FACULTY OF ADVOCATES

RESPONSE

of

THE FACULTY OF ADVOCATES

to

The Tribunals (Scotland) Act 2014: Consultation on two sets of Draft Regulations which make provision for:

1) a time limit within which to seek permission to appeal a decision of the Scottish Tribunals and Rules of Procedure for the Upper Tribunal;

and

2) Offences in the Scottish Tribunals

The Faculty of Advocates has been asked to provide views on draft regulations for time limits and rules of procedure and on draft regulations for offences in proceedings, made under the Tribunals (Scotland) Act 2014.

Questions on draft regulations prescribing a time limit for seeking permission to appeal and Upper Tribunal rules of procedure

Q1: Is the proposed time limit of 30 days appropriate for a party to submit an application for permission to appeal a decision of the First-tier Tribunal or Upper Tribunal?

We consider that the length of the time limit is appropriate. However, Rule 21(3)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 specifies the default time limit for an application for permission to

appeal to the UK Upper Tribunal as being "no later than… a month after" the relevant date, with special provision made for certain categories of case. In order to ensure uniformity and to reduce the likelihood of mistakes by persons who deal with both the UK Upper Tribunal and the Upper Tribunal for Scotland, we would suggest that consideration be given to using "no later than a month after" rather than "within the period of 30 days".

Furthermore, and in any event, given that lay representatives may be involved in a tribunal context, we consider that it would be preferable to give parties clear dates to work towards. In this regard, although rule 15 sets out how time is to be calculated, a lay representative may still not understand the legal significance of phrases such as "within the period of 30 days" or "no later than a month after" or how to deal with bank holidays. Although Tribunals might be sympathetic to such mistakes, in order to ensure that lay representatives understand what is required, a Tribunal issuing a decision should be required to indicate the actual date by which permission to appeal has to be made.

In addition, consideration should be given to the issuing of a timetable once permission to appeal has been granted, setting out the relevant dates for lodging of the notice of appeal, response to the notice of appeal and any reply. This may require a case management power to issue timetables, but could otherwise be left to internal guidance/directions.

Q2: Do you have any comments on the draft rules of procedure?

Regulations 3 and 4 and rules 3, 4 and 5 – although we consider that generally the length of the relevant time periods are appropriate, it may become apparent in due course that for certain types of appeal, where urgency might be an issue, shorter time periods for those appeals may be more appropriate. Examples could include appeals against decisions in relation to school placements that need to be finalised before the start of the school term or decisions in relation to mental

health issues.

Rule 4(3)(g) requires a respondent to indicate in their response to the notice of appeal whether they intend to make a cross appeal. However, nothing is said about permission to cross appeal, which would presumably be required by the respondent. In this regard it is likely that permission to cross appeal will often be sought out of time, as more than 30 days will have elapsed since the original decision. In the circumstances it could either be left for the respondent to make the application for permission to cross appeal out of time and to apply to the Upper Tribunal or Court of Session under regulation 4(4) for an extension of the period beyond 30 days. Alternatively, specific provision could be made in the regulations or rules for a time period within which an application for leave to cross appeal should be made. This could be calculated from receipt of the appellant's notice of appeal or from permission to appeal being granted, but would not necessarily require to be as long as the 30 days or one month time period within which an application to appeal is submitted. We consider that the latter alternative would be preferable as it would create certainty and could avoid unnecessary delay in circumstances where an extension of the 30 day time period has been refused and the respondent seeks to challenge that decision.

Rule 8(3)(d) – there seems to be a formatting error in that rule 8(3)(d) appears to be a continuation of rule 8(3)(c) rather than a separate sub-rule.

Rule 11 – the power in rule 11 to dismiss a party's case is severe, particularly as lay representatives may be involved, but we accept that it may be necessary to have such a power for exceptional circumstances. Rule 11(1), which provides for mandatory dismissal after failure to comply with an order which warned that dismissal would follow in the event of non-compliance, can be contrasted with rule 11(3) under which the Tribunal retains a discretion whether to dismiss or not for non-compliance. We would expect that Tribunals will use rule 11(1)

sparingly. Nevertheless, there may be circumstances where there is some reasonable excuse for failure to comply with an order which warned that dismissal would follow in the event of non-compliance. We accordingly suggest that the Tribunal should also retain a discretion under rule 11(1) whether to dismiss or not for non-compliance. Alternatively, rule 11(1) could be deleted and the power to dismiss could rest on the present rule 11(3) alone.

Rule 14 allows a party to appoint a lay representative or a supporter, but there is no provision empowering the Upper Tribunal to refuse to permit a particular person to represent the party or to assist them where there may be good reason for doing so. Rule 32(5) of the Additional Support Needs Tribunals for Scotland (Practice and Procedure) Rules 2006/88 ("the ASNT Rules") contains such a provision. Although rule 27(4) empowers the Upper Tribunal to exclude a person from a hearing, it may not be wide enough to restrict unsuitable representatives or supporters. Consideration should be given to including in rule 14 a provision similar to that in rule 32(5) of the ASNT Rules, alternatively to making rule 27(4) wide enough to confer a power to restrict unsuitable representatives or supporters.

Rule 19(2)(d) – We think the word "of" should replace "or". We also comment at the end of this response in relation to the interplay of this rule with the criminal offences proposed.

Q3: In particular, are there any additional rules of procedure that you would wish to see prescribed?

Although rule 8 contains provisions relating to case management and the power to give directions and rule 18 contains provisions regarding evidence, there is no specific power to ordain experts to meet and to report to the Upper Tribunal on that meeting. It may be worthwhile including an express provision to that effect.

Q4: In particular, do you consider that any of the proposed rules of procedure are not relevant to the Upper Tribunal?

No.

Do you have any other comments on the draft regulations?

We have the following comments on how the time limits for permission to appeal contained in regulations 3 and 4 link with the lodging of a notice to appeal under rule 5.

Regulation 3 sets out a 30 day time period in which to seek permission to appeal to the decision making forum (being the First-tier Tribunal or the Upper Tribunal) and regulation 4 sets out a further 30 day time period in which to seek permission to appeal to the appellate forum (being the Upper Tribunal or the Court of Session) where the decision making forum has refused permission to appeal. That second 30 day time period runs from the date when notice of the decision making forum's decision to refuse permission to appeal is sent to the appellant.

Rule 3 sets out provisions for lodging with the Upper Tribunal a notice of appeal against a decision of the First-tier Tribunal, but does not contain any provision as to when that notice of appeal must be lodged, for example within 30 days of getting permission to appeal from the decision making forum.

Rule 3(3)(c) requires the appellant to provide with the notice of appeal a copy of the notice of permission to appeal or alternatively the notice of refusal of permission to appeal from the First-tier Tribunal. Presumably therefore a notice of appeal under rule 3 is intended to serve as a notice of appeal where permission to appeal has been granted or as a combined application for permission to appeal and a notice of appeal where permission to appeal has been refused. However, the rules do not make adequate provision for how a notice of appeal can serve these dual purposes.

Rule 3(5) provides that if an appellant lodges a notice of appeal later

than the time required by regulation 4(2), then the notice of appeal must include a request for an extension of time under regulation 4(4) and that unless the Upper Tribunal extends the time for lodging a notice of appeal it may not admit the notice of appeal. This clearly anticipates a situation where the First-tier Tribunal has refused permission to appeal, in which case the 30 day period for the lodging of a (presumably) combined application for permission to appeal and notice of appeal would run from the date when notice of the First-tier Tribunal's decision was sent to the appellant. However, what is not clear is how rule 3(5) operates when the First-tier Tribunal has granted permission to appeal. This is because in that situation regulation 4(2) would not apply because, by definition, it applies to a situation where permission to appeal was refused, and the relevant 30 day period is calculated from the date on which the notice of refusal of permission was sent to the applicant.

Consequently, where permission to appeal has been granted by the First-tier Tribunal, there is no clear starting point for the purposes of rule 3(5) with reference back to regulation 4(2). Similarly, regulation 4(4) does not provide the possibility of an extension of the 30 day period for an appellant with permission to appeal but who is arguably late with their notice of appeal, since the extension only applies to a 30 day period where permission was refused.

In the circumstances it would be preferable to have a clear time period in rule 3 to the effect that a notice of appeal has to be lodged within a specified time after permission to appeal has been granted (unless an extension has been obtained).

Furthermore, we consider that it would be preferable for the permission stage to be completed one way or another before a notice of appeal is lodged or at least before a respondent is required to respond to a notice of appeal. In this regard rule 4 provides for a respondent to respond to a notice of appeal within 30 days after the date on which the Upper Tribunal has sent a copy to them. If this was done routinely after

a notice of appeal is received, this would mean that time would start running for the respondent whilst the Upper Tribunal's permission to appeal decision is pending. This would mean a respondent would be required to start work for an appeal that might not happen. One way of avoiding that would be to provide that the Upper Tribunal is not to send a copy of the notice of appeal to the respondent unless and until permission to appeal has been granted.

Questions on Draft Regulations creating offences in relation to proceedings before the Scottish Tribunals

Q1: Do you have any comments on the draft regulations creating offences in relation to proceedings before the Scottish Tribunals?

We have a concern in relation to the wording of the offence in regulation 2(1)(a). The wording simply follows the enabling provision in section 67(1)(a)(i) of the Tribunals (Scotland) Act 2014. The regulation does not set out the *mens rea* of the offence, nor whether the false statement must be material to the application. By way of background, most statutory provisions which create criminal offences for the making of false statements set out that the false statement must be made "*knowingly*" or "*knowingly and wilfully*", (see Taxes Management Act 1970, section 107(2) and the Criminal Law (Consolidation) (Scotland) Act 1995, section 44(2)). A recent formulation in an Act of Parliament can be seen in paragraph 18(2) of Schedule 2, part 2, of the Modern Slavery Act 2015 in which the false statement must be false "*in a material particular*" and the person must either know that it is false or is reckless as to whether it is false or not. We consider that the offence proposed by regulation 2(1)(a) should be more specific by requiring, as a minimum, that the false statement is made knowingly or with no honest belief in its truth. In regard to this offence, we are also a little doubtful whether the "reasonable excuse" defence in regulation 2(2) is apposite where the person has knowingly made a false statement. Whereas we can readily understand that there may be a reasonable

excuse for failing to attend as a witness or failing to produce a document, it is much harder to see how a person could reasonably make a false statement. If the false statement offence in regulation 2(1)(a) was more clearly delineated as we have suggested, we would suggest that the "reasonable excuse" defence could be limited to the offences under regulation 2(1)(b) and (c).

Q2: Are there any additional offences in relation to proceedings that you would like to see added?

No. In any event, there is no power under section 67 of the Tribunals (Scotland) Act 2014 for any additional offences to be added by way of regulations.

Q3: Would you like to see any of the proposed offences omitted?

Subject to re-wording of the offence in regulation 2(1)(a), we consider that the proposed offences are appropriate.

Q4: Do you have any views on the penalties proposed for committing these offences?

No.

Do you have any other comments on the draft regulations?

We have one final comment which relates to the interplay of these draft regulations with the Scottish Tribunals rules. In relation to the offence of failing to attend or give evidence when required to do in accordance with the Upper Tribunal Rules, the person will have received a clear written warning of the consequences of such conduct when the citation is served, (see the Upper Tribunal Rules at rule 19(2)(d)). Rule 19(2)(d) refers to the need to advise of the consequences of failing to comply with the citation <u>or order.</u> The inclusion of the word "order" might be thought to be a reference to the order to answer questions or produce a document under rule 19(1)(b) such that a person against whom such

an order is issued should be warned about the consequences of failure to comply. However, as presently drafted, rule 19(2) relates only to the wording of citations under rule 19(1)(a). In our view, it is important that a person who is ordered to answer a question or produce a document should receive a clear written warning that failure to comply, without reasonable excuse, amounts to a criminal offence. We consider that rule 19(2) should be re-worded to ensure that such a warning is provided when such an order is served on the person. Furthermore, we are of the view that the rules of the various First-tier Tribunals should also be amended as necessary to provide for warnings to be given for non-compliance with any direction, citation or order where non-compliance would be a criminal offence and/or that such provision should be made in these regulations.