build on and complement other offender management arrangements. For example it will build on the Integrated Case Management (ICM) system developed by the SPS which currently applies to offenders subject to post-release supervision, i.e. those sentenced to 4 years or more, sex offenders sentenced to 6 months or more, offenders on extended sentences and offenders serving life sentences (in total about 3000 a year). ICM provides for the compilation of information relating to offending, risk and needs of each offender, assessment, initial interviews with each prisoner, social work input and integrated case conferences for each offender.

The Justice Department is also engaged in a programme of work with the SPS, ADSW and ACPOS around developing standard tools for assessing risk of reoffending and risk of harm. But this is a fast moving area and so we are also working with the Risk Management Authority to ensure the use of appropriate assessment measures to help achieve clarity and proportionality in how offender needs and circumstances are matched to post custodial arrangements. We will provide more information in the detailed reply.

I hope this is helpful to the Committee. I will ensure that you have a full response to the report ahead of Stage 2.

CATHY JAMIESON