



Law Society  
of Scotland

# Administrative Justice committee

Administrative Justice principles: a second  
discussion paper and consultation

August 2022



## Introduction

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1. The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.
2. We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.
3. We believe that the development of Scotland's administrative justice system would materially assist the creation of that fairer and more just society, and we therefore embarked in 2018 on a process to assist in the development of thinking about administrative justice in Scotland. A key element of that work has been the development of a principles-based approach to administrative justice. This paper outlines that approach and seeks feedback around how this could develop.

## Executive Summary

We propose in this paper the implementation through legislation of a principles-based approach to administrative justice.

Because of the breath of the administrative justice system, embedding principles through cultural change or voluntary adoption is likely to be a difficult and gradual process. Legislation to secure administrative justice principles has been enacted in other jurisdictions, notably in South Africa with the Promotion of Administrative Justice Act 2000.

Given the range of different interactions through the administrative justice system and also the range of different ways that administrative justice disputes are resolved, from courts and tribunals to ombudsman services, ensuring that these principles are holistic will require creativity and innovation.

There should be opportunities to coordinate with other reforms, particularly with the proposed incorporation of four United Nations Human Rights Treaties, including the International Covenant on Economic, Social and Cultural Rights, into Scots Law.<sup>1</sup>

## Administrative Justice and Covid-19

4. The Covid-19 pandemic has and continues to have a profound effect, with hardly any part of society untouched by its effect or in its wake. The justice system has been significantly impacted by the pandemic, particularly as formal, face-to-face means of resolving disputes cannot easily take place while requirements for social distancing remain in place and as backlogs develop, particularly for criminal cases but also across the entire justice system including for issues resolved by tribunals within the scope of administrative justice.
5. The economic impact of the pandemic has been similarly profound and the consequences of this are likely to impact society for the next decade. The justice system faced significant financial pressure during the previous economic downturn, with cuts to core services, shuttering of court buildings and a retrenchment of service provision. There may be lessons from the previous economic downturn that could be learned for the challenges ahead, and difficult decisions around how to resource the system overall, particularly with the additional capital costs of ICT infrastructure.
6. One response to the pandemic across the justice system has been to move dispute resolution online, accelerating programmes of work that had been underway before the pandemic, such as the use of videoconferencing, as well as introducing new technology into the justice system. Measures introduced through necessity to meet the challenges of the current crisis may be retained as the 'new normal' and this may create some unintended tension. Issues around effective participation, the impact on vulnerable people, digital exclusion, and differences in outcomes between digital and face-to-face justice may come to the fore. Measures introduced without proper evaluation may require further scrutiny to ensure that the justice system remains fair and accessible to all. The findings of the Society's recent research into the use of telephone and video hearings in civil cases, for instance, saw support for the use of these methods for procedural hearings (with 91% of respondents thinking that remote procedural hearings worked well, but only 5% thinking that remote proofs and 3% that remote evidential hearings worked well)<sup>2</sup>.
7. The significant changes made to the way in which decisions are taken, reviewed and challenged during the pandemic have often been made at pace and through necessity, without wider consideration of what the consequences of these changes may be. In the area of devolved social

<sup>1</sup> The Scottish Government announced its intention to introduce a Human Rights Bill in the current session of Parliament on 12 March 2021.

<sup>2</sup> Law Society of Scotland, *Civil Courts Online Survey Summary – Analysis of Research*, May 2021 (<https://www.lawscot.org.uk/media/370952/covid-civil-courts-survey-responses-may-2021.pdf>)

security, for instance, the Social Security Committee of the Scottish Parliament expressed concerns in a report on the pandemic<sup>3</sup>: “[I]t is not clear to the Committee that lessons are being learned about how existing services should, where required, be reformed and new services designed to provide efficient support. We need a greater level of assurance that these lessons are being considered systematically and banked to improve future service provision, resilience, and agility”.

8. The current pandemic is also likely to bring more people within the scope of the justice system and, in particular, the administrative justice system. The pandemic has required state intervention in the lives of people across the UK in ways and to a degree previously unforeseen. This intervention has included support for small businesses, the subsidising of wages and earnings through the furlough scheme and the self-employed support scheme, and the extension of the benefit system to support a much wider pool of people as a result of the harsh economic impact of the crisis.
9. While Covid-19 may mean that more people may be affected by the administrative justice system, the capacity of this system to deal with this growth may be challenged by the backlogs that have developed because of the pandemic. In many areas, decision-making has slowed because of the transition to home-working required for public health and backlogs have developed in tribunal hearings. The scale of the change wrought by the pandemic has also focused attention on the recovery from that crisis. It has been suggested that the longer-term aim of this activity should be to ‘build back better’, and that there may be an opportunity for the reframing of the ways in which the institutions of our society operate. What this might mean for administrative justice is not yet clear.
10. While it will be seen from the following section that we had embarked in 2018 on a general review of the administrative justice system in Scotland, it is now clear that the Covid-19 pandemic requires a fundamental reappraisal of the ways in which the administrative justice system operates. Such a reappraisal requires an assessment of the outcomes that the system seeks to achieve, and in turn consideration of the principles by which it should be guided, and. The focus on renewing and transforming the justice system in the wake of the pandemic provides an opportunity to develop new ways of working for the whole AJ system.

## The Administrative Justice Project

11. In Spring 2019 the Society published a Discussion Paper and convened a conference on ‘Shaping the Future of Administrative Justice in Scotland – where do we go from here?’<sup>4</sup> In that paper the Society noted that the landscape for administrative justice had changed significantly in recent years, not least through the advance of new technology and the devolution of new powers to Scotland. We noted that the situation remained complex and, partly for that reason the position of

<sup>3</sup> Social Security Committee, Scottish Parliament, *The Social Security Response to Covid-19*, 2021 (<https://sp-bpr-en-prod-cdneq.azureedge.net/published/SSC/2021/3/17/ff70672c-8008-4ad0-b379-92300c8d658d-1/SSCS052021R3.pdf>)

<sup>4</sup> 27 March 2019

government may have seemed to those outside of it to be uncertain. It has been difficult to discern any overall strategy within government, guiding thinking in the area, and government at both UK and Scotland levels has pursued several apparently unsuccessful initiatives since the abolition of the Administrative Justice and Tribunals Council in 2013. A new Administrative Justice Council was established by JUSTICE<sup>5</sup> on behalf of the Ministry of Justice in 2018, and this may see administrative justice increase in profile.

12. We remain concerned that key points of focus in the pre-existing strategy, and in particular the centrality of the user of the system, may no longer be as salient to policy-makers as they were 10 years ago. In our Discussion Paper we concluded, “Overall, we heard that there needs to be more understanding of the holistic nature of the system, for decision-makers and policy-makers, but even more so for the public, focusing on the remedies sought more than the systems accessed.” Outcomes from the Discussion Paper and the Conference led us to conclude that these concerns were shared by a wide cross section of practitioners and that it would be of benefit to work towards a further targeted paper, highlighting some of the actions which, so far as we are concerned, are needed to take administrative justice forward from here. Our focus on the remedies sought, rather than the systems accessed has also broadened, and we believe that a holistic, principles-based approach through legislation has the opportunity to enhance the quality of administrative justice across Scotland.
13. This Second Discussion Paper builds therefore on the outcomes from the March 2019 conference, with a view to identifying the principles of administrative justice in Scotland that apply today, and the paper advocates the development of legislation to give these principles practical effect.
14. The approach in this paper is in two stages; the first stage offers a definition of the administrative justice system for which the principles are relevant, and the second stage discusses the options for identifying principles. At both stages it relies on the work of the Administrative Justice and Tribunals Council but is also informed by other relevant sectoral or jurisdictional principles. Considering these issues now, as Nick O’Brien suggests, may be vital<sup>6</sup>:

“So stark is the impoverishment of policy on administrative justice that UKAJI [the UK Administrative Justice Institute] has argued that the time is now ripe for a fundamental re-evaluation of the very concept of ‘administrative justice’ if it is to be spared a future of marginal interest only to practising lawyers and a handful of nostalgic legal academics. [We need to] to consider how to ‘reposition’ administrative justice as ‘an overarching set of principles and values governing individuals’ interactions with the state rather than as one of the four ‘strands’ of the justice system’, alongside the more visible criminal, civil and family jurisdictions which tend to attract so much more of the policy limelight.”

<sup>5</sup> JUSTICE is a human rights charity, working to reform the UK justice system with a focus on the most vulnerable and marginalised in society.

<sup>6</sup> Nick O’Brien, *Administrative Justice in the Wake of I, Daniel Blake*, (2017) *The Political Quarterly* 9

## Structure and approach of the Second Discussion Paper

15. As noted above the aim of this Second Discussion Paper is not to offer a new statement of principles. That may come in the next stage of this project, but it is important to develop the debate, involving the main stakeholders. The first stage of any debate is to define its terms. So, the first stage of a debate on the principles underpinning the administrative justice system of Scotland is to identify and agree the scope of that system.
16. This discussion paper is divided into five parts as follows;
- Part 1 - The first part of the paper considers the question of a definition of the 'administrative justice system'. There is no lack of definitions at present; they vary between different organisations and stakeholders. However, there is a consensus that the system extends beyond the various dispute resolution mechanisms— courts, tribunals, ombuds institutions— and that it also looks at the initial decisions made, the processes of review, mandatory reconsideration or mediation. Questions of whether this definition should also include governance and accountability structures, or the private disputes that sit alongside those between individuals and public bodies do arise and are also considered.
  - Part 2 maps the current dispute resolution options available to resolve common administrative justice issues.
  - Part 3 reviews the current legal landscape within which principles require to operate in Scotland. This considers the devolution settlement and its incorporation of Convention rights, public law, equality legislation and the common law.
  - Part 4 considers comparative principles-based approaches across the UK and in other jurisdictions. The breadth of our administrative justice system is such that comparative principles have been drawn from a number of different sources, from those that affect the justice sector overall, those established for courts or tribunals, principles from public service delivery, from ombuds institutions and those that attempt to deal with the full range of administrative justice issues.
  - Part 5 - The final part of the paper considers the broad themes emerging from the previous sources, looking to integrate these into the grounds of what a future set of principles may be, how these principles might practically operate and how enforceable they would be.
17. We conclude that the need for a statutory principles-based approach is the most effective step that can be taken to reform and improve the administrative justice landscape in Scotland, and that these principles need to be incorporated in legislation.

## Part 1: Definition of Administrative Justice

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Before considering potential principles for an administrative justice system, it is essential to define what is now understood by the expression 'administrative justice', determining which elements fall within the scope of that expression.

### The 'administrative justice system'

18. What an administrative justice system is remains an evolving issue. A definition was enacted in the Tribunals, Courts and Enforcement Act 2007 - for the purposes of establishing the scope of the Administrative Justice and Tribunals Council (AJTC) - namely "*the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including... the procedures for making such decisions... the law under which such decisions are made, and... the systems for resolving disputes and airing grievances in relation to such decisions*"<sup>7</sup>. However, the AJTC observed, in its written evidence to the House of Commons Public Administration Select Committee in 2010, that this 'system' thinking was not necessarily reflected in policy and practice<sup>8</sup>:

"The concept of an administrative justice 'system' is taking time to be universally recognised. It implies a strategic, cross-cutting view of decision-making and redress mechanisms across government, making it is possible for general principles to be stated, good practice to be shared, and comparisons to be drawn between alternative approaches. The concept challenges the historical silo-based approach that often appears to define the public sector in the UK. Tribunals have little control over the demand which flows to them from departments and agencies. The latter have few financial or other incentives to learn from complaint or appeal outcomes or to reduce demand by doing more to get it "right first time". At the [UK] policy level, the Cabinet Office has the lead on ombudsman policy, while the MoJ has responsibility for most (but not all) tribunals. The MoJ also has nominal responsibility for the administrative justice system as a whole but has little influence over the rest of central government and no influence over local or devolved governments. In practice, collaboration between decision-making departments and the MoJ, to understand and improve the end-to-end experience of the citizen when disputes occur, is in its infancy. And there is a complex mix of devolved and non-devolved tribunals in Scotland and Wales, with confused responsibilities, a lack of clarity about strategic direction and no-one (apart from AJTC) with UK oversight of the system as a whole."

### Initial decision-making and 'right first time'

<sup>7</sup> Schedule 7, paragraph 13 (since repealed)

<sup>8</sup> House of Commons Public Administration Select Committee, *Oversight of Administrative Justice: Written Evidence*, 2010 (<https://www.parliament.uk/documents/commons-committees/public-administration/written-evidence-OAJ.pdf>)

19. Hitherto, policy development around administrative justice has tended to suggest a focus on redress mechanisms – the complex network of courts, tribunals and ombuds institutions that look to resolve disputes and provide justice. However, the initial decisions that led to these disputes is also a very important aspect of the system. The AJTC in its 2011 report, *Right First Time*, highlighted the importance of higher standards of first-instance decision-making<sup>9</sup>. At a stage when many appeal tribunals were finding in favour of claimants, a preventative approach that eliminated this need to correct administrative shortcomings would have significant benefits for individuals, for public bodies and for the exchequer in cost savings. This more holistic approach to the administrative justice system is taken by many other organisations and commentators:
20. The UK Administrative Justice Institute (UKAJI) described administrative justice as *“how government and public bodies treat people, the correctness of their decisions, the fairness of their procedures and the opportunities people have to question and challenge decisions made about them”*<sup>10</sup>.
21. The Ministry of Justice (MoJ) has described administrative justice as encompassing *“a broad group of bodies, functions and processes which enable people to raise grievances, challenge and resolve disputes against administrative or executive decisions made by or on behalf of the state. The system is also concerned with the quality of original decision making and the routes for challenging maladministration”*<sup>11</sup>.
22. The Consumer Focus Scotland Administrative Justice Steering Group said the *“the term ‘administrative justice’ should be defined broadly to include: initial decision-making by public bodies affecting citizens’ rights and interests, including the substantive rules under which decisions are made and the procedures followed in making decisions; systems for resolving disputes relating to such decisions and for considering citizens’ grievances. The benefits of this broad definition are that it delimits a coherent field of inquiry and enables discussion of administrative justice to respond to the full range of citizens’ concerns about their interaction with public services”*<sup>12</sup>.
23. The Scottish Committee of the Administrative Justice and Tribunals Council (STAJAC), in its response to the Scottish Parliament on the 2013 Tribunals (Scotland) Bill, stated that *“administrative Justice is a facet of civil justice. While it is often seen simply as that part in which adjudication is delivered via tribunals, the breadth of administrative justice is far wider than the tribunals system, encompassing also the whole area of decision making by public authorities where*

<sup>9</sup> Administrative Justice and Tribunals Council, *Right First Time*, 2011  
([https://webarchive.nationalarchives.gov.uk/20130102164216/http://ajtc.justice.gov.uk/docs/AJTC\\_Right\\_first\\_time\\_web\(7\).pdf](https://webarchive.nationalarchives.gov.uk/20130102164216/http://ajtc.justice.gov.uk/docs/AJTC_Right_first_time_web(7).pdf))

<sup>10</sup> UK Administrative Justice Institute, *A Research Roadmap for Administrative Justice*, 2018  
([https://administrativejusticeblog.files.wordpress.com/2018/02/final-ukaji\\_research\\_roadmap\\_web.pdf](https://administrativejusticeblog.files.wordpress.com/2018/02/final-ukaji_research_roadmap_web.pdf))

<sup>11</sup> Ministry of Justice, *Administrative Justice and Tribunals: A Strategic Work Programme 2013–16*  
([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/217315/admin-justice-tribs-strategic-work-programme.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217315/admin-justice-tribs-strategic-work-programme.pdf))

<sup>12</sup> Consumer Focus Scotland, *Administrative Justice in Scotland - the Way Forward: A Summary of the Final Report of the Administrative Justice Steering Group*, 2009



*the rights of users are involved. By definition it also therefore includes complaints and ombudsmen systems affecting public authorities and public functions across government and public authorities as a whole<sup>13</sup>.”*

24. Adopting a ‘right first time’ approach and looking at initial decision-making, of course, broadens the scope of the administrative justice system, at least quantitatively considering not just the disputes arising from them but also the initial decisions made by public bodies<sup>14</sup>. A ‘right first time’ approach also broadens the scope qualitatively, as consideration is given to what elements are needed to make a decision ‘right’. Some have broadened the ‘right first time’ approach further. In *The Ombudsman Enterprise and Administrative Justice*, Buck, Kirkham and Thompson emphasise the importance of developing systems to oversee initial decision making and systems for dispute resolution, with a three-step approach: ‘getting it right’ at the decision-making stage; ‘putting it right’ through dispute resolution processes; and ‘setting it right’ through a network of governance and accountability mechanisms covering decision-making and dispute resolution<sup>15</sup>.
25. The definition in the 2007 Act meant that the internal working of government would theoretically become subject to the statutory oversight role of the AJTC; how else could Right First Time have properly been considered? It might be understandable then that government might wish to restrict that possibility by abolishing the Council. But in abolishing the Council, repeal of the 2007 Act also swept away the statutory definition of the system. And in some sense, once the Council was gone there was perhaps no need for a definition; there was simply dispute resolution to be considered.
26. It does seem however that there is a consensus that the Administrative Justice System extends to the area described in the now repealed provisions of Schedule 7 the 2007 Act, and that in particular the more holistic approach mooted by the AJTC in ‘Right First Time’ reflects the actuality of what is understood by the expression ‘the administrative justice system’.
27. There may be another reason for a definition of the system. In the absence of a definition, the task of considering the structure of dispute resolution becomes more difficult. If we think that consistency in approach is important then that is because we can see a system. And if we are to have ombuds processes as well as tribunal processes, and we are to have consistency in allocation to each then we have to have some means of determining which disputes are to fall into which process.
28. For the purposes of this paper therefore we proceed on the basis that the administrative justice system is

<sup>13</sup> Scottish Committee of the Administrative Justice and Tribunals Council, *Written submission from the Scottish Committee of the Administrative Justice and Tribunals Council*, July 2013 ([http://www.parliament.scot/S4\\_JusticeCommittee/Inquiries/T4\\_SCAJTC.pdf](http://www.parliament.scot/S4_JusticeCommittee/Inquiries/T4_SCAJTC.pdf))

<sup>14</sup> In the UK, there are around 3.8m people receiving disability benefits, with over 200,000 disability related claims at the Social Security and Child Support Tribunal, and with 71% of these appeals determined in favour of the claimant) Ministry of Justice, *Tribunal Statistics Quarterly, July to September 2019* ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/851596/Tribunal\\_and\\_GRC\\_statistics\\_Q2\\_2019\\_20.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/851596/Tribunal_and_GRC_statistics_Q2_2019_20.pdf))

<sup>15</sup> Trevor Buck, Richard Kirkham Brian Thompson, *The Ombudsman Enterprise and Administrative Justice*, 2011

'The overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including

- the procedures for making such decisions,
- the law under which such decisions are made; and
- the systems for resolving disputes and airing grievances in relation to such decisions.'

### Consultation question 1

**We suggest (paragraph 28 of the discussion paper) that the administrative justice system is, 'The overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including**

- **the procedures for making such decisions,**
- **the law under which such decisions are made; and**
- **the systems for resolving disputes and airing grievances in relation to such decisions.'**

**Do you agree?**

### Administrative justice and private disputes

29. Thinking of individuals as consumers in the context of interactions between individuals and public bodies may appear counter-intuitive to some, although this raises a further and significant issue around scope. UKAJI conceptualises administrative justice as 'how government and public bodies treat people', but there may be some disputes of a private nature that should (or **should** not) be considered part of the administrative justice landscape. Employment disputes that are resolved through Employment Tribunals, for instance, are disputes between private parties, even where the State may be a party. There are also ombudsman services that deal with private disputes, such as the Financial Conduct Authority and the Financial Services Ombudsman. The relationship between parties in a private dispute will not necessarily be as asymmetric as is bound to be the case in a dispute between an individual and the state, though issues like employment or housing may be as significant to the parties as their immigration status, tax liability or benefit entitlement. Including such disputes within scope, where practicable, might aid consistency and promote best practice across a complex and disparate administrative justice landscape, but there may be some approaches taken around administrative justice that would not fit private disputes well, for instance, a 'right first time' approach to the decisions of a private landlord.

30. Overall, we believe that these areas should be considered within the scope of the administrative justice system. The relevance of the resolution of these private disputes has grown in recent years as a result of the privatisation of many formerly public services and the contracting out of many

administrative functions. There is a strong argument that principles that apply when a public service is publicly provided should also apply when it is privatised.

## Consultation question two

**Do you agree that Employment Tribunals, Financial Services Ombudsman and other types of private dispute resolution should be included within the scope of the administrative justice system (paragraph 29)?**

## Administrative justice and devolution

31. This complex and disparate landscape presents other challenges, as the AJTC noted, around the division of responsibilities between devolved and reserved areas and the divergent approaches that may be taken around decision-making and dispute resolution. An example of this is the principles-based approach adopted in the Social Security (Scotland) Act 2018<sup>16</sup>. The legislation establishes a set of governing principles, including that social security is a human right, that respect for the dignity of individuals is to be at the heart of the system and that the system is to be designed with the people of Scotland on the basis of evidence. None of these principles are to be found in legislation governing the UK social security system. In addition to the potential for divergence in principles, policy or practice, there is also the challenge for individuals in navigating this complex system. The complexity of that landscape will be considered in the next section of this paper.

## Conclusion

32. It is essential that the scope of our administrative justice system be identified before the principles that might apply across that system are specified. There appears to be a consensus across a number of organisations and commentators that the definition of administrative justice should include the initial decision-making process as well as mechanisms for dispute resolution.

### <sup>16</sup> 1 *The Scottish social security principles*

The Scottish social security principles are—

- (a) social security is an investment in the people of Scotland,
- (b) social security is itself a human right and essential to the realisation of other human rights,
- (c) the delivery of social security is a public service,
- (d) respect for the dignity of individuals is to be at the heart of the Scottish social security system,
- (e) the Scottish social security system is to contribute to reducing poverty in Scotland,
- (f) the Scottish social security system is to be designed with the people of Scotland on the basis of evidence,
- (g) opportunities are to be sought to continuously improve the Scottish social security system in ways which—
  - (i) put the needs of those who require assistance first, and
  - (ii) advance equality and non-discrimination,
- (h) the Scottish social security system is to be efficient and deliver value for money.

33. By extension, it is fair to assert that the definition of administrative justice must also include intermediate steps beyond the initial decision, such as internal review, known as mandatory reconsideration, in social security disputes. On this analysis, it should also include the 'setting it right' approach, ensuring that there are adequate accountability and governance arrangements across the system. However, whether account needs to be taken of private disputes using the same or similar dispute resolution mechanisms, will probably require further consideration. And whether the unique and complex landscape of the Scottish administrative justice system demands special recognition in a definition or needs to be reflected in any set of principles, may also require further consideration.

### **Consultation question three**

**Do you agree that expression of principles is necessary to ensure that access to a system of administrative justice is practical and effective (paragraphs 32 and 33)?**

## Part 2: Mapping

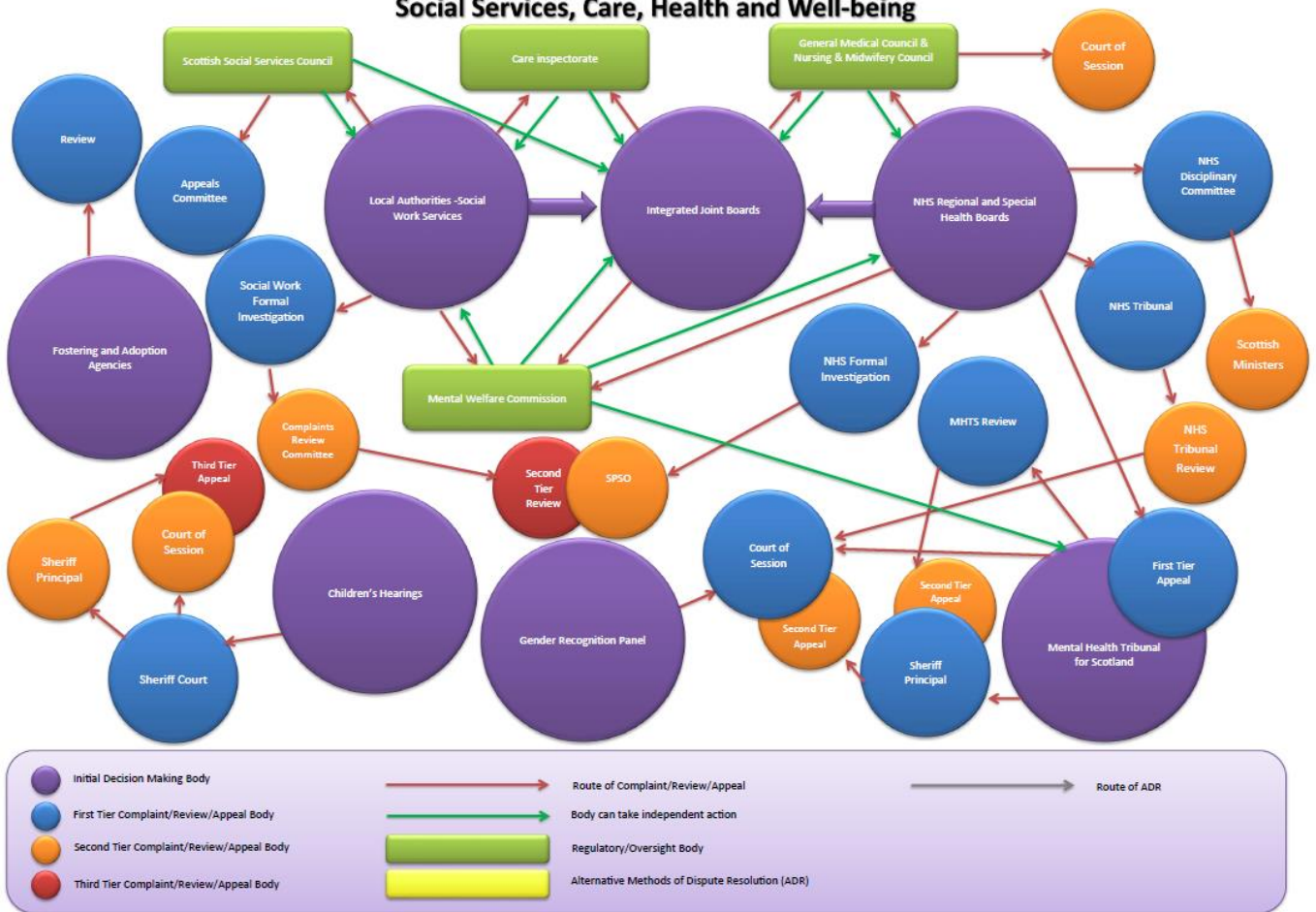
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### Administrative justice mapping

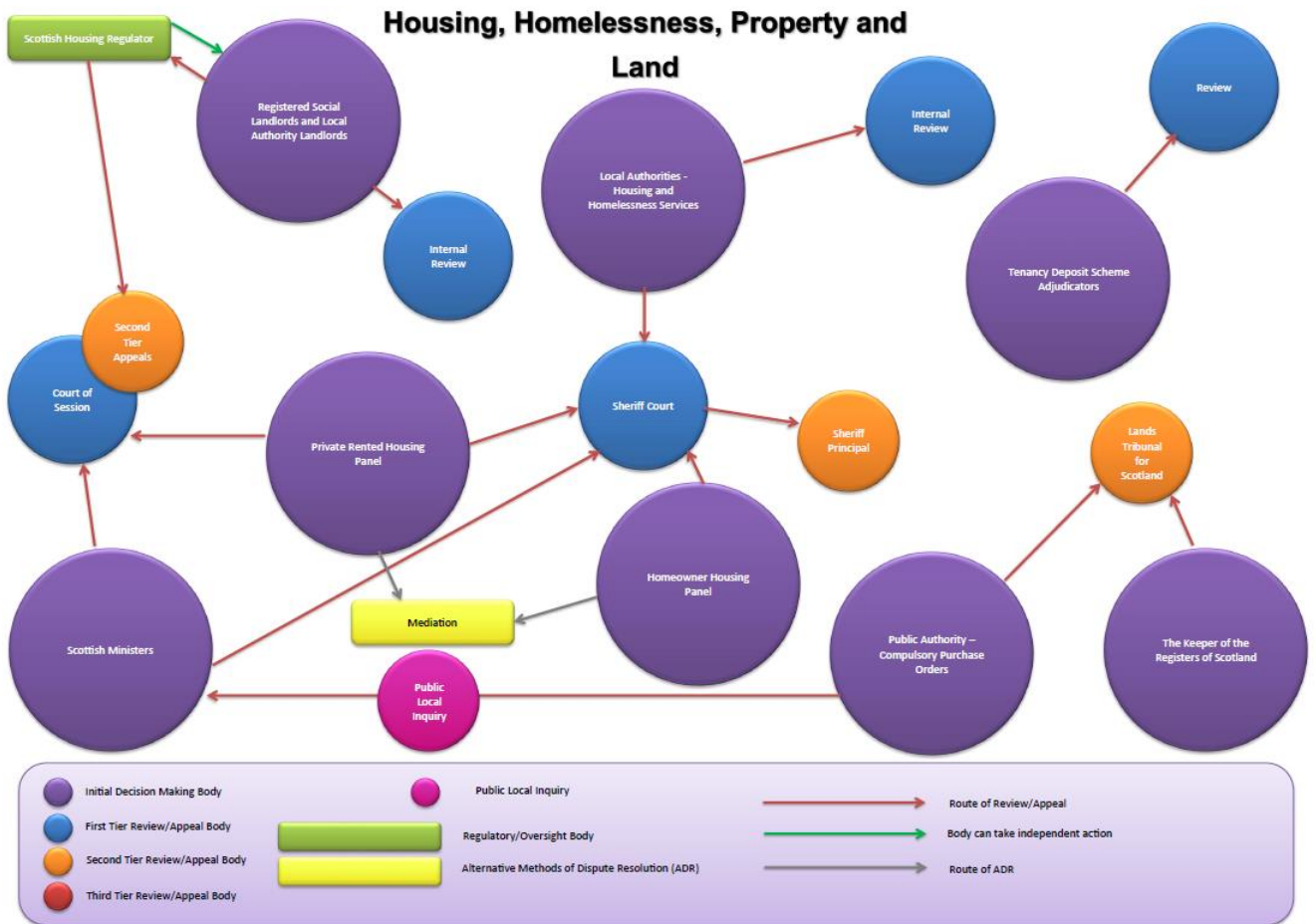
34. The administrative justice landscape is wide-ranging, fragmented and complex, covering a multitude of social policy areas which impact on the lives of ordinary citizens, largely but not exclusively, in the various ways in which they interact with and come up against the State. In November 2015, the then Scottish Tribunals and Administrative Justice Advisory Committee (STAJAC) published an important report entitled *'Mapping Administrative Justice in Scotland'*. In the report's Foreword the Committee expressed the hope that it would become *'a living resource which would be updated and refreshed, as required, to reflect the changing face of the AJ landscape in Scotland'*.
35. The report usefully differentiated itself from other earlier attempts to map administrative justice systems by detailing the individual dispute resolution and redress mechanisms which comprise the AJ landscape in Scotland, grouping these together in discrete subject areas, namely:
- Education and Learning;
  - Social Services, Care, Health and Well-being;
  - Development Management, Planning and Building Standards;
  - Housing, Homelessness, Property and Land;
  - Environment, Heritage, Water and Waste Management;
  - Transport, Driving and Traffic Management;
  - Freedom of Information, Data Protection and Investigatory Powers;
  - Immigration, Nationality and Asylum;
  - Taxation, Revenue and Social Security;
  - National Security and Defence;
  - Food and Agriculture;
  - The Police Service, Legal Services and Prisons;
  - Employment;
  - Licensing, Gambling, Charities and Electoral Registration.
36. The report includes pictorial organograms for each of these areas, which not only depict the decision-making and redress mechanisms in each of the grouped areas but vividly demonstrate the complex and busy nature of each of the landscapes. Examples of the most complex of these landscapes are Social Services, Care, Health and Well-being; Housing, Homelessness, Property and Land; and Taxation, Revenue and Social Security.

### Social services, care, health and wellbeing

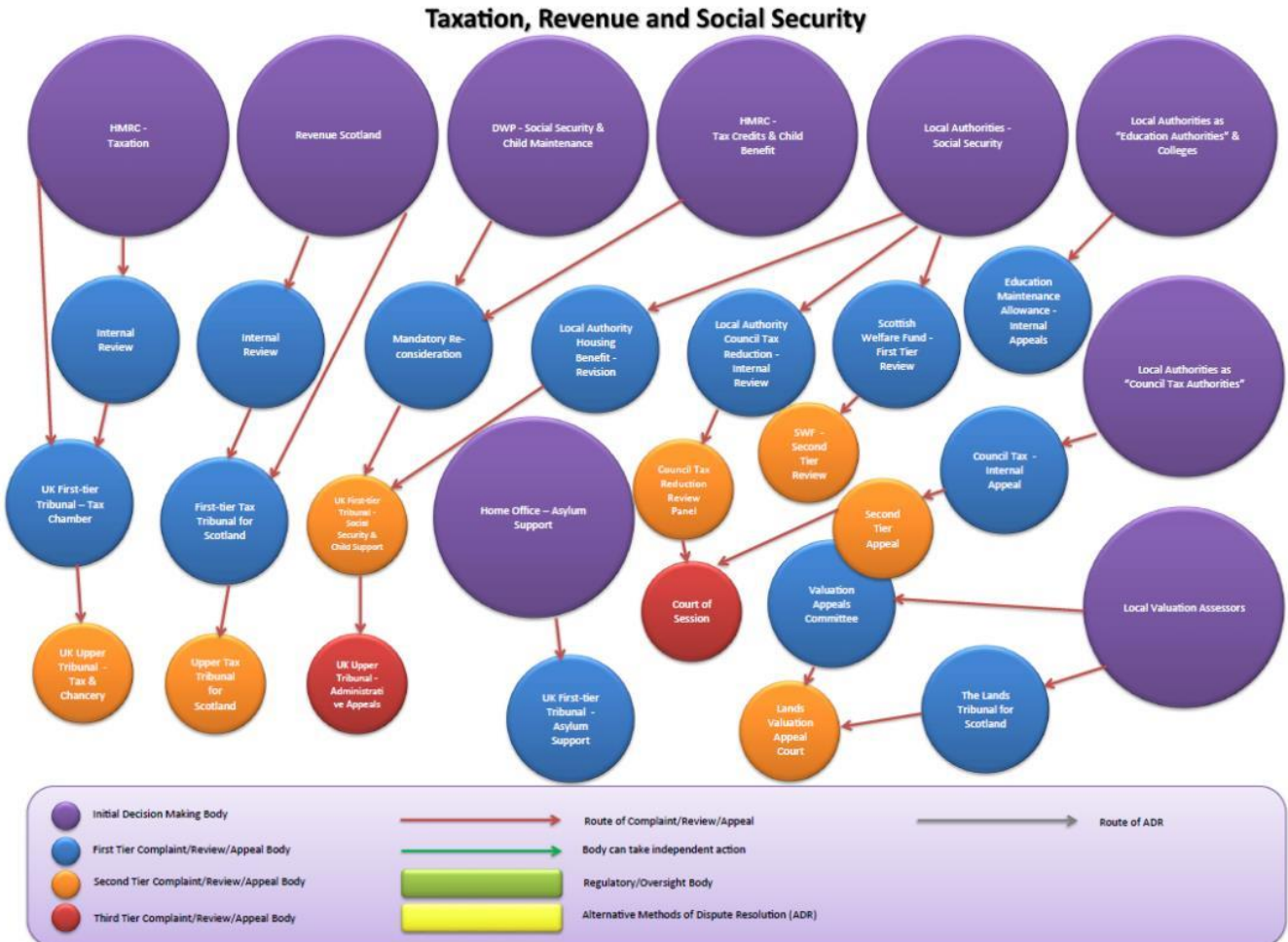
### Social Services, Care, Health and Well-being



## Housing, Homelessness, Property and Land



## Taxation, Revenue and Social Security





## Conclusion on Part 2

37. It is to be hoped that the Scottish Government will recognise the value of keeping STAJAC's very helpful document, *'Mapping Administrative Justice in Scotland'*, updated and refreshed, as recommended by STAJAC when the report was published in 2015. We echo STAJAC's recommendation that the contents of the report should be reviewed and updated on an ongoing basis. Since it is now several years since the report was published a first review of its contents is overdue.

## Part 3 – Legal framework

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38. As seen in the previous sections, the administrative justice system is highly complex, in that it reflects a range of decision-making and review procedures, tribunals, complaints procedures and ombuds services. Many of the disputes that fall within the administrative justice system are resolved informally, without reference to formal legal adjudication. However, many are determined through formal legal processes, including tribunals, and the framework within which these are judged does indicate several important principles.

### Administrative justice and human rights

39. The system for administrative justice must be one which respects human rights. The Human Rights Act 1998 established the framework for human rights across the United Kingdom, and the constitutional settlement contained in the Scotland Act 1998 made further provision for Scotland, including the provision that any act of a public body that is in contravention of human rights would be ultra vires.

40. A key element in the protection of human rights in the administrative justice system is found in Article 6, the fair trial provision, of the European Convention on Human Rights<sup>17</sup>.

41. While the extent to which particular types of dispute may be considered determinations of civil rights and obligations for the purposes of Article 6 is open to interpretation, the need to ensure that there is access to a fair and public hearing remains crucial. The need for such access was considered in the UNISON case<sup>18</sup>, which dealt with the impact of tribunal fees on the ability of claimants to bring employment disputes to the employment tribunal. The Supreme Court considered that the fees levied on claimants did impede access to justice, though on the grounds of constitutional principle and the rule of law, rather than specific grounds under ECHR. Lord Reed stated:

*“At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role*

<sup>17</sup> Art 6 - *in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*

<sup>18</sup> *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51

*includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.”*

42. If access to a fair and public hearing is central to a system of administrative justice, this may suggest that further principles are necessary to ensure that this access is practical and effective. These may include in particular that resources are available to ensure that these hearings are effective, that fees for accessing the system are not excessive, that there is not excessive delay and other factors.
43. Article 6 makes specific provision for representation if that cannot otherwise be afforded in criminal cases, though it does not extend the same provision to the determination of civil rights and obligations. It is established that legal aid can be available in cases where effective participation would otherwise not be practicable. For instance, courts in England and Wales have described that limited provision<sup>19</sup> as *“only in exceptional circumstances, namely where the withholding of legal aid would make the assertion of a civil claim practically impossible, or where it would lead to obvious unfairness of the proceedings, can such a right be invoked by virtue of article 6(1) of the convention.”* That legal aid is not mandated should not prevent it from inclusion as a principle for administrative justice. Outcomes are generally far more favourable with assistance, disputes are resolved at an earlier stage, and system costs reduced. Research from the Law Society of Scotland suggests that legal aid provides significantly greater financial benefit than the costs of its provision, for instance, a financial benefit to society of £5 for every £1 invested in family cases, and £12 for every £1 invested in housing cases<sup>20</sup>.
44. The development of human rights is likely to have a significant effect on the administrative justice system over the next decade in Scotland. Legislation has been enacted by the Scottish Parliament to implement the United Nations Convention on the Rights of the Child, though at the time of writing that has been referred to the Supreme Court for determination around competence<sup>21</sup>. Furthermore the Scottish Human Rights Taskforce is developing legislative proposals for the current parliamentary session to implement economic, social and cultural rights into domestic law. The impact of these changes is likely to have a wide-ranging and transformative effect on the way in which individuals and the State will interact, and on the disputes that are likely to be resolved by the administrative justice system in the medium to long term.

<sup>19</sup> *Pine v Law Society* [2002] EWCA Civ 175

<sup>20</sup> Law Society of Scotland, *Social Return on Investment in Legal Aid*, 2017 (<https://www.lawscot.org.uk/media/359230/social-return-on-investment-in-legal-aid-technical-report.pdf>)

<sup>21</sup> Supreme Court Case No 2021/0079 and 2021/0080 -

## Administrative justice and public law

45. In other jurisdictions, many of the articulations of principles for administrative justice, for instance, the Promotion of Administrative Justice Act 2000 in South Africa, have looked to establish public law principles for the determination of disputes between individuals and the state. Whether there is a recognised body of public law in Scotland remains debateable, though the grounds under which judicial review may be brought suggest further principles for the administrative justice system.
46. In broad terms, the grounds for judicial review are illegality, procedural unfairness or unreasonableness/irrationality:
- A decision can be overturned on the ground of illegality if the decision-maker did not have the legal power to make that decision, for instance because Parliament gave them less discretion than they assumed.
  - A decision can be overturned on the ground of procedural unfairness if the process leading up to the decision was improper. This might, for instance, be because a decision-maker who is supposed to be impartial was biased. Or it might be because a decision-maker who is supposed to give someone the chance to make representations before deciding on their case failed to do so.
  - A decision can be overturned on the ground of irrationality if it is so unreasonable that no reasonable person, acting reasonably, could have made it.
47. The oversight available through judicial review is largely based outside statute. Other jurisdictions have incorporated similar safeguards into primary legislation, and for a principles-based approach in relation to administrative justice in Scotland to be effective and actionable, statutory expression is likely to be required.
48. An Administrative Justice (Scotland) Act, provided within the competence of the Scottish Parliament, could establish these grounds, just as it could also be the basis for expression of a more holistic approach to Administrative Justice.

### Consultation question four

**Should there be a statutory expression of the grounds for judicial review (paragraphs 45 to 48)?**

## Public law, human rights and the 'hostile environment'

49. It has been held by the courts that the fact-finding processes involved in judicial review are not particularly suited to questions around social policy and its impact. In *Limbuella*<sup>22</sup>, a case involving applicants for asylum who, on account of not submitting applications as soon as practical on arrival

<sup>22</sup> *R (on the application of Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66

within the UK, were denied access to support under section 95 of the Immigration and Asylum Act 1999, the court stated:

*“It must be obvious that it is not possible for this court to make full, accurate and detailed findings of fact as to the exact realities faced by s.55 asylum-seekers in London, let alone elsewhere. Such an exercise could only be satisfactorily conducted by a process of factual enquiry involving a wide-ranging examination of the evidence, with oral testimony and cross-examination. A process of that kind is inapt for determination in the course of adversarial litigation in the judicial review jurisdiction<sup>23</sup>.”*

50. A developing culture of crowdfunding strategic litigation, however, may revisit such considerations more often (and also more liberal approaches to standing, for instance, allowing the UNISON judicial review of the introduction of fees, despite evidence only regarding hypothetical claimants<sup>24</sup>).

51. There will inevitably be tensions between the procedural fairness required by law and eg a policy intention specifically designed to create a “hostile environment” for a particular category of people. Discussing the hostile environment in regard to immigration and asylum, Sheona York highlights the length of time and the range of factors which led to this environment developing<sup>25</sup>:

*“A combination of decades of Home Office mismanagement, coupled with the more recent deep cuts in Home Office, tribunal and court staff, the increased number, cost and complexity of immigration applications, cuts in rights and grounds of appeal, and withdrawal of legal aid, leave applicants both practically and legally precarious... far from reducing numbers of ‘unlawful migrants’, as the ‘hostile environment’ policies were designed to do, effectively it is Home Office policies which themselves create and perpetuate illegality.”*

52. There may be some protections offered by the courts’ public law jurisdiction or the scope of human rights, though the margin of appreciation in which policy decisions are made can be broad. There has been significant debate around the degree to which social security benefits and sanctions engage issues around human rights<sup>26</sup>. The courts have recognised a degree of conditionality around entitlement to benefits. In *R. (on the application of Reilly) v Secretary of State for Work and Pensions*<sup>27</sup>, for instance, the Supreme Court determined that a directed period of unpaid work did not violate the claimant’s human rights around slavery and enforced labour (Article 4 of the European Convention on Human Rights). It is important to note that, during the pandemic, benefit sanctions have been suspended<sup>28</sup>. As the recovery from this pandemic continues, this policy will

<sup>23</sup> The discussion of polycentric disputes by Lon L. Fuller and Kenneth I. Winston, *The Forms and Limits of Adjudication*, Harvard Law Review, Vol. 92, No. 2 (Dec., 1978), pp. 353-409 expands on these issues

<sup>24</sup> [2017] UKSC 51

<sup>25</sup> Sheona York, *The “hostile environment” - how Home Office immigration policies and practices create and perpetuate illegality*, J.I.A.N.L. 2018, 32(4), 363-384

<sup>26</sup> Michael Adler, *Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK*, Palgrave Macmillan (2018)

<sup>27</sup> [2013] UKSC 68

<sup>28</sup> David Webster, *Briefing: Benefit Sanctions Statistics*, February 2021 (<http://www.cpag.org.uk/david-webster>)

cease,<sup>29</sup> and, as at the time of writing, it is unclear what steps will be taken or what transitional arrangements will be made.

53. Commentators such as Dr David Webster have argued, however, that the conditionality regime is “deliberately designed to reduce people without other resources to complete destitution”<sup>30</sup>. Article 1 of the First Protocol, around the right to property, Article 3, around the prohibition on torture, inhuman and degrading treatment, and Article 8, around the right to family life, may not directly protect against situations of extreme financial hardship.

54. Deprivation of resources can amount to a breach of Article 3 of the Convention, as was found in *Limbuela*. The House of Lords considered that destitution in these circumstances could amount to inhuman and degrading treatment contrary to Article 3 of the European Convention. Lord Bingham discussed the circumstances in which such a breach might occur:

*“...[W]hen it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation...”*

*It is not in my opinion possible to formulate any simple test applicable in all cases. But if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed.”*

55. The challenges around procedural fairness and human rights in a hostile environment are and remain acute. These examples are strong indictments of the current administrative justice system, and are among the clearest arguments for reform involving expression of enforceable principles.

## Administrative justice and equality

56. A further element of the legal framework is the effect of the Equality Act 2010. The protected characteristics under this Act are:

- Age
- Disability
- Gender reassignment

<sup>29</sup> UK Government announced on 29 June 2021 that the suspension of sanctions would end at the end of June.

<sup>30</sup> Dr David Webster, *Independent review of Jobseeker’s Allowance (JSA) sanctions for claimants failing to take part in back to work schemes* ([http://www.cpag.org.uk/sites/default/files/uploads/CPAG-David-Webster-submission-Oakley-review-Jan-14\\_0.pdf](http://www.cpag.org.uk/sites/default/files/uploads/CPAG-David-Webster-submission-Oakley-review-Jan-14_0.pdf))

- Marriage or civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation.

57. The Act requires public bodies to mainstream these protected characteristics in their activities, and various challenges have been brought under the provisions of the Act to decisions made by public bodies, for instance, around the policy on disability benefits.

## Conclusion

58. The broad legal framework within which administrative justice operates suggests a number of principles. Access to a fair and public hearing to resolve disputes is central, with the various elements that make this right practical and effective, particularly including resources for this access to be effective. Decisions made by public bodies must be within the law, must follow the procedures required and must be reasonable (albeit that the test of irrationality being that the decision is so unreasonable that no reasonable decision-maker would have made it is a limited ground).

59. Decisions made by public bodies must respect protected characteristics, avoiding discrimination on the basis of age, disability, gender reassignment, marriage of civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation. A system of administrative justice must also respect human rights, both Convention Rights as they stand now, as well as the potential extension of these in future, to children, to persons with disability, or to the wider range of social, economic and cultural rights that may be implemented in the near future.

60. There must be a role for legal representation, advocacy or other support, where appropriate to do so, to ensure effective participation through the process overall and the positive outcomes and system savings that this can generate. The active and interventionist role adopted by many tribunals may reduce the need for representation in many cases. However in complex cases and in cases involving appellants with significant issues or protected characteristics that require adjustment to be made, representation is an important safeguard.

61. This legal framework and this right to legal representation, advocacy or other support, can be implemented through legislation, with an Administrative Justice (Scotland) Act.

### Consultation question five

**Do you agree that a principles-based approach should incorporate the equality and human rights framework (paragraphs 58 to 61 of the paper)?**

### Consultation question six



**Do you agree that there should be a right to legal representation, advocacy or other support (paragraphs 60 and 61)?**



## Part 4: Comparative Approaches

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### Introduction

62. Our project has considered a range of principles-based approaches in other jurisdictions that may help to ensure an effective administrative justice system. These examples are included at Annex A of this paper. At the core of many of these sets of principles are concepts of procedural propriety, ensuring that disputes resolved through the administrative justice system are dealt with effectively.
63. The Franks Report, a review in 1957 into the operation of tribunals<sup>31</sup>, established three principles for administrative justice:
- **openness** – “If these processes were wholly secret, the basis of confidentiality and acceptability would be lacking”;
  - **fairness** – “If the objector were not allowed to state his case, there would be nothing to stop oppression”; and
  - **impartiality** – “The freedom of tribunals from the influence, real or apparent, of (Government) Departments concerned with the subject matter of their decisions”.
64. These elements of procedural propriety have been incorporated into law in a number of jurisdictions, such as Malta and South Africa, often expanding on the elements required to ensure that adjudication processes are fit for purpose. Many of these statutory requirements expand on these principles, for instance, around providing adequate information, time and the opportunity to make representations, whether in person or in writing.
65. Concerns in the UK around the impartiality of tribunals persisted, and the independence of the tribunals from the government departments whose decisions they reviewed. The Leggatt Review<sup>32</sup> examined these issues, with a report in 2001 stating five principles:
- **independent,**
  - **coherent,**
  - **professional,**
  - **cost-effective and**
  - **user-friendly.**
66. Many of these aspects were incorporated in the legislation to reform the tribunal system, the Tribunals, Courts and Enforcement Act 2007. This legislation established a new tribunal structure, bringing greater coherence to a situation in which different procedures and practices were applied across different tribunals. Additionally, the President of this new tribunal system had a duty under

<sup>31</sup> Report of the Committee on Administrative Tribunals and Enquiries (Cmnd. 218), 1957

<sup>32</sup> Report of the Review of Tribunals by Sir Andrew Leggatt: Tribunals for Users – One System, One Service (August 2001)

section 2 the Act to have regard to the need for tribunals to be accessible; the need for proceedings before tribunals to be fair, and to be handled quickly and efficiently; the need for members of tribunals to be experts in the subject-matter of, or the law to be applied in, cases in which they decide matters; and the need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals.

67. Many of these aspects also build on the elements of procedural propriety, though there was also a wider focus on the individuals involved in these disputes, and the need to ensure that systems of administrative justice are user-friendly and cost-effective. Placing users at the centre of the process became a theme further developed by the Administrative Justice and Tribunals Council, itself established under the 2007 Act, in its articulation of principles for administrative justice. Reporting in 2010, it stated these were to:

- Make users and their needs central, treating them with fairness and respect at all times,
- Enable people to challenge decisions and seek redress using procedures that are independent, open and appropriate for the matter involved,
- Keep people fully informed and empower them to resolve their problems as quickly and comprehensively as possible,
- Lead to well-reasoned, lawful and timely outcomes,
- Be coherent and consistent,
- Work proportionately and efficiently,
- Adopt the highest standards of behaviour, seek to learn from experience and continuously improve.

68. An emphasis on user-centred processes and treating users with fairness and respect is also stated in the principles established by a number of ombudsman bodies, such as the Northern Ireland Public Services Ombudsman, which includes respect and dignity as two of its five principles. In other areas of public life, the focus on users would also envisage a greater role for them, and for their lived experience, in the development and design of services and processes. This was a key theme of the Christie Commission report on the future delivery of public services in 2011, stating, “Reforms must aim to empower individuals and communities receiving public services by involving them in the design and delivery of the services that they use.”<sup>33</sup>

## Conclusion on part 4

69. Redesigning an administrative justice system in Scotland calls for a debate around the processes and procedures of this system and the principles that underpin them. Different approaches have been taken by different jurisdictions and within these, at different stages, often, as with Franks and Leggatt, to address perceived deficiencies in operation. From the comparative examples, and from the discussion elsewhere in this paper, several core, and often overlapping, elements to a

<sup>33</sup> Christie Commission, *Commission on the Future Delivery of Public Services*, 2011 (<https://www.gov.scot/publications/commission-future-delivery-public-services/>)

principles approach are emerging. These mainly apply to the adjudicative process rather than to the process which gave rise to the decision that has raised the dispute under consideration.

70. There are essential elements of procedural propriety at the heart of many principles-based approaches, as the Franks and Leggatt reports stated, as required under the supervisory jurisdiction of the courts through judicial review, or on the basis of human rights in some instances. Other sources have also raised proportionality as a factor.
71. There is a focus around effective adjudication. This has been articulated in terms of the quality of adjudication, such as ensuring professionalism and subject expertise by those that adjudicate. It has also been articulated in terms of accessibility for users, ensuring that processes are timely and cost-effective.
72. There is also a growing concentration on the needs of users through the administrative justice system, not only in terms of resolving individual disputes but also in the wider design and development of public services and processes. In areas of public life outside the justice system, and to a certain extent, even within that system, there has been a wider focus on developing systems led by evidence from lived experience. As a way to determine disputes between individuals and the State, the equality duties on public bodies also raise issues around ensuring that protected characteristics are acknowledged and progressed through any administrative justice system. In terms of system design, the need for continuous improvement, learning from experience and seeking to innovate have also been raised.
73. The principles from these examples will likely not be exhaustive. The next part of this paper considers the administrative justice principles stated by the AJTC in 2010, and the policy context since, to consider whether these are fit for purpose a decade on, or whether more consideration is required around the future of administrative justice and the rationale that guides it. They are of particular importance to the extent that they move the debate on from the stage of dispute resolution to include the process of initial decision making.

## Part 5: Towards an Administrative Justice Act?

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74. There is a qualitative distinction to be drawn between for example those principles set out by the Christie Commission<sup>34</sup> and developed in the Social Security (Scotland) Act 2018 and those set out by the AJTC in 2012..
75. Such an approach involves considering the policy choices made at the stage of determining the structures to which resolution of disputes are to be assigned.
76. It also means unpacking concepts of fairness, openness and impartiality to question how those apply within the processes adopted by the decision maker.
77. It means adopting the model of moral judgment as opposed to bureaucratic rationality, so that the efficiency of government has in fairness to give way to the objective fairness of a process.

### Administrative Justice and Tribunals Council

78. In seeking to develop a revised set of principles, it is useful to reflect again on those that were developed by the AJTC, to consider whether these remain fit for purpose or whether there have been developments in the last decade – in policy, society or any other context – which suggest that revision is required.
79. The principles established by the AJTC were intended to:
- Make users and their needs central, treating them with fairness and respect at all times,
  - Enable people to challenge decisions and seek redress using procedures that are independent, open and appropriate for the matter involved,
  - Keep people fully informed and empower them to resolve their problems as quickly and comprehensively as possible,
  - Lead to well-reasoned, lawful and timely outcomes,
  - Be coherent and consistent,
  - Work proportionately and efficiently,
  - Adopt the highest standards of behaviour, seek to learn from experience and continuously improve.

<sup>34</sup> Christie Commission on the future delivery of public services – 29 June 2011

80. The following questions arise:

- Should these principles apply to first-instance decision-making, stages such as mandatory reconsideration, as well as informal and formal dispute resolution?
- Should administrative justice share principles in common with civil, criminal, family and other branches of the justice system?
- Should these principles encourage a culture of continuous improvement?
- Should these principles apply to tribunals, ombudsman and other dispute resolution (such as mediation) procedures?

81. To some degree, the issues involved in these considerations overlap.

#### **Consultation question seven**

**Should a principles-based approach apply both to first-instance decision-making as well stages such as mandatory reconsideration and other informal and formal dispute resolution (paragraphs 78 to 81)?**

#### **Consultation question eight**

**Should administrative justice share principles in common with civil, criminal, family and other branches of the justice system (paragraphs 78 to 81)?**

#### **Consultation question nine**

**Should these principles require a culture of continuous improvement for adjudication processes (paragraphs 78 to 81)?**

#### **Consultation question ten**

**Should these principles apply to tribunals, ombuds services and other dispute resolution (such as mediation) procedures (paragraphs 78 to 81)?**

## **Right First Time**

82. Ensuring effective first-instance decision-making is a crucial element of a sustainable administrative justice system. This need was highlighted by the Administrative Justice and Tribunals Council in its report, *Right First Time*, in 2011. This highlighted the cost to the administrative justice system from the appeals process, and suggested a number of approaches that could be taken to develop a holistic, learning approach:

“Right first time’ means:

- making a decision or delivering a service to the user fairly, quickly, accurately and effectively;
- taking into account the relevant and sufficient evidence and circumstances of a particular case;
- involving the user and keeping the user updated and informed during the process;
- communicating and explaining the decision or action to the user in a clear and understandable way, and informing them about their rights in relation to complaints, reviews, appeals or alternative dispute resolution;
- learning from feedback or complaints about the service or appeals against decisions;
- empowering and supporting staff through providing high quality guidance, training and mentoring.”

83. The report further recommended a ‘polluter pays’ approach by levying costs against government departments in successful tribunal appeals. This proposal recognised the challenge of ‘failure demand’, where demand for resources is created by a failure of initial decision-making. The scale of this is significant. The Nottingham Systems Thinking Pilot reported in 2009 that 40% of the demand for local advice services was the result of poor initial decision making by the local authority<sup>35</sup>.

84. Robert Thomas highlighted the scale of successful appeals against government decisions in 2015<sup>36</sup>. For social security and child support appeals in 2013-14, there were 453,498 appeals decided, with 40% allowed and an average case clearance time of 25 weeks; for immigration and asylum appeals for the same period, there were 67,449 appeals decided, with 44% allowed and an average case clearance time of 28 weeks. While there is undoubtedly a role for tribunals to provide feedback to government departments on systemic issues around first-instance decision-making, as Thomas notes, only 1% of all social security claimants appeal decisions. There may need to be wider action taken to ensure a ‘right first time’ approach, and Thomas suggests several steps that could be taken: reorganising internal decision processes; using feedback from tribunals; making polluters pay (as with the Administrative Justice and Tribunals Council recommendation); and modifying agency culture.

85. The need for a ‘right first time’ approach has been recognised by the Scottish Government, which has recently published a second edition of guidance for public bodies around this approach<sup>37</sup>. This includes a checklist of factors for consideration, around preparation, investigation, decision, notification and responding to challenges. This guidance includes details from court and tribunal decisions, illustrating the need for the various factors to be considered in the decision-making

<sup>35</sup> Nottingham Systems Thinking Pilot, *Radically Re-thinking Advice Services in Nottingham: Interim Report of the Nottingham Systems Thinking Pilot*, 2009 (<http://www.adviceuk.org.uk/wp-content/uploads/2018/02/NottinghamSystemsThinkingPilot-InterimReport.pdf>)

<sup>36</sup> Robert Thomas, *Administrative Justice, Better Decisions, and Organisational Learning*, Public Law 2015 ([https://www.researchgate.net/publication/275956637\\_Administrative\\_Justice\\_Better\\_Decisions\\_and\\_Organisational\\_Learning](https://www.researchgate.net/publication/275956637_Administrative_Justice_Better_Decisions_and_Organisational_Learning))

<sup>37</sup> Scottish Government, *Right First Time: A Practical Guide for Public Authorities in Scotland to Decision-Making and the Law*, 2021 (<https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2021/01/right-first-time-practical-guide-public-authorities-scotland-decision-making-law-second-edition/documents/right-first-time-practical-guide-public-authorities-scotland-decision-making-law/right-first-time-practical-guide-public-authorities-scotland-decision-making-law/govscot%3Adocument/right-first-time-practical-guide-public-authorities-scotland-decision-making-law.pdf?forceDownload=true>)

process. This guidance around ‘right first time’ is an example of the leadership required to drive this approach across public bodies and to reduce ‘failure demand’ though other steps may be required.

86. Because of the complexity of the administrative justice landscape, the huge scope of decision-making by public bodies and the significance of these decisions for individuals, there is a need not just for leadership from government but also for scrutiny to ensure that this takes place. In the UK Parliament, the Public Administration and Constitutional Affairs Committee has a scrutiny role, though the scrutiny functions of committees in the Scottish Parliament is less clear. Embedding a ‘right first time’ approach in the audit processes for public bodies, centrally through Audit Scotland, and also separately, in the audit committees of local authorities and other bodies, to ensure that first-instance decision-making is effective needs to be considered.

### **Consultation question eleven**

**Is there a need to consider more widely a ‘right first time’ approach in audit processes for public bodies in the administrative justice system? Is there a wider role for scrutiny by Audit Scotland in this regard (paragraphs 85 and 86)?**

### **Consultation question twelve**

**While there are already some responsibilities for oversight of the administrative justice system shared across Scottish Parliament committees, should the Scottish Parliament have a dedicated Public Administration and Constitutional Affairs Committee (paragraphs 85 and 86)?**

87. The need for this ‘right first time’ approach, and the leadership and scrutiny to maintain it, is crucial in an effective democracy. As Thomas concludes in his 2015 article, “Better decision-making is also important in terms of the wider constitutional legitimacy of government. There is something of constitutional significance happening within government agencies. They are implementing policy through individualised decision-making processes... The goal of better decisions is fundamental to both the project of administrative justice and the constitutional legitimacy of government.”

### **Tribunals, ombuds institutions and ADR**

88. It has been argued that a broad tension has existed across the administrative justice landscape for decades between tribunals and ombudsmen and between adversarial and inquisitorial approaches to resolving disputes between the individual and the state. A legalistic approach protects the individual only so far: Article 6 only applies to tribunals where civil rights and obligations are to be determined, and this does not include all interactions between an individual and a public body; nor does it necessarily include disputes of a private nature, for example those resolved at an Employment Tribunal or by the Financial Services Ombudsman. However, it is important that a principles-based approach would cover courts, tribunals, ombuds institutions and, as will be considered below, any ADR approaches that are developed.

89. The wider use of mediation across the civil justice system in Scotland is often advocated, including in the recent report from Scottish Mediation<sup>38</sup>. The types of dispute involved in the administrative justice system may appear not to lend themselves easily to mediation, for instance, in social security, where an individual either is or is not entitled to a benefit. There have still been examples where mediation and conciliation have proved beneficial, such as in Brazil<sup>39</sup>. Mediation is also used extensively by ombuds institutions internationally, as detailed in a recent International Bar Association report<sup>40</sup>.
90. We believe that a principles-based approach must encompass both formal hearings, through courts and tribunals and also ADR, often though not exclusively always through ombuds institutions. An example of court-led ADR is judicial mediation in employment disputes. The evaluation of the pilot scheme by the Ministry of Justice in 2010 did not find a significant variation in the resolution rate of cases between the tribunal and judicial mediation<sup>41</sup>, though feedback from practitioners as the system has embedded has been more positive.
91. We believe that some caution around the wider use of mediation across the administrative justice system may be necessary, because of the structural imbalance between individuals and government and the gravity of the issues in dispute. The progress of cases through courts and tribunals allows wider oversight of the justice system overall. As considered above in the context of a 'right first time' approach, learning from the judgments of courts and tribunals is a key opportunity to improve decision-making processes. Where ADR is considered as an alternative to court or tribunal proceedings, it is important that the promotion of ADR is accompanied by sufficient research or published data to provide similar opportunity for improvement and oversight.

### Consultation question thirteen

**Despite the need to 'get it right first time', is there a greater role for alternative dispute resolution in the Administrative Justice system (paragraphs 88 to 91)?**

## Complexity

<sup>38</sup> Scottish Mediation, *Bringing Mediation into the Mainstream in Civil Justice in Scotland*, 2019 (<https://www.scottishmediation.org.uk/wp-content/uploads/2019/06/Bringing-Mediation-into-the-Mainstream-in-Civil-Justice-in-Scotland.pdf>)

<sup>39</sup> FREITAS, Neusa Aparecida de Morais. Et al, *Conciliation and mediation in social security law*, Revista Científica Multidisciplinar Núcleo do Conhecimento. Year 05, Ed. 12, Vol. 18 (<https://www.nucleodoconhecimento.com.br/law/social-security-law>)

<sup>40</sup> Julinda Beqiraj, Sabina Garahan and Kelly Shuttleworth, *Ombudsman schemes and effective access to justice: a study of international practices and trends*, 2018 (<https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiVvW9uP3vAhXNUBUIHXdFCP4QFjAKegQIBRAD&url=https%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3D77cc70e5-4cb4-40ae-a11b-4a17d96cfc93&usq=AOvVaw1b44trhIjOtRzi0ZR5r7N4>)

<sup>41</sup> Ministry of Justice, *Evaluating the use of judicial mediation in Employment Tribunals*, 2010 (<https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/evaluating-judicial-mediation-march10.pdf>)



92. Another aspect of the division between (courts and) tribunals and ombuds institutions is around the suggested complexity of the legal issues involved. The historic rationale for the allocation of particular types of work to particular fora was predicated in part by the difficulty of the law and the ability of the individual to engage (indeed, the availability of legal aid for tribunal proceedings is still limited to cases in which it can be demonstrated that the individual is otherwise unable to participate effectively in the hearing). The increasing complexity of the law may mitigate against an ombuds approach. In immigration cases, Lord Hope noted in *Alvi v SSHD*<sup>42</sup>:

*“The 1994 Statement of Changes in Immigration Rules (HC 395) extended to 80 pages. There have been over 90 statements of change since then, and HC 395 has become increasingly complex. The current consolidated version which is available on-line from the UKBA website extends to 488 pages.”*

93. Indeed, as reported in 2018<sup>43</sup>, there have been over 5,900 changes to the Immigration Rules since 2010. Courts and tribunals, on the one hand, and ombuds institutions, on the other, do not have the skills or resources to compete with government bureaucracies<sup>44</sup>. At over 375,000 words, the Immigration Rules had become almost twice the length of Hermann Melville’s *Moby Dick* at 206,000. The AJTC principles, considered in paragraphs 70 to 73 above, do not address the issue of complexity directly, though undoubtedly this challenge engages several of the other principles, such the need for administrative justice to be centred around users and their needs, having appropriate procedures, empowering users and the like.

## Consultation question fourteen

**Does the complexity of legal issues arising in the operation of the administrative justice system militate against development of Alternative Dispute Resolution for particular types of dispute or more generally (paragraphs 92 and 93)?**

## Outsourcing

94. A further change in the administrative justice landscape since the AJTC considered principles is the delivery of public services through outsourced providers. It has been suggested that contractors have often failed to ensure that citizens are treated fairly.<sup>45</sup> The evidence in relation to both medical assessment for social security benefits, and separately to tax credit compliance checks indicates serious failings by contractors ranging between adopting a mechanistic tick-box approach in assessing claims, to unlawfully reversing the burden of proof in tax benefit cases.<sup>46</sup> Robert Thomas has argued that there ‘is an urgent need to transform how government contracts, monitors, and

<sup>42</sup> [2012] UKSC 33 [11]

<sup>43</sup> <https://www.theguardian.com/uk-news/2018/aug/27/revealed-immigration-rules-have-more-than-doubled-in-length-since-2010>

<sup>44</sup> Lon L. Fuller and Kenneth I. Winston, *The Forms and Limits of Adjudication*, Harvard Law Review, Vol. 92, No. 2 (Dec., 1978), pp. 353-409

<sup>45</sup> Robert Thomas (2021) ‘Does outsourcing improve or weaken Administrative Justice? A Review of the evidence’, Public Law (forthcoming).

<sup>46</sup> Institute for Government, *Government procurement: the scale and nature of contracting in the UK*, 2018 ([https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG\\_procurement\\_WEB\\_4.pdf](https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_procurement_WEB_4.pdf))

challenges private contractors by improving transparency, civil service capability, strong competition, and requiring contractors to uphold strong ethical values.’

95. There are no authoritative figures concerning the proportion of public spending taken up by outsourcing, although it has been estimated that one third of public spending (£292Bn) is now spent on procurement of goods, works and services.<sup>47</sup> The introduction of market-based values into the organisation and delivery of public services has created opportunities for private companies to profit from the delivery of public services.<sup>48</sup> As considered previously, we believe that it is essential that the administrative justice system spans all public services, whether operated by public bodies, or by private undertakings on their behalf. This is particularly important because of the scale to which such services have been privatised.

### Consultation question fifteen

**Do you agree that it is essential that the administrative justice system spans all public services, whether operated by public bodies, or by private undertakings on their behalf (paragraphs 94 and 95)?**

### Information Technology

96. A significant policy development in the decade since the publication of the AJTC principles has been the wider access to public services through technology. There have been two broad strands to this development, the first being focused around how people access services, particularly the development of online portals and systems for the first stage of the administrative justice journey. Indeed, some services are now provided exclusively online unless reasonable adjustments under equality legislation are required. The second, an emerging area, is around the use of automated decision-making or artificial intelligence in these same journeys. The AJTC principles describe processes that are open and appropriate, though the prevalence of technology may be such that specific reference is merited in considering principles both at this stage and for a future where decision-making will increasingly be assisted by technology.

#### *Digital divide*

97. While more public services move online, especially in the circumstances of the Covid-19 pandemic, there remain persistent challenges around ensuring that these services remain universally accessible. Indeed, one of the scenes in *I, Daniel Blake* shows the difficulty he has in using information technology as a claimant of out-of-work benefits. This risks a ‘digital divide’ between people who are able to participate online and those who are not, whether because of a lack of information technology, literacy or numeracy skills, the need for interpretation, disability, geographic location or a range of other factors. The Office for National Statistics estimates that 10%

<sup>47</sup> Institute for Government, *Government Outsourcing: What Has Worked and What Needs Reform?* (2019), p.13. It is not possible to disaggregate spending on outsourcing (procurement of services) from the available data. Referred to by Thomas; fn 27 below

<sup>48</sup> Robert Thomas, footnote 24 above.

of the population have either never used the internet or have not used it in the last three months<sup>49</sup>. In Scotland, it has been suggested that the digital divide is wider, with 21% of the population lacking basic digital skills<sup>50</sup>. However, recent research from OFCOM suggested that the digital divide had fallen during the pandemic, with the proportion of households without internet dropping from 11% to 6% between March 2020 and March 2021<sup>51</sup>. The research found that the impact of the divide fell unevenly across the population, with older and financially vulnerable people more likely to be affected and also that a quarter of young people struggled to access for online learning.

98. Public services have often responded to this challenge by providing support services, for instance, at local libraries or community centres. It is important that such facilities were not available for long periods during periods of pandemic lockdown. The UK Government Service Manual outlines the ways in which assisted digital support can be designed<sup>52</sup>. The development of remote justice through the pandemic raises concerns around effective participation in the justice system. Supported services in public spaces may not provide appropriate access to remote hearings or the confidentiality to seek advice from legal professionals. If remote justice is to continue following the pandemic, there will need to be careful consideration of which types of case, or stages in the process, are appropriate for telephone or video participation and what steps should be taken for people unable to use online platforms. Even where participants have the capacity, skills and equipment to access hearings online, technical problems can make effective participation challenging. The evaluation of online tax tribunal hearings found that almost all cases had seen some technical issue during proceedings, though client satisfaction remained high<sup>53</sup>. Research from other jurisdictions also suggests that online hearings can deter engagement in the dispute resolution process, for instance, the different outcomes between physical and video hearings for immigration bail appeals in the UK<sup>54</sup> and deportation proceedings in the USA<sup>55</sup>.

### *Artificial intelligence*

99. There are risks in the use of artificial intelligence and two areas may be particularly relevant to the administrative justice system. The first is around the risk of cognitive bias, that artificial intelligence

<sup>49</sup> Office for National Statistics, *Exploring the UK's digital divide*, 2019

(<https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/articles/exploringtheuksdigitaldivide/2019-03-04/pdf>)

<sup>50</sup> Scottish Council of Voluntary Organisations, *Tackling Digital Exclusion in Scotland*, 2017 (<https://storage.googleapis.com/digital-participation-charter/tackling-digital-exclusion-in-scotland-a4.pdf>)

<sup>51</sup> OFCOM, *Digital divide narrowed by pandemic, but around 1.5m homes remain offline*, 28 April 2021 (<https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2021/digital-divide-narrowed-but-around-1.5m-homes-offline>)

<sup>52</sup> <https://www.gov.uk/service-manual/helping-people-to-use-your-service/assisted-digital-support-introduction>

<sup>53</sup> Ministry of Justice, *Implementing Video hearings (Party-to-State): A Process Evaluation*, 2018

([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/740275/Implementing\\_Video\\_Hearings\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740275/Implementing_Video_Hearings_web.pdf))

<sup>54</sup> Bail Observation Project, *Still a Travesty: Justice in Immigration Bail Hearings*, 2013 (<https://bailobs.files.wordpress.com/2015/03/2nd-bop-report.pdf>)

<sup>55</sup> Ingrid V. Eagly, *Remote Adjudication in Immigration*, *Northwestern University Law Review*, 2015

(<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1217&=&context=nulr&=&sei-redir=1&referer=https%253A%252F%252Fwww.bing.com%252Fsearch%253Fq%253Deagly%252Bresearch%252B2015%252Bdeportation%252Eform%253DPRDLR1%2526src%253DIE11TR%2526pc%253DDCTE>)

systems discriminate against particular groups of characteristics, either because of the data used to train or inform such systems or within the algorithmic decision-making itself. The UK Government's guidance on using artificial intelligence in the public sector highlights this issue<sup>56</sup>. The second risk is that decision-making may not be transparent or reasoned, the "black box" problem of artificial intelligence that the decision-making system is so complex that it becomes practically inexplicable. This risk was considered sufficiently high that the AI Now Institute recommended in a 2017 report, "[c]ore public agencies, such as those responsible for criminal justice, healthcare, welfare, and education (e.g. "high stakes" domains) should no longer use "black box" AI and algorithmic systems... The use of such systems by public agencies raises serious due process concerns<sup>57</sup>."

100. One of the significant protections for individuals subject to automated decision-making rests with the Data Protection Act 2018, which implemented the General Data Protection Regulation. Section 49 provides that a data controller "*may not take a significant decision based solely on automated processing unless that decision is required or authorised by law*". The significance of a decision is defined by reference to whether it has an adverse legal effect concerning the data subject, or significantly affects the data subject and it is arguable that most, if not all, decisions by public bodies would engage this provision. Section 50 further states that where these decisions are permitted by law on an automated basis, the individual must be notified of this fact, with the subsequent right to seek a reconsideration within a month of the notification or a new decision not based solely on automated decision-making. Section 98 further states that the individual is entitled to "knowledge of the reasoning underlying the processing" (or, as Article 13 of the GDPR states, "*meaningful information about the logic involved*" in automated decisions).

These protections may not necessarily address the concerns expressed. In developing administrative justice principles, automated decision-making may not lead to a user-centred, fair, or open system. Individuals may not receive reasons for why a decision has been made, but rather information on how that decision-making is structured and the capacity for reconsideration by a person. Despite these drawbacks, the use of such automated systems could help to deliver benefits to an administrative justice system. A decision-maker informed by the evidence of thousands or millions of previous cases, that took an objective, evidence-based approach, that looked to learn and continuously improve its performance could meet many of the requirements of a principles-based approach. Steps to learn from this data are underway, for instance, in England and Wales, through analysis of MoJ data<sup>58</sup>.

101. In a blog on information technology and administrative justice, Paul Daly writes that "*given the focus on cost-effective and efficient decision-making, artificial intelligence, in the form of automation,*

<sup>56</sup> <https://www.gov.uk/government/publications/understanding-artificial-intelligence/a-guide-to-using-artificial-intelligence-in-the-public-sector>

<sup>57</sup> AI Now Institute, *AINow Report 2017* ([https://assets.ctfassets.net/8wprhvnpc0/1A9c3ZTCZa2KEYM64Wsc2a/8636557c5fb14f2b74b2be64c3ce0c78/AI\\_Now\\_Institute\\_2017\\_Report.pdf](https://assets.ctfassets.net/8wprhvnpc0/1A9c3ZTCZa2KEYM64Wsc2a/8636557c5fb14f2b74b2be64c3ce0c78/AI_Now_Institute_2017_Report.pdf))

<sup>58</sup> ADR UK, *ADR UK makes £3 million investment in MoJ data linkage for research to improve understanding of justice system*, March 2020 (<https://www.adruk.org/news-publications/news-blogs/adr-uk-makes-gbp3-million-investment-in-moj-data-linkage-for-research-to-improve-understanding-of-justice-system-170/>)

*computer-powered algorithmic decision-making or machine learning, could profitably be used where bureaucratic rationality is the operative model of administrative justice*<sup>59</sup>. If professional treatment or moral judgment is the operative model (using the concepts introduced by Jerry Mashaw in *Bureaucratic Justice*), Daly continued, the benefit would be significantly more limited (highlighting the example of the Robodebt programme in Australia<sup>60</sup>, where automated systems were used to pursue alleged benefit overpayments, predicated on a system of income averaging that overlooked irregular work patterns, sickness absence and the like).

102. The challenges of school examination results and moderation by algorithm in Scotland that were used in 2020 are an example of the types of issue that may be faced by the administrative justice system in future. Though the policy decision around the use of automated decision-making was ultimately reversed, this situation saw a very large number of people affected by the same, ultimately flawed, process. The capacity difficulties that this would place on any appeals process would be immense.

103. Unless the type of moratorium on artificial intelligence recommended by the AI Now Institute is implemented, it is foreseeable that this technology will have an increasing influence on the relationships between individuals and the state and the administrative justice landscape. This makes the development of a principles-based approach a more immediate challenge, to ensure that these values are incorporated into the development of these new systems and processes.

### **Consultation question sixteen**

**Do you agree that it is likely that automated decision-making will have an ever increasing influence on the relationships between individuals and the state and on the administrative justice landscape (paragraphs 93 to 103)?**

### **Consultation question seventeen**

**Do you agree that the development of automated decision-making makes the development of a principles-based approach to the administrative justice system an urgent challenge, to ensure that values and principles can be incorporated into the development of automated decision-making processes (paragraphs 96 to 103)?**

## **Principles or actionable rights**

104. The question arises whether any set of principles is to be designed so as to give rise to actionable rights. One of the considerations around the development of a principles-based approach to administrative justice is their practical impact on day-to-day decision-making by public bodies or by bodies exercising public functions. Some of the principles considered above are established by

<sup>59</sup> Paul Daly, *Information Technology and Administrative Justice*, 18 December 2018 (<https://www.administrativelawmatters.com/blog/2018/12/18/information-technology-and-administrative-justice/>)

<sup>60</sup> <https://www.theguardian.com/australia-news/centrelink-debt-recovery>

statute, others are an integral part of the operation of a public body, while others operate on a more voluntary basis. There are several options for any set of principles developed, including:

- Advisory – principles are developed on an advisory basis and awareness is raised around how they operate in public decision-making.
- Voluntary – similar to the approach in British Columbia, principles are developed for organisations to endorse and to incorporate in their decision-making as they see fit.
- Voluntary with reporting – as part of the endorsement process, public bodies are also asked to commit to reporting against the principles on a periodic basis.
- Statutory – principles could be included in primary legislation, whether requiring public bodies to have due regard to these – similar to the Legal Services (Scotland) Act 2018 – to report on these, to have these capable of consideration by courts in determining disputes under other grounds – similar to the Social Security (Scotland) Act 2018 – or to be directly enforceable.

105. The particular example of the Social Security (Scotland) Act is an example of the statutory approach. Principles are established in section 1 of the Act, including the provision that access to social security is a human right and that claimants will be treated with dignity and respect. Section 2 of the Act considers enforceability of these principles, stating:

***“Effect of the principles***

- (1) *The Scottish social security principles are set out in section 1 so that—*
  - (a) *they can be reflected in the Scottish social security charter as required by section 15(3), and*
  - (b) *the Scottish Commission on Social Security can have regard to them as required by section 97(6).*
- (2) *A court or tribunal in civil or criminal proceedings may take the Scottish social security principles into account when determining any question arising in the proceedings to which the principles are relevant.*
- (3) *Breach of the principles does not of itself give rise to grounds for any legal action.”*

106. An Administrative Justice (Scotland) Act could develop principles either on this basis, or make these principles directly enforceable by a court or tribunal.

### **Consultation question eighteen**

**Do you consider that principles should be incorporated into law so as to give rise to actionable rights (paragraphs 104 to 106)?**

### **What do you do with principles?**

107. There is a debate to be had around what, having identified a set of principles that are relevant or even essential for a modern Administrative Justice System, should be done with them. That debate comes down to whether or not they should be cast in statutory concrete. The Society's

administrative justice conference in 2019 agreed that there was a need for measurable standards for decision-makers, and there seemed to be significant support for the idea of primary legislation enshrining the main features of the administrative justice system. We believe that, provided within the competence of the Scottish Parliament, legislation to introduce, at least, procedural standards and a right to representation or other support, should be considered. An Administrative Justice (Scotland) Act would be tangible progress towards a more holistic approach to administrative justice, and would resolve many of the issues raised in this Discussion Paper.

108. This approach has been taken in other jurisdictions, for instance in South Africa, with the Promotion of Administrative Justice Act in 2000. This established a series of procedural safeguards, from notice of the proposed administrative action to the right to make representations, at least in writing and, subject to the discretion of the administrator, in person. While legislation has embedded these protections, the experience of the Act in South Africa has also highlighted the need for education and awareness across the administrative justice system to ensure that these rights are demonstrated in practice.

109. The question will of course arise whether that means enshrining principles in legislation. There has been a considerable debate about incorporating principles in legislation, including at our own roundtable event. Aspirational legislation has its supporters and those who consider it anathema in the absence of clear thinking about its implications. It comes down to thinking through before legislating. Lord Thomas noted in November 2019 that<sup>61</sup>

1. Provisions should be clearly drafted so that the duties are expressed in terms which are enforceable.
2. There should be a mechanism for effective enforcement<sup>62</sup>.

110. Even if the objective is to control and influence decision making and not give rights enforceable by individuals in court, a mechanism to ensure adherence to the performance of the duties is still necessary. If we are going to legislate principles into effect, then we must be aware of the need for clarity and for enforcement.

### Consultation question nineteen

**Do you agree that even if the objective of principles were to be to control and influence decision making and not give rights enforceable by individuals in court, that a mechanism to ensure adherence to the performance of the duties is still necessary (paragraphs 107 to 110)?**

<sup>61</sup> The Lord Renton Lecture - Institute of Advanced Legal Studies, 21 November 2019 - Lord Thomas of Cwmgiedd – "Thinking policy through before legislating – aspirational legislation"

<sup>62</sup> In its report *The Legislative Process: Preparing Legislation for Parliament* (25 October 2017) the House of Lords Constitution Committee drew attention in chapter 2 to the debate about whether legislation was needed simply to implement policy if there were other means of implementing policy. The Committee referred to the 2017 Annual Lecture of the Statute Law Society delivered by Sir Robert Rogers (now Lord Lisvane) where he argued against the idea of legislation being used to "send a message", he stated that "the sole purpose of primary legislation" should be "to change the law only to the extent required to achieve the precise changes" sought.  
<https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/27/2705.htm>

## Conclusions

111. Over the years there have been a number of exercises which have aimed to identify principles which underpin administrative justice in the UK. Each time the subject area gets bigger and the issues more complex. The process is gradual but is also incremental; each of the major reviews in the field has progressed from the one before. Our focus in this discussion paper is around the application of principles for Scotland, and the legislative reforms that the Scottish Parliament could enact to transform administrative justice in the areas of its competence.
112. The Franks Report of 1957, born out of concerns about the range and diversity of tribunals, uncertainty about the procedures they followed, and worries over the lack of cohesion and supervision, led to the identification of a critical need for fairness, openness and impartiality as cornerstones in their proceedings. Sir Andrew Leggatt's report some 40 years later was also again principally focussed on the world of tribunals. But 'One system, one service' made an equally critical advance in identifying the centrality of the interests of the user. The 2007 Tribunals Courts and Enforcement Act brought the administrative justice system into greater public focus and at the same time propelled the interests of the user of that system to centre stage. Events since 2007 cannot be said to have been directed at cementing that position. Mishap after mishap has befallen public administration in its efforts to cater for the growing levels of contact and dispute between citizen and state.
113. It is almost inevitable that the identification of the Administrative Justice system as such, along with the clarifying of the centrality of the user, and the rapid growth in demands, has meant that attention would move from process issues such as the functioning of tribunals and inquiries, which had been the focus of both Franks and Leggatt, to wider issues. The nature of administrative justice and the rights of those whose interests are most directly affected by the system are now the areas in which the identification of principles is to be pursued.
114. The Administrative Justice system has changed out of all recognition over the past fifty years. The coverage of the system has increased significantly and the nature of the delivery of public services today would probably be virtually unrecognisable to the designers of the welfare state in 1948. Not only has technology affected decision making but the structures of government have changed markedly. Delivery of services has moved from departments of state to arms-length agencies. And those in turn have given way to contractualisation and outsourcing; increasingly the user has become a commodity to be processed through a system rather than a citizen whose vital rights and interests are to be addressed by the State. The roots of the Windrush affair and the creation of a 'hostile environment', and the apparent mishandling of Disability Living Allowance and Universal Credit claims, have all contributed to a new reality in which the treatment of those caught up in the administrative justice system demands a re-assessment.



115. The principles of the Administrative Justice system must now be considered not simply through the prism of how disputes over decisions taken by the State are to be resolved. The new reality requires a greater degree of clarity as to the processes by which administration itself is carried out, how decisions that affect the individual citizen should be reached and how disputes arising from those decisions should be resolved.
116. We believe that an approach that places these principles on a statutory footing is the most practical step that can be taken to transform the administrative justice landscape in Scotland and build fairer and more effective decision-making and dispute resolution processes. This would not include disputes in areas reserved to the UK Government, but would provide an opportunity for a distinct Scottish approach that would transform administrative justice in Scotland as part of the renewal process in the wake of the current pandemic.

## Annex A: Comparative Approaches

The various principles based approaches discussed in part 4 are included in this annex.

### Administrative justice principles

The development of administrative justice principles has a long history, with three principles first suggested by the Franks Report in 1957:

<b>Franks Report (1957)</b>	
Openness	“If these procedures were wholly secret, the basis of confidence and acceptability would be lacking”
Fairness	“If the objector were not allowed to state his case, there would be nothing to stop oppression.”
Impartiality	“The freedom of tribunals from the influence, real or apparent, of (Government) Departments concerned with the subject-matter of their decisions”

The remit for the Leggatt review in 2001 suggested a different set of principles:

<b>Leggatt (2001)</b>
Independent
Coherent
Professional
Cost-effective
User-friendly

The Administrative Justice and Tribunals Council in 2010 developed a further set of principles. The Council stated that a good administrative justice system should:

<b>Administrative Justice and Tribunals Council (2010)</b>
Make users and their needs central, treating them with fairness and respect at all times
Enable people to challenge decisions and seek redress using procedures that are independent, open and appropriate for the matter involved

Keep people fully informed and empower them to resolve their problems as quickly and comprehensively as possible
Lead to well-reasoned, lawful and timely outcomes
Be coherent and consistent
Work proportionately and efficiently
Adopt the highest standards of behaviour, seek to learn from experience and continuously improve

## Legal services

The legal sector in Scotland has implemented regulatory principles, to which Scottish Ministers, the Law Society and other justice sector organisations must have regard. Section 1 of the Legal Services (Scotland) Act 2010 provides:

<b>Legal Services (Scotland) Act (2010)</b>
Supporting the constitutional principle of the rule of law
Supporting the interests of justice
Protecting and promoting the interests of consumers
Protecting and promoting the public interest generally
Promoting access to justice
Promoting competition in the provision of legal services
Promoting an independent, strong, varied and effective legal profession
Encouraging equal opportunities within the legal profession
Promoting and maintaining adherence to the professional principles

The Legal Services Act 2007 provides regulatory objectives for the justice sector in England and Wales (and which would apply to policy for reserved tribunals). These are the same as for Scotland, with two exceptions: first, encouraging equal opportunities within the legal profession is not included; second, increasing public understanding of the citizen's legal rights and duties is included.

## Civil procedure

The reforms of civil procedure in England and Wales in the 1990s saw the development of a principles-led approach. The Woolf Review recommended the following principles of what the justice system should be:

<b>Woolf Report (1996)</b>
Be just in the results it delivers
Be fair in the way it treats litigants
Offer appropriate procedures at a reasonable cost;
Deal with cases with reasonable speed
Be understandable to those who use it
Be responsive to the needs of those who use it
Provide as much certainty as the nature of particular cases allows
Be effective: adequately resourced and organised

These principles were largely adopted as part of the overriding objective of the Civil Procedure Rules for England and Wales:

<b>Civil Procedure Rules – Overriding Objective (1999)</b>
Enabling the court to deal with cases justly and at proportionate cost
Ensuring that the parties are on an equal footing
Saving expense
Dealing with the case in ways which are proportionate to the money involved
Dealing with the case in ways which are proportionate to the importance of the case
Dealing with the case in ways which are proportionate to the complexity of the issues
Dealing with the case in ways which are proportionate to the financial position of each party
Ensuring that it is dealt with expeditiously and fairly
Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases
Enforcing compliance with rules, practice directions and orders

Scotland has not adopted a similar principles-led approach, save for the new simple procedure. Rule 1.2 states these principles:

### Simple procedure rules (2017)

Cases are to be resolved as quickly as possible, at the least expense to parties and the courts

The approach of the court to a case is to be as informal as is appropriate, taking into account the nature and complexity of the dispute

Parties are to be treated even-handedly by the court

Parties are to be encouraged to settle their disputes by negotiation or alternative dispute resolution, and should be able to do so throughout the progress of a case

Parties should only have to come to court when it is necessary to do so to progress or resolve their dispute

## Tribunals

The Council on Tribunals' Framework of Standards for Tribunals in 2002 stated a number of principles:

### Framework of Standards for Tribunals (2002)

Tribunals should be independent and provide open, fair and impartial hearings

Tribunals should be accessible to users and focus on the needs of users

Tribunals should offer cost effective procedures and be properly resourced and organised

The Tribunals, Courts and Enforcement Act 2007 placed a duty on the President of Tribunals in England and Wales to consider the following needs:

### Tribunals, Courts and Enforcement Act (2007)

The need for tribunals to be accessible

The need to be fair

The need to be handled quickly and efficiently

The need for members of tribunals to be experts in the subject of, or the law to be applied in, cases in which they decide matters

The need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals

## Ombudsman services

Examples from the ombudsman sector include the Parliamentary and Health Service Ombudsman Principles of Good Administration<sup>63</sup>, established in 2007:

<b>PHSO Principles of Good Administration (2007)</b>
Getting it right first time
Putting things right
Being customer focused
Being open and accountable
Acting fairly and proportionately
Seeking continuous improvement

Another example is the British and Irish Ombudsman Association's Guide to Good Complaint Handling:

<b>BIOA Principles of Good Complaint Handling (2007)</b>
Clarity of purpose
Accessibility
Flexibility
Openness and transparency
Proportionality
Efficiency
Quality outcomes

A further example is the Northern Ireland Public Services Ombudsman's FREDA principles:

<b>Northern Ireland Public Services Ombudsman (2016)</b>
Fairness
Respect
Equality

<sup>63</sup> <https://www.ombudsman.org.uk/sites/default/files/page/0188-Principles-of-Good-Administration-bookletweb.pdf>

Dignity

Autonomy

## Public service delivery

The way in which public services in Scotland are delivered was considered by the Christie Commission, which reported in 2011. Though a number of the principles suggested for the reform of public services are not necessarily pertinent to the decision-making, complaints and appeals processes that are central to administrative justice, the influence of this report, particularly around the participation of users in the design and delivery of services, has been significant. The principles are:

### Christie Commission (2011)

Reforms must aim to empower individuals and communities receiving public services by involving them in the design and delivery of the services they use

Public service providers must be required to work much more closely in partnership, to integrate service provision and thus improve the outcomes they achieve

We must prioritise expenditure on public services which prevent negative outcomes from arising

And our whole system of public services – public, third and private sectors – must become more efficient by reducing duplication and sharing services wherever possible

A leading example of the way in which Christie Commission principles have been adopted in the delivery of public services is the development of a devolved social security system for Scotland. This has been a human rights informed and principles-led approach, distinct from the more functional ways in which reserved benefits are treated. Section 1 of the Social Security (Scotland) Act 2018 establishes these principles:

### Social Security (Scotland) Act (2018)

Social security is an investment in the people of Scotland

Social security is itself a human right and essential to the realisation of other human rights

Opportunities are to be sought to continuously improve the Scottish social security system in ways which put the needs of those who require assistance first

Opportunities are to be sought to continuously improve the Scottish social security system in ways which advance equality and non-discrimination

The Scottish social security system is to be efficient and deliver value for money.

## International comparisons

Many jurisdictions have enacted principles of administrative justice into their laws, including Malta, South Africa and elsewhere. In 2007, Malta passed the Administrative Justice Act. Section 3 of the Act states that “the principles of good administrative behaviour include the following”:

<b>Malta – Administrative Justice Act (2007)</b>
An administrative tribunal shall respect the parties’ right to a fair hearing, including the principles of natural justice, namely nemo iudex in causa sua, and audi et alteram partem
The time within which an administrative tribunal shall take its decision shall be reasonable in the light of the circumstances of each case. The decision shall be delivered as soon as possible and for this purpose the tribunal shall deliver one decision about all matters involved in the cause whether they are of a preliminary, procedural or of a substantive nature
An administrative tribunal shall ensure that there shall be procedural equality between the parties to the proceedings. Each party shall be given an opportunity to present its case, whether in writing or orally or both, without being placed at a disadvantage
An administrative tribunal shall ensure that the public administration makes available the documents and information relevant to the case and that the other party or parties to the proceedings have access to these documents and information
Proceedings before an administrative tribunal shall be adversarial in nature. All evidence admitted by such a tribunal shall, in principle, be made available to the parties with a view to adversarial argument
An administrative tribunal shall be in a position to examine all of the factual and legal issues relevant to the case presented by the parties in terms of the applicable law
Save as otherwise provided by law, the proceedings before an administrative tribunal shall be conducted in public
Reasons shall be given for the judgment. An administrative tribunal shall indicate, with sufficient clarity, the grounds on which it bases its decisions. Although it shall not be necessary for a tribunal to deal with every point raised in argument, a submission that would, if accepted, be decisive for the outcome of the case, shall require a specific and express response

Administrative justice legislation has been passed in jurisdictions such as South Africa and Zimbabwe, though this legislation is not principles-led. In South Africa, for instance, legislation provides the following:

<b>Promotion of Administrative Justice Act (2000)</b>
Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair
A fair procedure depends on the circumstances of each case.
In order to give effect to the right to procedurally fair administrative action, an administrator... must give a person



- Adequate notice of the nature and purpose of the proposed administrative action
- A reasonable opportunity to make representations
- A clear statement of the administrative action
- Adequate notice of any right of review or internal appeal
- Adequate notice of the right to request reasons
In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her discretion, also give a person... an opportunity to
- Obtain assistance and, in serious or complex cases, legal representation
- Present and dispute information and arguments
- Appear in person

## Other considerations

In terms of research to be taken into account in considering the development of principles of administrative justice in Scotland, the UK Administrative Justice Institute (UKAJI) produced a Research Roadmap for Administrative Justice in January 2018.<sup>64</sup> This roadmap was developed following a consultation undertaken in 2017 which consultation paper considered research priorities using four overlapping themes or heads, principles, people, processes and information.

In 2012, the MoJ produced its Administrative Justice and Tribunals Strategic Work Programme 2013-16. Paragraphs 14 -17 set out the principles of fairness, accessibility and efficiency:

“We believe that administrative justice should be underpinned by three key principles: **fairness, accessibility and efficiency**. The success of the improvements we make across the system will be measured against these principles. This is not to say that constituent bodies in the administrative justice and tribunals system should not adhere to additional principles but we would envisage all parts of the system to be fair, accessible and efficient.

15.

In ensuring **fairness**, we expect the system to provide impartial and timely routes of complaint and redress which uphold the law. Fairness should be enshrined in all decision making and dispute resolution processes, and is preserved finally in the potential for an individual to seek redress through either a tribunal or court.

16.

<sup>64</sup> [https://administrativejusticeblog.files.wordpress.com/2018/02/final-ukaji\\_research\\_roadmap\\_web.pdf](https://administrativejusticeblog.files.wordpress.com/2018/02/final-ukaji_research_roadmap_web.pdf)

The systems that uphold justice in administrative decision making should also be **accessible**. Processes should, as far as possible, be understandable and navigable to the lay person. People should be helped to understand the decisions that have been taken about them, and provided with proportionate and transparent means of redress that empower them to resolve their problems as quickly as possible. The structures and procedures used within administrative justice and tribunals should recognise the needs of users.

17.

Lastly, the administrative justice and tribunals system should aim to be **efficient**. This means incentivising state decision-making bodies to make correct and soundly-based decisions in the first instance and, where disputes arise, to provide proportionate forms of redress to allow parties to resolve their differences as quickly and simply as possible. Changes to the system should be made on the basis that service improvements also deliver cost savings. Efficiency is naturally a key consideration in addressing tribunal funding and fee issues and in enhancing proportionality, as set out in **chapters 3 and 5.**”

Also, the Council of Europe (Committee of Ministers) resolution (77) 31 on the on the protection of the individual in relation to acts of administrative authorities September 1977 refers to the following 5 principles:

I

Right to be heard

1. In respect of any administrative act of such nature as is likely to affect adversely his rights, liberties or interests, the person concerned may put forward facts and arguments and, in appropriate cases, call evidence which will be taken into account by the administrative authority.

2. In appropriate cases the person concerned is informed, in due time and in a manner appropriate to the case, of the rights stated in the preceding paragraph.

II

Access to information

At his request, the person concerned is informed, before an administrative act is taken, by appropriate means, of all available factors relevant to the taking of that act.

III

Assistance and representation

The person concerned may be assisted or represented in the administrative procedure.

IV

Statement of reasons

Where an administrative act is of such nature as adversely to affect his rights, liberties or interests, the person concerned is informed of the reasons on which it is based. This is done either by stating the reasons in the act, or by communicating them, at his request, to the person concerned in writing within a reasonable time.

V

#### Indication of remedies

Where an administrative act which is given in written form adversely affects the rights, liberties or interests of the person concerned, it indicates the normal remedies against it, as well as the time-limits for their utilisation.”



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